

## **Freedom of Information exemptions**

### **Introduction**

The Freedom of Information Act 2000 (FOI Act) came into force on 1 January 2005. It is a new law that means all recorded information held by public authorities is open to the public, unless an exemption applies. Anyone, regardless of age or location, can request information held by public authorities. This includes central government Departments, all local authorities, schools, universities, the National Health Service, the police and many more.

### **The Right to Information**

The FOI Act also introduces a right for any person to request any recorded information held by the county council.

### **Who can make an information request?**

Anyone, regardless of age or location, can make a request for information. A FOI request must be in writing, contain a contact name and address and must sufficiently describe the information required. The request must not be vexatious or repeated.

### **What Information can be requested?**

Any recorded information held by a public authority is eligible for release. Contracts, letters, faxes, emails, voicemail messages and even scribbles in the margin and on post-it notes will be covered. However, a number of exemptions may be applied to protect information from being disclosed.

An example of this is if the information requested relates to personal information the county council holds. Requests for personal information of a living, identifiable person should be dealt with as subject access requests made under the Data Protection Act 1998, and are covered by an absolute exemption under the FOI Act.

### **How must the county council respond?**

Subject to the exemptions mentioned in paragraph 8 below, the county council must confirm or deny whether it holds the information. If it does hold the information, it must then communicate the information to the applicant. All of this must be completed within 20 working days of receipt of the request.

### **Can the county council charge a fee?**

The FOI Act makes provisions for authorities to ascertain if and when they can charge for supplying information in relation to a FOI request. These provisions are known as the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

The county council will not normally be able to charge a fee except where the cost of meeting a request exceeds £450. If the cost of locating, retrieving or collating the information exceeds £450 the council has discretion as to whether or not they respond to the request. If they respond, they can pass on the costs to the applicant, but the applicant should be notified beforehand. If the cost of responding to the request does not exceed £450, the council will be entitled to charge a reasonable sum to cover costs, such as photocopying and postage costs.

A request for fees should be made within the 20 working days. Fees should be paid within three months of the date the fee was asked for otherwise there is no need to respond to the request. Further guidance will follow shortly.

## **What happens if the council fails to comply with the FOI Act?**

Any person can make a complaint to the county council if s/he feels that it has failed to comply with the FOI Act. If the complainant is not satisfied with the response, h/she can appeal to the information commissioner who is responsible exclusively for overseeing FOI.

### **I. Legally**

Failure to comply with the FOI Act can ultimately lead to contempt of court, which is a serious offence, but the potential consequences include scrutiny by internal or external auditors, judicial review, bad publicity and a worsening of public relations. There is also the possibility that the local government ombudsman could become involved. The ombudsman has discretion as to whether to get involved, but the information commissioner does not.

### **II. General**

The FOI Act also states that it is a criminal offence both corporate and personal for anyone to alter, deface, block, erase, destroy or conceal any record held by the council, with the intention of preventing the disclosure once it has been requested by an applicant. It is important, therefore, to ensure that the destruction of all documents complies with the timescales set down in adopted file retention and disposal schedules.

## **What information is not covered?**

The FOI Act lists 23 categories of information that are exempt. These are split into absolute exemptions and qualified exemptions.

Generally speaking, anyone making a request for information is entitled to be informed in writing by the county council whether it holds information of the type requested and to have that information supplied, unless:

- an absolute exemption applies or

- a qualified exemption applies and the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosure that the council holds some information

If an exemption is absolute, there is no general right of access to the information. If an exemption is qualified, the public authority must decide whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The county council does not even need to confirm or deny that it holds the information. The following is a full list of the exemptions and a short note is provided on each of the most relevant ones.

Eight of the exemptions are absolute. Even where an exemption is absolute, it does not mean you cannot disclose in all cases. It means that the FOI Act does not require disclosure. You can still disclose, taking into account all the facts of the case. There is still a legal obligation to provide reasonable advice and assistance to the enquirer.

Section 21 - Information reasonably accessible to the applicant by other means

This could include, for example, information contained already in our Publication Scheme (see paragraph 1 above) or information obtainable from the ODPM.

### **The absolute exemptions are:**

Section 22 - Information intended for future publication

Here there has to be a genuine intention to publish at the time the request is made. It is not necessary to have set a publication date but the exception can be claimed only if it is reasonable in all the circumstances to do so.

Section 23 - Information supplied by, or relating to, bodies dealing with security matters (e.g. a warning of a possible terrorist attack)

Section 32 - Court records (e.g. care proceedings)

Section 34 - Parliamentary privilege

Section 40 - Personal information

Part (1) - personal data

If information is the personal data of the person making the request, it will be exempt under Part (1) of section 40. In other words, if a request for information that constitutes personal data is received from the data subject, it is exempt from the FOI Act. This is in accordance with the Data Protection Act 1998. Any applications for personal data should be treated as a data subject access requests (e.g. details about an individual's pension). If information constitutes the personal data of the applicant, the duty to confirm or deny will also be excluded in respect of that information even if confirmation or denial would not in itself have disclosed personal data. The Data Protection Act subject access fee rules will apply if your department require a fee to be paid.

Part (2) - personal data of a third party

This relates to information which constitutes the personal data of a third party (which is not at the same time the personal data of the applicant). In the first instance this will be dealt with as a FOI request. However, personal data of a third party will be exempt if its disclosure to a member of the public would:

contravene any of the data protection principles (or, in the case of category (e) data would contravene any of the principles if they applied)

contravene section 10 of the Data Protection Act

not be required to be disclosed in response to a subject access request due to the operation of one of the exemptions in Part IV of the DPA

If the information constitutes the personal data of a third party and its disclosure to a member of the public would contravene one or more of the data protection principles, the information will be exempt under section 40(3)(a)(i) (or section 40(3)(b)), and the FOI Act request must be refused.

#### Section 41 - Information provided in confidence

This relates to information obtained from a person if its disclosure would constitute a breach of confidence actionable by that, or another person (e.g. a contract genuinely containing sensitive commercial information protected by a confidentiality clause).

#### Section 44 - Prohibitions on disclosure

This relates to disclosure prohibited by court order where it would constitute contempt of court or be incompatible with EU obligations.

The remaining 15 are qualified and subject to the Public Interest test. The county council need only disclose the information if this is in the public interest (see paragraph 10 below on how to apply this test). Qualified exemptions do not justify withholding information unless, following a proper assessment, the balance of the public interest comes down against disclosure.

### **The qualified exemptions are:**

#### Section 24 - National security

#### Section 26 - Defence

This does not affect local authorities.

#### Section 27 - International relations

This does not affect local authorities.

#### Section 28 - Relations with the United Kingdom

This does not affect local authorities.

#### Section 29 - The economy

This covers the communal economic interests of the UK and the financial interests of any administration in the UK, which do not include local authorities.

#### Section 30 - Investigations of proceedings conducted by public authorities

This will cover:

- information held in connection with prosecutions being brought by the council
- information held in connection with civil proceedings, such as that held by Social and Health Care for obtaining a Child Protection Order

#### Section 31 - Law enforcement

Disclosure here must be likely to prejudice the prevention or detection of crime, the apprehension or prosecution of offenders or the administration of justice.

#### Section 33 - Audit functions

Generally speaking, public authorities cannot claim the exemption, although there may be other exemptions that would be appropriate to consider. This could, for example, be applicable to auditing of the council's accounts by an independent third party.

#### Section 35 - Formulation of government policy etc.

### Section 36 - Prejudice to the effective conduct of public affairs

Information can be withheld under this section if, in the opinion of the council's monitoring officer, its disclosure would inhibit the full and frank provision of advice or exchange of views, or prejudice the effective conduct of public affairs (also see the reference to Section 33 below).

### Section 37 - Communications with Her Majesty, etc and Honours

### Section 38 - Health and Safety

This is exempt if disclosure would be likely to endanger the safety or physical or mental health of anyone. In this context, the information covered will relate either to physical health and medical matters, or physical safety (i.e. the risk of accident and the security of individuals).

### Section 39 - Environmental information

This is covered by the Environmental Information Regulations 2004 and is dealt with as a request for information under them. Environmental information relates to any information in written, visual, aural, electronic or any other material form on:

- the state of the elements of the environment (air, water, soil, land)
- factors that affect or are likely to affect the elements of the environment referred to in (a) (energy, noise, radiation)
- policies, legislation, plans, programmes etc. affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements
- reports on the implementation of environmental legislation
- cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c)
- the state of human health and safety (conditions, cultural sites etc.) inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)

### Section 42 - Legal Professional privilege

This covers advice given in communications by legal advisers, solicitors or barristers.

Legal professional privilege can be:

- advice privilege (where no litigation is contemplated or pending) or
- litigation privilege (where it is)

This area is complex and Legal Services should be consulted before you use this exemption.

### Section 43 - Commercial interests

This information is exempt if it constitutes a trade secret or if disclosure would prejudice the commercial interests of any person or body.

## **Applying the Public Interest Test**

### **Background**

Having established that a qualified exemption definitely applies to a particular case, the council must then carry out a Public Interest Test to identify if the public interest in applying the exemption outweighs the public interest in disclosing it. In other words, unless it is in the public interest to withhold the information, it has to be released. Although precedent and developed case law will play a part in this, individual circumstances will vary and each case will need to be considered on its own merits.

The exemption stated under Section 36 (Prejudice to the effective conduct of public affairs) can only be applied by the council's monitoring officer.

## Carrying out the Test

What is in the public interest is not necessarily the same as what the public are interested in. It may be irrelevant that a matter is the subject of public curiosity. In most cases it will be relatively straightforward to decide where the balance of the public interest in disclosure lies. However, there will inevitably be cases where the decision is a difficult one. Applying such a test depends to a high degree on objective judgement and a basic knowledge of the subject matter and its wider impact.

In applying the Public Interest test, please note the following:

- Potential or actual embarrassment to or loss of confidence in the council is not a valid factor
- The fact that the information is technical, complex to understand and may be misunderstood is not of itself a reason to withhold information
- The potential harm of releasing information will reduce over time and should be considered at the time the request is made rather than by reference to when the relevant decision was taken originally

A decision not to release information may be perverse - i.e. a decision to withhold information because it is not in the public interest to release it, itself could result in harm to public safety, the environment or a third party.

Factors to take into account when weighing the public interest include:

For disclosure	Against disclosure
To increase access to information held by the council?	To distort public reporting or be misleading because it is incomplete?
To allow individuals to understand decisions taken that affect their lives or assist them in challenging those decisions?	Is premature disclosure likely to prejudice scrutiny or release sensitive issues still on the internal agenda or evolving?
To improve the accountability and transparency of the council in its use of public funds and/or help to show that it obtains value for money?	To cause unnecessary public alarm or confusion?
To contribute to public debate and assist the understanding of existing or proposed policy?	To seriously jeopardise the legal or contractual position of the council?
To increase public participation in decision-making?	To infringe other legislation - e.g. the Data Protection Act?
To increase public participation in political processes in general?	To create a controversial precedent on the release of information or impair your ability to obtain information in the future?
To bring to light information affecting public health or safety?	To adversely affect the council's proper functioning and discourage openness in expressing opinions?
To reduce further enquiries on the topic?	If a large amount of information on the topic has already been made available, to shed any more

light or serve any useful purpose?

You will need to record the answers to these questions and the reasons for those answers. Deciding on the public interest is not simply a matter of adding up the number of relevant factors on each side. You may need to explain to the FOI Team, Legal Services or the monitoring officer how important each factor is in the circumstances to assist him/her to make an overall assessment on public interest.

## For Disclosure

Where the balance of the public interest lies in disclosure, the enquiry should be dealt with and the information required should be made available. Where the factors are equally balanced, the decision should usually favour disclosure (see the third bullet point above).

## Against Disclosure

After carrying out the Public Interest test, if the council or the monitoring officer decides that the exemption should still apply, proceed to reply to the request. There will be occasions when it has been decided that a qualified exemption applies but consideration of the Public Interest test may take longer. In such a case, you must contact the enquirer within 20 working days, stating that a particular exemption applies but including an estimate of the date by which a decision on the Public Interest test will be made. This should be within a reasonable time. It should not normally take more than five additional working days to do this.

## Absolute exemptions

There are eight absolute exemptions but only five directly apply to Oxfordshire County Council. These are listed below. If one of these exemptions applies then there is no need to consider carrying out a Public Interest Test. We do not have to provide the information, but we must make clear in our response which exemption we are applying and why.

S21 Information accessible by other means	Information that Oxfordshire County Council is required to publish by law or is published in the Oxfordshire County Council Publication Scheme. It can also include information that is already available from an external source (e.g. a circular from the Department of Health, the OFSTED website). In any event it must be 'reasonably' accessible to the applicant.  Example: Requests for local transport plans, museum service plans or annual reports.
S32 Court Records	Information that is only held as part of the documentation for a court or tribunal case, or a statutory inquiry.  Example: Financial records that are the subject of litigation and are held only for that purpose.
S40 Personal Information (about the requester)	All requests where a person is seeking information about her/himself are exempt under the FOI Act. This is because a request of this nature is a subject access request and needs to be dealt with under the Data Protection Act 1998.

	Example: Home addresses and telephone numbers.
S41 Information provided in confidence	Information provided by a third party and held by OCC becomes exempt if release of the information would constitute a legally actionable breach of confidence at the time the request is made.  Example: A financial regulator might decline to confirm or deny that it has been provided with a confidential report on a company. Confirmation that it even held a report would indicate that it harboured suspicions about the activities of that company. However, if it was already public knowledge that a report had been sent to it, there would be no breach of confidence in confirming receipt. In both cases, the regulator might not wish to disclose the content of the report.
S44 Legal prohibitions on disclosure	Disclosure of this type of information is prohibited by any legislation, or would constitute contempt of court.  Example: Access to Medical Reports Act 1988 (c. 28)

## Public Interest Exemptions (Qualified Exemptions)

There are 15 Public Interest exemptions but only nine directly apply to Oxfordshire County Council. These are listed below. If one or more of these exemptions applies we must consider releasing the information, unless we decide that the public interest in withholding the information outweighs the public interest in releasing it.

### Public Interest (PI)

The PI in disclosure must be considered in every case where a PI exemption applies. Where the balance is equal or close with regards to releasing or withholding the information the balance will lie in favour of disclosure. When applying the Public Interest Test specific factors will need to be taken into account in each case, such as:

- health of the population and/or individuals
- economic management
- prosecution of offenders

The PI protected by the exemptions will vary with each exemption.

### The Harm (Prejudice) test

The prejudice formula means that the harm caused by the release of information should be real, actual or of substance.

S22 Information intended for future publication	This applies where information requested is planned to be published at a later stage at the time the request was made.  Example: Statistical information which is usually published to a specific timetable (annually, quarterly)
S30 Investigations and proceedings conducted by public authorities	Information held for the purpose of criminal investigations and proceedings and information obtained from confidential sources relating to these or civil proceedings arising out of them.

	<p>Example: Reports relating to investigations into and specific criminal proceedings undertaken by the authority - these could include trading standards or environmental health prosecutions.</p>
S31 Law enforcement	<p>Information not covered by S30 (above) and which is likely to prejudice a wider range of investigations and conduct.</p> <p>Example: Information relating to the prevention or detection of crime.</p>
S36 Prejudicial to the effective conduct of public affairs	<p>This applies to information which if released would harm Oxfordshire County Council's ability to:</p> <ul style="list-style-type: none"> <li>carry out its work effectively</li> <li>would discourage free and frank discussion during deliberation, or</li> <li>would discourage free and frank provision of advice</li> </ul> <p>Example: Communications resulting from threats made by members of the public as a result of which officers would be concerned about their views being made public.</p>
S38 Health and safety	<p>Information that would, or would be likely to, endanger the physical, mental health or safety of any individual.</p> <p>Example: Information which if released could endanger the safety of pupils in schools.</p>
S39 Environmental information	<p>Environmental information is exempt, as a request for this type of information should be dealt with under the Environmental Information Regulations 2004.</p> <p>Example: What chemically based cleaning products are used by Oxfordshire County Council's cleaners?</p>
S40 Personal information (concerning a third party)	<p>In general, requests for personal information about someone else (a third party) should be dealt with under the FOI Act. However if disclosing the information would contravene the Data Protection Act then the information should not be released.</p> <p>Example: Information concerning staff pensions.</p>
S42 Legal professional privilege	<p>This exemption applies where a claim to legal professional privilege could be maintained in legal proceedings. Privilege applies to certain communications between a professional advisor (e.g. a solicitor) and their client.</p> <p>Example: A letter from an external solicitor providing legal advice to Oxfordshire County Council.</p>
S43 Commercial interests	<p>Information which is a trade secret or the release of which is likely to prejudice the commercial interests of any person, including Oxfordshire County Council.</p> <p>Example: Otherwise unavailable product information or trade practices which would be advantageous to other companies (e.g. the recipe for Coca Cola).</p>