



EXEMPTION NOTE

Section 34 Formulation of policy

This note is one of a series intended to provide practical guidance on the exemptions set out in the Isle of Man Freedom of Information Act 2015 (FOI).

Requests for information must be considered on a case by case basis and the Information Commissioner will review decisions on the facts of each case.

THE EXEMPTION

Section 34 states:

34 Formulation of policy

- (1) Information is qualified exempt information if —
 - (a) the information is held by a public authority that is —
 - (i) a Department; or
 - (ii) the Cabinet Office; and
 - (b) the information relates to —
 - (i) the formulation or development of government policy;
 - (ii) communications between Ministers (including, in particular, the proceedings of the Council of Ministers or of any committee of the Council of Ministers);
 - (iii) the provision of legal advice or any request for such advice; and
 - (iv) the operation of a Ministerial private office.
- (2) Once a decision as to policy has been made, statistical information used to provide an informed background to the taking of the decision is not qualified exempt information by virtue of this section.
- (3) In determining whether the public interest in maintaining this exemption outweighs the public interest in disclosing the information, regard must be had to the public interest in disclosing factual information used to provide an informed background to decision-taking.
- (4) In this section, “Ministerial private office” means any part of the Isle of Man government that provides personal administrative support to a Minister.

THE MAIN POINTS

1. This is a qualified exemption.
2. It is a class-based exemption and only applies to the specified category or class of information.
3. If the PA determines that it can be applied to some, or all, of the information sought in a request, the PA must still go on to consider the public interest in the information and determine whether “the public interest in maintaining the exemption outweighs the public interest in disclosing the information”.

The Information Commissioner has published guidance on the public interest and further advice is contained in Section 3 of the Code of Practice.

4. The exemption can only be applied by a PA which is one of the Departments of Government or the Cabinet Office.
5. A relevant Public Authority may withhold all or some of the information sought by a request when that information relates to:
 - the formulation or development of government policy;
 - communications between Ministers
 - the provision of legal advice
and
 - the operation of Ministerial office.

6. The formulation of a policy suggests the exemption is intended to apply to the early stages of the policy process, that is when options are considered, associated risks identified, consultation with various parties occurs, and recommendation and submissions are made to Ministers. Development of policy suggests that the exemption extends to the review or amendment of existing policy.
7. The exemption extends to information relating to Ministerial communications. The communication must be between Ministers; the PA cannot apply the exemption to a communication between a Minister and other third parties including public servants. However the exemption can apply to communications made by a private secretary on behalf of a Minister.
8. The exemption extends to legal advice and any request for that advice.
9. A relevant PA can apply the exemption to information which relates to the operation of a Minister's private office. This exemption would apply to information created by others on behalf of the Minister provided that information relates to the functions or duties as a Minister.
10. If a PA applies this exemption then it must provide the applicant with a refusal notice the content of which must accord with section 18 of FOI. See also the Code of Practice at <http://www.tynwald.org.im/business/opqp/sittings/Tynwald%2020142016/2015-GD-0068.pdf>

FURTHER RESOURCES

APPENDIX 1: IOM Commissioner Decisions & IOM Case law

APPENDIX 2: Other Commissioner Decisions & Case law

APPENDIX 1 IOM Commissioner Decisions & Case law

IOM Commissioner Decisions

Issue Date	Decision Number	Public Authority
22 December 2017	2017/0002	Cabinet Office

IOM Case law

None



APPENDIX 2 Other Commissioner Decisions & Case law

Note

Neither the Commissioner nor the Court are obliged to follow decisions or case law from other jurisdictions.

UK Information Commissioner Decisions

Date	Reference	Parties
12 January 2017	FS50601833	The Cabinet Office



Scottish Information Commissioner (SIC) Decisions

The SIC's decisions are available at: www.itspublicknowledge.info/decisions

Decision Number	Parties	Summary
178/2013	Tom Gordon and the Scottish Ministers	Mr Gordon wanted copies of the Government's submissions to the Law Officers on an independent Scotland's position within the EU. The decision looks at the public interest arguments both in favour of and against disclosing the information. Following an investigation, the SIC found that the public interest lay in maintaining the exemption.
130/2006	Paul Hutcheon and the Scottish Ministers	"Relate to" means more than simply having some association with an area of activity devolved to the Scottish Ministers.
057/2005	William Alexander and the Scottish Ministers	In applying the public interest test, it may be necessary to distinguish different stages in policy development. In this case, a distinct and active phase of policy development started in February 2003. The SIC was satisfied that, on balance, it was in the public interest to disclose information before February 2003, but not after it.
166/2006	Martin Williams and the Scottish Ministers	The SIC was satisfied that papers on a summit on sectarianism given by the government related to the formulation or development of policy, rather than the implementation of policy.
010/2009	Paul Martin MSP and the Scottish Ministers	The SIC accepted that information about the policy of recruiting 1,000 additional police officers related to the formulation or development of the policy. However, he ordered the Ministers to disclose some of the information on public interest grounds – disclosure would provide insight into the key steps taken to develop the policy.
143/2007	Barry Winetrobe and the Scottish Ministers	The exemption did not apply to a note from a Minister's private secretary to an official.
105/2007	Paul Hutcheon and the Scottish Ministers	The SIC accepted that discussions about the need to seek legal advice were covered by the exemption as they "related to" the provision of advice.
105/2007	Paul Hutcheon and the Scottish Ministers	The SIC was satisfied that, given the use of the word "any" in the exemption, the exemption would apply to information on the operation of Ministerial private offices in general.

Case law

UK Tribunal decisions

Upper Tribunal

Date	Citation	Parties
21 October 2013	[2013] UKUT 0526 (AAC)	Cabinet Office v IC & Aitchison

