



EXEMPTION NOTE

Section 41 Information for future publication

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).

While this note provides general guidance all 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 41 states:

41 Information for future publication

Information is qualified exempt information if —

- (a) it is held with a view to its being published, by a public authority or any other person, at some future date (whether determined or not);
- (b) when the request for information is made the information is already being held with that view; and
- (c) it is reasonable in all the circumstances that the information be withheld from disclosure until that future date.

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. This exemption is not about withholding information from the applicant but in certain circumstances allowing the PA to control when, in the public interest, information intended for future publication is released.
5. To apply the exemption the PA must be able to evidence:
 - that the information is held with the definite and settled intention to publish it,
 - the intention to publish must pre-date the date of the request, and
 - it is reasonable to withhold the information until the publication date.
6. The exemption applies whether the PA, or a third party, is to publish the information.
7. The term ‘publication’ requires the information to be made available to the public. It is not sufficient if a public authority or another person only intends to make the information available to a particular, restricted audience.
8. ‘Publication’ is not confined to making information available in print or online.
9. The term is very broad and can include the action of making information generally known or available.

For example :

- by physical inspection;

- in some circumstances, through speech;
- in picture form, if there is an intention to make the picture available through public display;
or
- via notes made in preparation for a speech - if there is an intention to broadcast the speech publicly.

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. The PA will have to explain why the exemption applies and it is in the public interest to withhold the information. See also Code of Practice <hyperlink>

DUTY TO ADVISE AND ASSIST

Section 15 requires PAs to provide reasonable advice and assistance to persons who wish to make, or have made, requests for information.

If a PA refuses a request on the basis that the information is intended for future publication the PA should advise the applicant how and where the information will be published and also state when that information is expected to be published either by reference to a date or completion of a particular event such as management review.

Further advice can be found in the Code of Practice <hyperlink>

OTHER CONSIDERATIONS

1. Can the PA demonstrate its clear intention to publish and what evidence would it give to the Commissioner to evidence this?
2. The information that the public authority intends to be published must be the specific information the applicant has requested.
3. A PA cannot, when it receives a request, attempt to give itself more time to provide the information by deciding to publish it in the future rather than provide it within the statutory time limit for answering a request.
4. How will the PA satisfy itself that it is "reasonable in all the circumstances" to withhold the information?

Factors the PA could consider include:

- Does the information relate to a new initiative or service that is not as yet in operation?
- Is the information complete and if not would disclosure present a misleading or distorted picture?
- Could disclosure disadvantage a third party, for example of information about an imminent invitation to tender?
- Is the information due to be published in the near future?

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
12 December 2017	2017/0003	Department of Education and Children

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
051/2005	Mr B and the Scottish Prison Complaints Commission (SPCC)	The SPCC refused to disclose information on the basis that the information would be in the Annual Report. The Annual Report did not contain the specific information requested by Mr B. The SIC decided the exemption did not apply
030/2008	Mark Nixon and Glasgow City Council	Mr Nixon asked for information about job profiles. The Council stated that it intended to publish the information – and did eventually publish information, although later than expected. However, the published information did not fully comply with Mr Nixon's request. While the SIC was satisfied that the Council did intend to publish the information at some point in the future, the Council had not been able to satisfy him that it intended to publish the information within 12 weeks* of the request. The SIC also questioned whether publishing information on an authority's intranet could be considered publication for the purposes of the exemption.
135/2008	Euan Pearson and Fife Council	The Council withheld a consultation response its Housing Service had made about a planning application. No evidence was provided on whether completion of the response was expected to take more or less than 12 weeks*, or to the period within which it was customary to complete such responses. Accordingly, the SIC could not accept that the information was held with a view to publication within 12 weeks*.
217/2013	Howling Events and Visit Scotland	Visit Scotland was asked for a copy of a report. It refused to disclose the report, relying on the exemption. Since it only intended to disclose a summary of the report, the SIC found that the exemption did not apply.
036/2012	Rab Wilson and Ayrshire and Arran	Mr Wilson asked the Board for copies of reports it had prepared. The Board applied the exemption in, but the SIC was satisfied that the decision to publish versions of the reports only came about after Mr Wilson had made his request. This meant that the exemption could not apply.

* Scotland has a 12 week limit on publication – there is no publication date limit in the IOM.

Case law

UK Tribunal decisions

