



EXEMPTION NOTE

Section 28 National security and defence

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 28 states:

28 National security and defence

- (1) Information is qualified exempt information if exemption from section 8(1) (right of access to information held by public authorities) is required to safeguard national security.
- (2) A certificate signed by the Chief Minister (or, in the absence of the Chief Minister, by the Minister for Home Affairs) certifying that refusal to supply the information (or information of a specified description that includes that information) is necessary to safeguard national security is conclusive evidence of that fact.
- (3) Without limiting the generality of subsection (2), the certificate may —
 - (a) identify the information to which it applies by means of a general description; and
 - (b) may be expressed to have prospective effect.
- (4) In any proceedings under this Act, a document purporting to be a certificate under subsection (2), or document purporting to be a certified copy of the certificate, is to be treated as the certificate or copy unless the contrary is proved.
- (5) Information is qualified exempt information if its disclosure would, or would be likely to, prejudice —
 - (a) the defence of the British Islands or any of them; or
 - (b) the capability, effectiveness or security of any relevant forces.
- (6) In this section, “relevant forces” means —
 - (a) the armed forces of the Crown; and
 - (b) any forces co-operating with those forces, or any part of any of those forces.

THE MAIN POINTS

1. This is a qualified exemption.
2. The exemption has two distinct parts:
 - i. Safeguarding national security
 - ii. Defence of the British Islands or the capability of the armed forces.
3. To apply the exemption to information concerning the defence of the British Islands or the capability of the armed forces requires determination of a prejudice test.
4. If the PA determines that the exemption 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.

Safeguarding national security

5. A PA may apply the exemption to information if it "is required" to safeguard national security. A PA must be able to evidence that disclosure of the information would constitute a threat to national security.
6. "Is required" is interpreted as meaning reasonably necessary.
7. Although there has to be a real possibility that the disclosure would undermine national security, the impact does not need to be direct or immediate.
8. The term "national security" is not defined in FOI and covers many kinds of information including:
 - the defence of the realm
 - the prospect of war
 - the disposition of the armed forces
 - the location and movement of nuclear weapons
 - the activities of the security and intelligence services

The list is not exhaustive.

9. The exemption may still be applied to information in the public domain, particularly where information has entered the public domain through unofficial channels. For example, where information has been leaked, authorities might be concerned that disclosure will not only authenticate the information, but also confirm that the information is accurate.
10. When considering the public interest, it is the interests of the British Islands and citizens that are of concern.
11. Where the Chief Minister signs a certificate stating that, information cannot be disclosed in order to safeguard national security, this will be conclusive of that fact and the Commissioner does not have the power to decide that the exemption doesn't apply.

However, a certificate may be subject to challenge in the Court via a Petition of Doleance.

12. A certificate may take one of two forms:

- i. A certificate identifying specific information to be withheld created in response to a request.
- ii. A prospective certificate issued with a general description of the information to be covered.

Defence of the nation/ capability of armed forces

13. A PA seeking to apply this exemption must be able to demonstrate that disclosure would prejudice defence or any of the other interests identified in this exemption. The simple fact that the information relates to any of these matters is not sufficient for the exemption to apply.

14. The defence of the nation includes internal as well as external threats. As a result, there is likely to be an overlap between information which would prejudice the defence of the British Islands or the capability, effectiveness or security of relevant forces and information withheld for the purpose of safeguarding national security. The "British Islands" means the United Kingdom, the Channel Islands and the Isle of Man.

Official Secrets Act 1989

15. The Official Secrets Act 1989 (OSA) provides some guidance about the types of matters that may be relevant to "defence":

- the size, shape, organisation, logistics, order of battle, deployment, operations, state of readiness and training of the armed forces of the Crown;
- the weapons, stores, or other equipment of those forces and the invention, development, production and operation of such equipment and research relating to it;
- defence policy and strategy and military planning and intelligence and
- plans and measures for the maintenance of essential supplies and services that are or would be needed in time of war.

16. Section 2(2) of OSA states that disclosure of information relating to defence is damaging if it:

- damages the capability of, or any part of, the armed forces to carry out their tasks;
- leads to loss of life or injury to members of those forces;
- leads to serious damage to the equipment or installations of those forces;
- endangers the interests of the UK abroad;
- seriously obstructs the promotion or protection by the UK of those interests; or
- endangers the safety of British citizens abroad

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

None

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



Scottish Information Commissioner (SIC) Decisions

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

Decision Number	Parties	Summary
140/2014	Rob Edwards and the Scottish Ministers	In this case, the Ministers did satisfy the SIC that exemption was required for the purposes of safeguarding national security. Mr Edwards asked for the location and quantities of potassium iodate tablets in Scotland; these are used to prevent cancer following exposure to radiation. The SIC accepted that disclosing the information would reveal the UK's capacity to respond to attack and would be beneficial to terrorist organisations.
151/2007	Rob Edwards and the Scottish Ministers	This involved a request for copies of documents contained in a file called, "Release of Radionuclides in Drinking Water Systems". The Ministers argued that disclosing information could harm national security as it related to measures to protect essential services. The SIC found that the Ministers had failed to demonstrate why exemption was required for the purpose of safeguarding national security.

Case law

UK Tribunal decisions

First Tier Tribunal

Date	Citation	Parties
6 July 2010	EA/2009/0111	Dept. for Transport/ Kalman
25 October 2011	EA/2011/0004	Burt v IC v MoD

