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**FREEDOM OF INFORMATION ACT 2000  
LEGAL FRAMEWORK**

1. The Freedom of Information Act 2000 came fully into force on 1 January 2005. This document provides a brief overview of its structure and highlights recent case law in key areas.

**(i) The general principle: a right of access to information**

2. Section 1 FOIA establishes a general right of access to information held by public authorities<sup>1</sup> for any person who makes a request for information. This right has two branches:

- (i) A right to be informed by the public authority whether it holds information of the description specified in the request<sup>2</sup>; and
- (ii) If the public authority does hold the information, to have that information communicated to the person making the request.<sup>3</sup>

**(ii) Exemptions: absolute or qualified by the public interest test**

3. Part II of FOIA establishes exemptions to the general right of access to information. The exemptions fall into two categories depending upon their effect:<sup>4</sup>

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<sup>1</sup> A “public authority” is defined in section 3 of the Act as any body, person, or the holder of any office which is listed in Schedule 1 to the Act. Public authorities for the purposes of the Act include the health regulators such as the General Medical Council, General Chiropractic Council, General Dental Council, General Osteopathic Council and the Human Fertilisation and Embryology Authority.

<sup>2</sup> Section 1(1)(a). The duty of a public authority to state whether it holds the specified information is referred to in the Act as “the duty to confirm or deny”: section 1(6).

<sup>3</sup> Section 1(1)(b).

<sup>4</sup> The effect of the exemptions is provided for by section 2.

- (i) Where a provision confers an absolute exemption (1) there is no duty to confirm or deny in relation to the particular information falling within it and/or (2) the information falling within it is “exempt information” which means that the public authority is under no obligation to communicate it.
- (ii) Where the provision confers a qualified exemption, there is no duty to confirm or deny and/or no obligation to disclose only if, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty and/or the exemption outweighs the public interest in disclosing whether the authority holds the information and/or disclosing the information itself. The balancing act public authorities are required to perform in deciding whether to disclose is referred to as “the public interest test”.

4. **Absolute exemptions.** Section 2(3) of FOIA contains a list of provisions conferring absolute exemption. They are section 21 (information accessible to the applicant by other means), section 23 (information supplied by, or relating to, bodies dealing with security matters), section 32 (court records), section 34 (parliamentary privilege), section 36 (prejudice to effective conduct of public affairs) so far as relating to information held by the House of Commons or the House of Lords, section 40(1) (information containing personal data of which the applicant is the data subject) and subsection (2) so far as relating to cases where the first condition referred to in that subsection (personal data which do not fall within subsection (1)) is satisfied by virtue of subsection (3)(a)(i) or (b) of that section (contravention of data protection principles)<sup>5</sup>, section 41 (information provided in confidence) and section 44 (prohibitions on disclosure).

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<sup>5</sup> For consideration of the interaction between FOIA and the Data Protection Act 1998 see Common Services Agency v Scottish Information Commissioner [2008] UKHL 47 [2008] 1 WLR 1550; Guardian News and Media Limited v Information Commissioner EA/2008/0084

5. **Qualified exemptions.** All other exemptions are qualified by the public interest test. These are section 22 (information intended for future publication), section 24 (national security), section 26 (prejudice to defence), section 27 (prejudice to international relations), section 28 (prejudice to relations within the United Kingdom), section 29 (prejudice to the economy), section 30 (investigations and proceedings conducted by public authorities), section 31 (prejudice to law enforcement), section 33 (prejudice to audit functions), section 35 (formulation of government policy), section 36 (prejudice to effective conduct of public affairs relating to information other than that held by the House of Commons and House of Lords), section 37 (communications with Her Majesty and honours), section 38 (prejudice to health and safety), section 39 (environmental information), section 40 (personal information insofar as is not absolutely exempt), section 42 (legal professional privilege) and section 43 (commercial information).
  
6. A number of the qualified exemptions require some particular form and degree of prejudice to be established before the information can fall within the scope of the exemption. Most of these depend upon whether disclosure of the requested information would, or would be likely to, prejudice identified interests. While this is not a high hurdle it requires a proper assessment of the likelihood of the particular prejudice occurring: see, for example, John Connor Press Associates v Information Commissioner, Information Tribunal decision of 25 January 2006, holding that in section 43(2) (prejudice to commercial interests) “likely to prejudice” means a chance of prejudice which must be “more than a hypothetical or remote possibility; there must have been a “real and significant risk”.
  
7. **The public interest balance.** The Information Tribunal has consistently emphasised that a public authority is not entitled to maintain a blanket refusal for certain types of information but must address the circumstances of each individual request (see, for example, Guardian Newspapers and Brooke v ICO EA/2006/0011 and EA/2006/0013; Galloway v Information Commissioner EA/2008/0036).

8. The Information Tribunal, High Court and Court of Appeal have considered the appropriate approach to the public interest balance in a number of cases under FOIA and the Environmental Information Regulations 2004. The following principles emerge from the case law:
- (i) The 'default setting' in FOIA is in favour of disclosure: information held by public authorities must be disclosed on request unless the Act permits it to be withheld (Guardian Newspapers Ltd & Brooke v Information Commissioner and BBC EA/2006/0011 & 0013 at [82]).
  - (ii) The balancing exercise begins with both scales empty and therefore level (Department for Education and Skills v Information Commissioner and Evening Standard EA/2006/0006 at [64-65]).
  - (iii) The balance of public interest factors must be assessed in all the circumstances of the case. This will involve a consideration of both direct and indirect consequences of disclosure, including 'secondary signals' such as loss of frankness and candour (DfES at [70] and [75]).
  - (iv) The assessment of the public interest in maintaining the exemption should focus on the public interest factors associated with the particular exemption and the particular interest which the exemption is designed to protect (Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and 0030).
  - (v) The public interest factors in favour of maintaining an exemption are likely to be of a general character. The fact that a factor may be of a general rather than a specific nature does not mean that it should be accorded less weight or significance. (Home Office and Ministry of Justice v Information Commissioner [2009] EWHC 1611 (Admin) at [34]).

- (vi) There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. The cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between. (ECGD v Friends of the Earth [2008] EWHC 638 (Admin) at [38]).
- (vii) The statutory language of some exemptions may demonstrate that there is an “assumption” of good reason for non-disclosure to which significant weight should be afforded in any event (HM Treasury v Information Commissioner [2009] EWHC 1811 (Admin) (concerning section 35(1)(c) – Law Officers’ Advice) and Department of Business Enterprise and Regulatory Reform v O’Brien and Information Commissioner [2009] EWHC 164 (concerning section 42 – legal professional privilege)). But cf Home Office v Information Commissioner [2009] EWHC 1611 (Admin).
- (viii) Considerations such as openness, transparency, accountability and contribution to public debate are regularly relied on in support of a public interest in disclosure. To bear any material weight each factor must draw some relevance from the facts of the case under consideration to avoid a situation where they will operate as a justification for disclosure of all information in all circumstances (Department for Culture Media and Sport v Information Commissioner EA/2007/0090 at [28]).
- (ix) The relevant time at which the balance of public interest is to be judged is the time when disclosure was refused by the public authority, not the time when the Commissioner made his decision or when the Tribunal hears the appeal (see CAAT v Information Commissioner and Ministry of Defence Ea/2006/0040 at [53]).

- (x) The “public interest” signifies something that is in the interests of the public, not matters which are of interest to the public (Department of Trade and Industry v Information Commissioner EA/2006/0007 at [50]).
- (xi) In conducting the public interest balance, the aggregate public interest in maintaining any applicable exemptions should be weighed against the public interest in disclosure (The Office of Communications v The Information Commissioner [2009] EWCA Civ 90.)<sup>6</sup>

**(iii) Scope of the section 1(1) duty: dealing with a request for information and related provisions**

- 9. Part I FOIA contains a number of general provisions which, broadly, determine whether and how a public authority’s duty under section 1 arises and must be complied with.
- 10. **A “request for information”.** The section 1(1) duty arises only in respect of a “request for information”. “Information” means “information recorded in any form”: section 84. Under FOIA a request for information is a request which (a) is in writing (b) states the name of the applicant and address for correspondence and (c) describes the information requested: section 8(1). Public authorities are not entitled to pick apart the language used by a requester in order to refuse to respond on the basis that it is not a “request for information”. If a reasonable public authority would have understood the basis of the request, the section 1(1) duty arises.<sup>7</sup>
- 11. **Further information required: no section 1(1) duty until provided.** Where a public authority reasonably requires further information in order to identify

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<sup>6</sup> This case is on appeal to the Supreme Court on this point.

<sup>7</sup> A request for information includes a request about a previous request for information. Within government such a request is referred to as a “meta-request” and the information

and locate the information requested and has informed the applicant of that requirement it is not obliged to comply with the duty under section 1(1) unless it is supplied with that further information: see section 1(3).

12. **Section 1(1) duty applies to information held at time of receipt of request.**

The information in respect of which the applicant is to be informed or which is to be communicated is “the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion which would have been made regardless of the receipt of the request”: section 1(4).

13. **Charging for responding to requests for information.**

Public authorities may charge a fee for responding to requests for information (determined in accordance with regulations made by the Secretary of State) for so doing if they give the applicant a “fees notice” within the time for complying with section 1(1): section 9. The relevant regulations are the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (referred to as the “Fees Regulations”). The charges a public authority is permitted to impose differ according to whether the public authority is obliged to respond to a request or whether it offers to do so notwithstanding that the cost of doing so would exceed the “appropriate limit” under section 12 (see below). Regulation 6 sets out the manner in which the public authority may determine the maximum fee to be charged under section 9. The maximum fee is equivalent to a sum the public authority reasonably expects to incur in complying with a request, and may include the costs of complying with any obligation under section 11 as to the means or form of communicating the information, reproducing any document and postage or other forms of transmission. But the public authority may not take into account costs which are attributable to the time which the person communicating the information spends.

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being requested is referred to as “meta-data”: see Home Office and Ministry of Justice v Information Commissioner [2009] EWHC 1611 (Admin).

14. **No section 1(1) duty if fee not paid.** A public authority is not obliged to comply with section 1(1) unless the fee is paid within the period of three months beginning with the day on which the fees notice is given to the applicant.<sup>8</sup>
15. **No duty under section 1(1) where costs exceed “appropriate limit”.** Section 12(1) of FOIA provides that a public authority is not obliged to comply with section 1(1) “if the authority estimates that the cost of complying with the request would exceed the appropriate limit”. But this does not exempt the public authority from complying with paragraph (a) of section 1(1) (the duty to confirm or deny) unless the cost of complying with that paragraph alone would exceed the appropriate limit.<sup>9</sup> The “appropriate limit” is defined by the Fees Regulations and is £600 for a Schedule 1 public authority and £450 for any other.<sup>10</sup>
16. The Fees Regulations provide for the costs which a public authority may take into account for the purpose of its estimate as to whether the “appropriate limit” is exceeded.<sup>11</sup> These are limited to the costs the authority reasonably expects to incur in (a) determining whether it holds the information (b) locating the information or a document which might contain it (c) retrieving the information or a document which might contain it and (d) extracting the information from a document containing it. Costs representing the time taken by any person undertaking those activities on behalf of the authority are to be estimated at a rate of £25 per person per hour.
17. **Vexatious/repeated requests: no section 1(1) duty.** A public authority is not obliged to comply with a request for information if the request is vexatious: section 14(1). Nor is the public authority obliged to comply with a request for information “identical or substantially similar” to a request from the

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<sup>8</sup> Section 9(2).

<sup>9</sup> Section 12(2).

<sup>10</sup> Regulation 3.

same person with which the public authority has previously complied, unless a “reasonable interval” has elapsed.

18. **The provision of advice and assistance.** The Information Commissioner has, on a number of occasions, had to consider whether public authorities have complied with their duties under section 16 of FOIA to provide advice and assistance to persons who propose to make, or have made, a request. The Code of Practice provides detailed guidance as to what is expected of public authorities. Broadly, public authorities are expected to establish a channel of communication with an applicant in order to enable him or her to define the information in such a way that the authority can locate it and to provide details of the types of information which could be provided.
19. **Means of communication of information.** Where an applicant making a request for information expresses a preference for communication by one of a number of specified means (copy, inspection, digest/summary) the public authority is obliged “so far as is reasonably practicable” to give effect to that preference and in deciding whether it is reasonably practicable shall have regard to all the circumstances including the cost of doing so: sections 11(1) and 11(2). Subject to this, information may be communicated by any means which are reasonable in the circumstances: section 11(4). See Common Services Agency v Scottish Information Commissioner [2008] UKHL 47 [2008] 1 WLR 1550.
20. **Time Limits.** Under FOIA a public authority is obliged to comply with its section 1 duty promptly and in any event within 20 working days of the date of receipt of a request for information.<sup>12</sup> However where the public authority gives the applicant a fees notice (see above), the working days beginning with the day on which the fees notice was given to the applicant and ending with the day on which the fee was received by the public

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<sup>11</sup> Regulation 4.

<sup>12</sup> Section 10(1). The Freedom of Information (Time for Compliance with Requests) Regulations 2004 allow specific public authorities a longer, 60 day maximum period, in certain circumstances.

authority are disregarded for the purposes of calculating the 20 day time limit.

21. If a request is to be refused the public authority is required, within 20 days, to send the applicant a notice stating which exemption is relevant and stating why the exemption applies.<sup>13</sup> Where the public authority has decided that the public interest test is satisfied in relation to a qualified exemption it must give reasons for this conclusion.<sup>14</sup> However, a public authority which is considering whether the public interest favours relying on an applicable exemption need not comply with its obligations under section 1 “until such time as is reasonable in the circumstances”.<sup>15</sup> In its notice to the applicant, which must nevertheless be sent within 20 days, a public authority which has not reached a decision on the balance of public interest must indicate that this decision has not been reached and give an estimate of the date by which it expects a decision to be reached.

#### **(iv) General functions**

22. Part III contains provisions relating to the general functions of the Secretary of State and the Information Commissioner. These include issuing codes of practice as to guidance to public authorities on the practice which it would be desirable for them to follow: sections 45 and 46. The Information Commissioner has a duty to promote the following of good practice by public authorities and can make “practice recommendations” where it appears that the practice of a public authority does not conform to any requirements of the codes of practice.

#### **(v) Enforcement and Appeals**

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<sup>13</sup> Section 17.

<sup>14</sup> Section 17(3)

<sup>15</sup> Sections 10(3) and 17(3).

23. Provisions relating to enforcement and appeals are contained in Parts IV and V of FOIA. A person dissatisfied with a public authority's response to a request may apply to the Information Commissioner for a decision whether, in any specified respect, a request for information made by the complainant has been dealt with in accordance with the requirements of Part I of FOIA.<sup>16</sup> The Information Commissioner publishes his Decision Notices, which can be found at [www.informationcommissioner.gov.uk](http://www.informationcommissioner.gov.uk).
24. Complainants and public authorities have a right of appeal to the Information Tribunal from a Decision Notice.<sup>17</sup> This is an appeal by way of rehearing. On an appeal, the Tribunal has the power to hear evidence which was not before the Commissioner, and may make different findings of fact from the Commissioner.<sup>18</sup> The Tribunal has the power to allow an appeal, substitute another Decision Notice, or dismiss the appeal. The decisions of the Information Tribunal on appeals are published on its website at [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk).
25. An appeal, on a point of law, lies against the decision of the Information Tribunal to the High Court of Justice in England, Court of Session, or High Court of Justice in Northern Ireland, depending upon the address of the public authority concerned.<sup>19</sup>
26. In January 2010, the Information Tribunal will transfer into the General Regulatory Chambers within the First-Tier Tribunal of the unified tribunal structure. Onward appeals will be heard in the Administrative Appeals Chamber of the Upper Tribunal.

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<sup>16</sup> Section 50(1).

<sup>17</sup> Section 57.

<sup>18</sup> Section 58.

<sup>19</sup> Section 59.

