

The public interest test

Freedom of Information Act

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1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.
2. An overview of the main provisions of FOIA can be found in [The Guide to Freedom of Information](#). This is part of a series of guidance, which goes into more detail than the Guide to FOIA, to help public authorities to fully understand their obligations and to promote good practice.
3. This guidance explains to public authorities what the public interest test is, when it is required and how to apply it, taking

into account relevant factors and weighting them appropriately, in order to decide whether to disclose information.

Overview

The exemptions in Part II of the Freedom of Information Act are 'absolute' or 'qualified'. If an absolute exemption applies, the information does not have to be released. If the exemption is qualified, the public authority must weigh the public interest in maintaining the exemption against the public interest in disclosure. This is the public interest test.

A public authority can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure.

The public interest here means the public good, not what is of interest to the public, and not the private interests of the requester.

In carrying out the public interest test the authority should consider the circumstances at the time at which it deals with the request. If carrying out an internal review, it may consider the circumstances up to the point that review is completed.

Public interest arguments for the exemption must relate specifically to that exemption. For example, where the exemption is about prejudice to a particular interest there is an inherent public interest in avoiding that prejudice. However, there is not necessarily an inherent public interest where the exemption protects a particular class of information.

The authority must consider the balance of public interest in the circumstances of the request.

There will always be a general public interest in transparency. There may also be a public interest in transparency about the issue the information relates to. The authority should consider any public interests that would be served by disclosing the information.

If there is a plausible suspicion of wrongdoing on the part of the public authority, this may create a public interest in disclosure. And even where this is not the case, there is a public interest in releasing information to provide a full picture.

Arguments based on the requester's identity or motives are generally irrelevant. Arguments that the information may be misunderstood if it were released usually carry little weight.

The fact that other methods of scrutiny are available does not in itself weaken the public interest in disclosure. Where other means of scrutiny have been used, apart from FOIA, this may weaken the public interest in disclosure.

There is a public interest in promoting transparency about the UK government and public authorities, although requesters do not have to be UK nationals or residents.

The authority must consider the relative weight of the arguments for and against disclosure. This can be affected by the likelihood and severity of any prejudice; the age of the information; how far the requested information will help public understanding; and whether similar information is already in the public domain.

Where a qualified exemption applies and the authority does not wish to confirm nor deny that it holds the requested information, the decision to give a 'neither confirm nor deny' response is itself subject to the public interest test.

What FOIA says

Section 2 FOIA is as follows:

2 Effect of the exemptions in Part II.

(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—

- (a) the provision confers absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,

section 1(1)(a) does not apply.

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or

to the extent that—

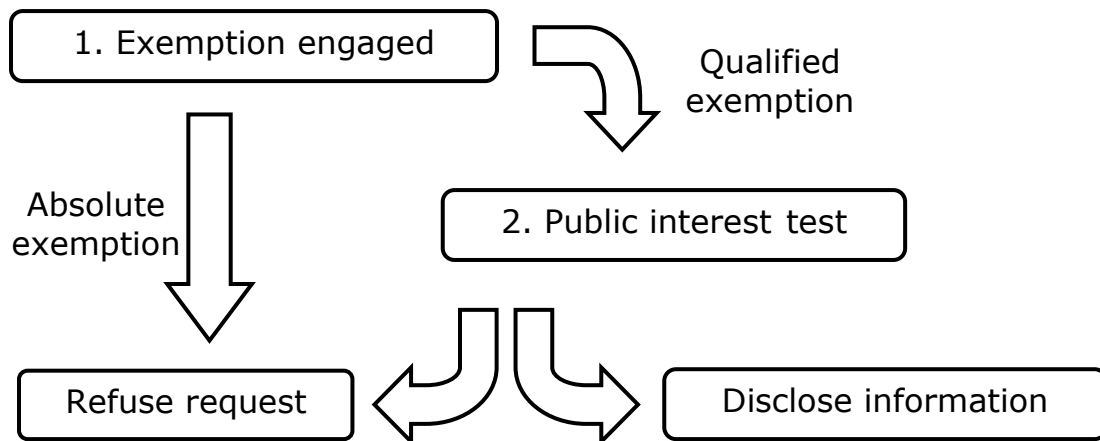
- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—

- (a) section 21,
- (b) section 23,
- (c) section 32,
- (d) section 34,
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords,
- (ea) in section 37, paragraphs (a) to (ab) of subsection (1), and subsection (2) so far as relating to those paragraphs
- (f) in section 40—
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
- (g) section 41, and
- (h) section 44.

Types of exemptions

4. FOIA gives a right of access to information that public authorities hold, but it also contains several possible exemptions from that right, which are listed in Part II of the Act. Some of these exemptions require the authority to consider the balance of public interest in deciding whether to withhold the information; these are known as 'qualified' exemptions. Others do not; these are known as 'absolute' exemptions. The absolute exemptions are listed in section 2(3); the exemptions in Part II that are not listed in that section are qualified.
5. The following diagram shows the difference in the way that absolute and qualified exemptions are handled:



6. As the diagram indicates, when a public authority wishes to withhold information under a qualified exemption, it must carry out a two-stage process. Firstly, it must decide that the exemption is engaged ie the exemption applies to the requested information. Then it must carry out the public interest test, which means that it must decide whether the public interest is better served by maintaining the exemption (and hence withholding the information) or by disclosing the information.
7. The effect of section 2(2)(b) is that when the authority has carried out the public interest test, it can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosing it. If the public interest is equal on both sides, then the information must be released. If the public interest in disclosure is greater than the public interest in maintaining the exemption, then the information must also be released. In this sense we can say that there is an assumption in favour of disclosure in FOIA.

The public interest

8. To carry out the public interest test it is necessary to understand what 'the public interest' means in the context of FOIA.

In the public interest

9. The public interest can cover a wide range of values and principles relating to the public good, or what is in the best

interests of society. Thus, for example, there is a public interest in transparency and accountability, to promote public understanding and to safeguard democratic processes. There is a public interest in good decision-making by public bodies, in upholding standards of integrity, in ensuring justice and fair treatment for all, in securing the best use of public resources and in ensuring fair commercial competition in a mixed economy. This is not a complete list; the public interest can take many forms.

10. However, these examples of the public interest do not in themselves automatically mean that information should be disclosed or withheld. For example, an informed and involved public helps to promote good decision making by public bodies, but those bodies may also need space and time in which to fully consider their policy options, to enable them to reach an impartial and appropriate decision, away from public interference. Revealing information about wrongdoing may help the course of justice, but investigations into wrongdoing may need confidentiality to be effective. This suggests that in each case, the public interest test involves identifying the appropriate public interests and assessing the extent to which they are served by disclosure or by maintaining an exemption.

Of interest to the public

11. The public interest is not necessarily the same as what interests the public. The fact that a topic is discussed in the media does not automatically mean that there is a public interest in disclosing the information that has been requested about it.

Example

In *Guardian Newspapers Ltd and Heather Brooke v the Information Commissioner and the British Broadcasting Corporation* ([EA/2006/0011 and 0013](#), 8 January 2007) the Information Tribunal said at paragraph 34:

*"Mr Wells also exhibited to his statement a long list of press articles relating to the affair. Lord Wilberforce said in *British Steel Corp v Granada Television Ltd* [1981] AC 1096 at 1168: "There is a wide difference between what is interesting to the public and what it is in the public interest to make known". We did not find that the list of articles assisted us, since in the selection no distinction was made between matters which were in the interests of the public*

to know and matters which were merely interesting to the public (ie, which the public would like to know about, and which sell newspapers, but which under s 2(2) are not relevant)."

12. Media coverage of an issue may indicate that there is a public interest at stake, but it is not proof of the fact.

Private interests

13. FOIA section 2(2) refers to the public interest; furthermore, disclosures of information under FOIA are in effect to the world at large and not merely to the individual requester. So the requester's private interests are not in themselves the same as the public interest and what may serve those private interests does not necessarily serve a wider public interest.

Example

The case of *Grace Szucs v the Information Commissioner* ([EA/2011/0072](#), 16 August 2011) concerned a request from Mrs Szucs to the Intellectual Property Office (IPO) for the legal advice they had received about how to deal with a previous request that Mrs Szucs' husband had submitted. Mr Szucs was involved in a dispute with the IPO about how it had handled a complaint from him. In response to Mrs Szucs' request, the IPO withheld the legal advice under FOIA section 42(1).

In carrying out the public interest test, the First-tier Tribunal distinguished between private interests and what is in the public interest. They said at paragraph 54:

"The disclosure of the disputed information is not necessary for the public to obtain information about the IPO. The fact the legal advice the IPO received in relation to the request for information made by Mr Szucs in 2005 may be of interest to Mrs Szucs, her husband, their associates and perhaps a slighter wider section of the public, but it does not follow that its disclosure is in the public interest."

The public interest test

Timing

14. When carrying out the public interest test a public authority should consider the circumstances at the time at which it deals with the request.
15. If an authority is carrying out an internal review then it may consider the circumstances up to the time the review is completed.
16. This reflects the position taken by the [*Upper Tribunal in APPGER v ICO and Foreign and Commonwealth Office \(UKUT 0377 \(ACC\), 2 July 2015\)*](#) It endorsed the line that 'the public interest should be assessed by reference to the circumstances at or around the time when the request was considered by the public authority (including the time of any internal review)'
17. When dealing with a complaint that information has been wrongly withheld the Commissioner will consider the situation at the time at which the authority originally dealt with the request, or the time of the authority's internal review.
18. There may be rare cases where events after this time change the balance of the public interest test, in such a way that disclosure would be inappropriate or undesirable. If so, the Commissioner has discretion to decide what he orders the authority to do. This approach was confirmed by the Upper Tribunal in [*Information Commissioner v HMRC & Gaskell \(GIA/3016/2010 / \[2011\] UKUT 296\(AAC\), 20 July 2011\)*](#)
19. Amongst other matters, the Commissioner had appealed to the Upper Tribunal against the First Tier Tribunal's finding that he had no discretion when deciding what steps to order in a decision notice. The Upper Tribunal decided that the Commissioner does have discretion as to what steps to order, if any; he is not obliged to order steps in every case.
"In conclusion, I agree with both counsel that the requirement under section 50(4) that the decision notice should specify the steps which must be taken by the public authority does not amount to a mandatory obligation on the Commissioner to require steps to be taken..... As a matter of law the mandatory element of section 50(4) is that, if the Commissioner considers that the public authority ought to take any steps to comply with those statutory requirements, then he must specify them in the

decision notice, along with the defined period within which they must be undertaken.”

Public interest arguments

20. In carrying out the public interest test, the authority should consider the arguments in favour of disclosing the information and those in favour of maintaining the exemption. The authority should try to do this objectively, recognising that there are always arguments to be made on both sides. It may be helpful for the authority to draw up a list showing the arguments it is considering on both sides; this will help when it comes to assessing the relative weight of the arguments.

Arguments in favour of maintaining the exemption

- Arguments must be relevant to the specific exemption

21. FOIA provides a right of access to information public authorities hold and the exemptions from that right listed in Part II of the Act aim to protect particular, specified interests. So, the public interest arguments in favour of maintaining an exemption must relate specifically to that exemption. In *Christopher Martin Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and 0030*, 17 October 2006 (*Hogan*), the Information Tribunal said at paragraph 59:

“In considering factors that mitigate against disclosure, the focus should be upon the public interests expressed explicitly or implicitly in the particular exemption provision at issue.”

22. Arguments that relate to other exemptions are irrelevant. So if for example an authority wishes to apply section 31(1)(a), relating to the prevention or detection of crime, the public interest arguments put forward for maintaining the exemption must relate specifically to the need to avoid prejudicing crime prevention or detection, and not for example, to endangering health and safety, which is dealt with in section 38.

- Class-based and prejudice-based exemptions

23. When considering the public interest test, there is a difference between ‘prejudice-based’ and ‘class-based’ exemptions. These two terms are explained in our separate guidance document on the Prejudice test. Briefly, class-based

exemptions protect information because it is of a particular type (for example information held for the purposes of an investigation); prejudice-based exemptions protect information where its disclosure would or would be likely to harm a particular interest (for example the prevention or detection of crime).

24. There is a public interest inherent in prejudice-based exemptions, in avoiding the harm specified in that exemption, such as prejudicing crime prevention or endangering health and safety. The fact that a prejudice-based exemption is engaged means that there is automatically some public interest in maintaining it, and this should be taken into account in the public interest test. The same is not necessarily true if the exemption is class-based.

Example

In *Department for Education and Skills v Information Commissioner and the Evening Standard* ([EA/2006/0006](#) 19 February 2007), the DfES had argued (paragraph 45) that Parliament had accepted that any disclosure of information covered by a class-based exemption (in this case section 35(1)(a), the formulation and development of government policy) caused some damage to the public interest. The Tribunal rejected this argument. They said at paragraph 63:

"In our judgement, inclusion within such a class of information simply indicates the need and the right of the public authority to examine the question of the balance of public interests when a request under s.1 is received. Often such examination will be very brief because disclosure poses no possible threat to good government."

In other words, the fact that the information fell within the exemption was simply a trigger to consider the public interest; it did not imply that there was a public interest in not disclosing it.

This approach was approved by the High Court in the case of *Office of Government Commerce v Information Commissioner* [2008] EWHC 737 (Admin) (11 April 2008) at paragraph 79.

25. As a general rule there is no inherent public interest in class-based exemptions. However, there is an inherent public interest in section 42, which exempts legally privileged information. This is because of the importance of the principle

of legal privilege; disclosing any legally privileged information threatens that principle. For further discussion of this point, see our separate guidance on [The exemption for legal professional privilege](#).

26. Class-based exemptions are engaged because the information is of a particular type. If it can also be shown that disclosure of the information would or would be likely to have a prejudicial effect, then there is a public interest in avoiding that prejudice.

- Blanket rulings

27. FOIA Section 2(2)(b) requires the authority to consider whether “*in all the circumstances of the case*”, the public interest in maintaining the exemption outweighs the public interest in disclosure. This means that although an authority may have a general approach to releasing certain types of information, and this may be helpful from an administrative point of view, this should not prevent them from considering the balance of public interest in the individual circumstances of each request. In *Hogan*, the Information Tribunal said at paragraph 57:

“The public authority may well have a general policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information. However such a policy must not be inflexibly applied and the authority must always be willing to consider whether the circumstances of the case justify a departure from the policy.”

Arguments in favour of disclosure

- General public interest in transparency

28. The public interest arguments in favour of maintaining an exemption must relate specifically to that exemption, but this is not necessarily the case when considering the arguments in favour of disclosure. The Information Tribunal in *Hogan* made this point at paragraph 60:

“While the public interest considerations against disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption.”

29. There is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. FOIA is a means of helping to meet that public interest, so it must always be given some weight in the public interest test.

- Public interest in the issue

30. As well as the general public interest in transparency, which is always an argument for disclosure, there may also be a legitimate public interest in the subject the information relates to. If a particular policy decision has a widespread or significant impact on the public, for example changes to the education system, there is a public interest in furthering debate on the issue. So, this can represent an additional public interest argument for disclosure.

31. If a major policy decision is being taken, there may also be a contrary argument that information should not be disclosed because of the need for a safe space in which to formulate and develop policy.

- Public interest in the information

32. In addition to the general public interest in transparency and accountability, and any public interest arising from the issue concerned, there may be a specific public interest in disclosing the information in question. This will of course depend on the circumstances of the case.

33. The following case is an example of where there is a specific public interest in transparency, to help people to understand their legal obligations.

Example

Simon Philip Kalman v Information Commissioner and Department for Transport ([EA/2009/0111](#), 6 July 2010) concerned a request for Directions issued under the Aviation Security Act 1982 (ASA) relating to security-screening passengers at airports. The Department for Transport withheld the Directions under FOIA section 24(1), relating to national security. Section 24(1) is a qualified, prejudice-based exemption.

The Appellant argued that the effect of the Directions was that refusing to submit to a search could potentially constitute a criminal offence. Furthermore, the ASA provides a bar to civil or criminal claims arising from anything done or not done in compliance with a Direction. If they were not disclosed the Directions could be

described as a 'secret law'; people were entitled to know the source of their legal obligations and any legal restrictions on their right to make a claim.

The First-tier Tribunal accepted the 'secret law' argument as a public interest factor in favour of disclosure. They said at paragraph 66:

"The public have a legitimate interest therefore in knowing whether an action complained of arises out of a Direction or not... it is in the public interest for parties to know, if they have a complaint, where they stand in relation to the powers exercised by airport security staff before bringing legal actions"

- Suspicion of wrongdoing

34. A further example of a potential public interest in transparency is where there is a suspicion of wrongdoing on the part of the public authority. A requester may, for instance, allege that a public authority has committed some form of wrongdoing, and that the information requested would shed light on this. For this to be considered as a factor in the public interest test,
- disclosure must serve the wider public interest rather than the private interests of the requester (see **Private interests** above); and
 - the suspicion of wrongdoing must amount to more than a mere allegation; there must be a plausible basis for the suspicion, even if it is not actually proven.
35. A number of sources may suggest whether a plausible basis exists:
- The facts may suggest that the basis for an authority's actions is unclear or open to question. The case of *Mersey Tunnel Users' Association v Information Commissioner and Merseytravel* ([EA/2007/0052](#), 15 February 2008), is an example of this and is discussed below under **Weighing the arguments**. The Information Tribunal in that case said at paragraph 46 "*legitimate and serious questions can readily be asked about both the power to make the payments and the obligation to do so*"
 - If there has been an independent investigation, for example by an Ombudsman or auditors, the outcome of this may indicate whether or not there is any substance in an allegation of wrongdoing.

- The content of the information is important in making this assessment. It may refute the suspicion, in which case there may be some public interest in disclosing the information in order to clear up misconceptions; or, it may indicate that the suspicion is justified (a so-called 'smoking gun'), in which case there is an even stronger public interest in disclosure.
- Evidence of public concern about the issue could also be a factor for disclosure. An example of this is MPs' expenses:

Example

In *House of Commons v Information Commissioner and Leapman, Brooke, and Thomas* ([EA/2007/0060](#), 26 February 2008) the Information Tribunal at paragraph 49 found "as a fact" that there was "a long-standing lack of public confidence in the system of MPs' allowances" and "the extent of information published is not sufficient to enable the public to know how the money is spent". This clear evidence of public concern gave a plausible basis for the suspicion which created an additional public interest in disclosure.

36. If there is evidence of public concern but those concerns do not have an objective basis, there can still be a public interest argument for disclosure if this would show that the concerns are unjustified and would help restore confidence in the public authority.
 37. The Commissioner cannot assess whether there has been maladministration or other wrongdoing. In dealing with a complaint, we would consider the types of evidence listed above to assess whether the suspicion of wrongdoing creates a public interest in disclosure, not to decide whether there has been wrongdoing.
- Presenting a 'full picture'**
38. Even if wrongdoing is not an issue, there is a public interest in fully understanding the reasons for public authorities' decisions, to remove any suspicion of manipulating the facts, or 'spin'. For example, this may well be a public interest argument for disclosing advice given to decision makers. The fact that the advice and the reasons for the decision may be complex does not lessen the public interest in disclosing it and may strengthen it. Similarly, the information does not have to give a consistent or coherent picture for disclosure to help public understanding; there is always an argument for presenting the full picture and allowing people to reach their own view. There is also a public interest in the public knowing that an important

decision has been based on limited information, if that is the case.

Example

Cabinet Office and Christopher Lamb v Information Commissioner ([EA/2008/0024 and 0029](#), 27 January 2009) concerned a request for the minutes of Cabinet meetings at which the Attorney General's advice on the Iraq war was discussed. The Information Tribunal said at paragraph 82:

"...the majority considers that the value of disclosure lies in the opportunity it provides for the public to make up its own mind on the effectiveness of the decision-making process in context"

39. If information that is already in the public domain (rather than the requested information) is misleading or misrepresents the true position, or does not reveal the full picture, this may increase the public interest in disclosure. For instance, where part of some legal advice has been disclosed, leading to misrepresentation or a misleading picture being presented to the public, there may be a public interest in disclosing the full advice.

Irrelevant factors

40. There are a number of arguments which may be put forward in the public interest test, that we consider are unlikely to be relevant. This is supported by the comments of the Information Tribunal in *Hogan* at paragraph 61:

"While FOIA requires that all the circumstances of the case be considered, it is also implicitly recognised that certain factors are not relevant for weighing in the balance. First, and most importantly, the identity and, or, the motive of the applicant is irrelevant ... Second, the 'public interest' test is concerned only with public interests, not private interests. Third, information may not be withheld on the basis that it could be misunderstood, or is considered too technical or complex."

41. Our view on these points is as follows.

- Identity of the requester

42. The requester's identity or their motives in seeking the information are not relevant to the public interest test. FOIA is often said to be 'applicant and motive blind'. This is because a disclosure under FOIA is in effect a disclosure to the world. The public interest issues that come into play when a qualified exemption is engaged are about the effect of making the information public, not the effect of giving it to a particular requester. This does not mean that the requester's public interest arguments should not be considered.

- Private interests of the requester

43. The requester's private interests are not in themselves relevant to the public interest test. For example, a requester may have a grievance they are pursuing and may think the information they want will help them. This in itself is not a relevant factor. There would only be a public interest argument if it could be shown that there is a wider public interest that would be served by disclosing that information.

- Information may be misunderstood

44. Information requested under FOIA may be technical or complex. This is not usually in itself an argument for maintaining the exemption. The obvious solution is for the authority to publish an explanation of the information, rather than withhold it.

45. It may be argued that the information would be misleading, perhaps because it consists of notes reflecting only part of a discussion or because it may be inaccurate or out of date. FOIA provides a right to information that public authorities hold; it does not require that information to be complete, accurate or up to date.

Example

In *Home Office v Information Commissioner* ([EA/2008/0027](#), 15 August 2008) the Home Office had argued that data it held on work permits should not be disclosed because it may be inaccurate or incomplete. The Information Tribunal said at paragraph 15 that:

"... if the records are faulty or inadequate and the information turns out therefore to be inaccurate that is irrelevant: the right under the Act is to information which is held, not information which is accurate."

46. The public authority should normally be able to publish some context or explanation with the information it releases. The argument that it would not be in the public interest to publish inaccurate or misleading data would usually only carry any weight if the section 22 exemption is claimed (information intended for future publication) and the public authority's publication plans include providing the necessary context or explanation. In any other type of case, the argument may only be used if it is not possible to provide this explanation, or if the explanation would not limit any damage caused.

Example

HMRC v IC (EA/2008/0067 – 11 March 2009)

The complainant requested a copy of the report prepared following an investigation into allegations about a proposed amnesty for United Kingdom tobacco producers. The Commissioner found that the information about the involvement of third parties should not be disclosed under section 31 but that the elements of the report relating to an HMRC employee could be disclosed because the authority would have other means to require an employee to co-operate with an investigation which it would not have with external third parties e.g. employment obligations.

On appeal, HMRC argued that only disclosing the information provided by its own staff presented an "unbalanced picture". Secondly, HMRC argued that this unbalanced picture "...would [have] a resultant deleterious effect upon future non-statutory investigations of a similar kind if the future interviewees felt there was a risk of partial, and therefore possibly unbalanced, disclosure" (paragraph 58).

The Commissioner countered these arguments by suggesting that the unbalanced picture argument was overstated because the "... Report essentially exonerated those about whom allegations were made" and secondly that if these third parties felt that their role in the affair had been misrepresented, then it was open to them to present their side of the story (paragraph 60).

At paragraph 59 the Tribunal said: "...this is tantamount to a suggestion that any third parties otherwise affected could, as HMRC put it in written submissions, 'speak up about their role and put rebuttals into the public domain' HMRC points out that the Commissioner has held that it would be contrary to the public interest to require evidence of third parties to be disclosed under FOIA and therefore it would be totally inappropriate, as well as unfair, and not in the public interest to force them by indirect means to make such disclosure. The Tribunal respectfully agrees".

The Tribunal therefore found that the public interest test for section 31 favoured maintaining the exemption, because it would not be in the public interest to compel third parties to present arguments in their defence when the Commissioner had already found that it would not be in the public interest to disclose information about the third parties. Therefore in this case, the prejudicial effect could not be mitigated by an accompanying explanatory statement or by setting the disclosure into context.

Similar arguments may also go to support the engagement of exemptions other than section 31.

Other means of scrutiny

47. It may be argued that, where issues of public concern are at stake, the existence of other means of scrutiny or regulation that could address them weakens the public interest in disclosure. This argument suggests that there is no need for the public to scrutinise the requested information through FOIA because it can be adequately considered by another body as part of their scrutiny or regulatory function.
48. The fact that other means of scrutiny are available and could be used does not in itself weaken the public interest in disclosure and we consider this argument to be irrelevant in the public interest test. However, where other means have been used or are being pursued, this may go some way to satisfying the public interest that would otherwise be served by disclosure. If, for example, a report providing the conclusions or outcome of other means of scrutiny or regulation is publicly available, this may to some extent lessen the public interest in disclosing the information requested under FOIA. Furthermore, if the other investigation is ongoing, the public interest may be better served by allowing it to continue without interference, rather than disclosing information prematurely.
49. The questions to be considered are:
- how far the other means of scrutiny go to meet the specific public interest in transparency in any particular case; and
 - what information is available to the public by these other means.

There is always some public interest in disclosing the 'full picture', for general transparency and accountability, so the public interest in disclosure cannot be completely discounted.

50. The following examples illustrate how the Information Tribunal has considered the existence of other means of scrutiny in particular cases:

Example

In University of Central Lancashire v Information Commissioner and

David Colquhoun, ([EA 2009/0034](#) 8 December 2009), Professor Colquhoun had requested copies of the course materials for undergraduate students on the BSc course in homeopathy, arguing that this information should be disclosed to allow the public to see how the University had reconciled the principles of homeopathy with established scientific principles and to allow a proper peer review.

The University argued at paragraph 17 (iii) that it *"...already did much to allow potential students and the general public to assess the value and quality of its degree courses. Its website contained a wide range of information. It provided introductory materials to potential students, including reading lists. Standards were ensured by the validation procedures which were required before a course was launched and which involved independent expert external monitors and by quality assurance (QAA) which demands a continuing compliance with national standards"*.

The Information Tribunal however said at paragraph 47:

"...the public has a legitimate interest in monitoring the content and the academic quality of a course. It is no answer, we consider, to say that this function is performed by the process of validation or the continuing monitoring of standards with external input. Whether or not these processes are conducted with critical rigour, it must be open to those outside the academic community to question what is being taught and to what level in our universities"

They added at paragraph 48 that in this case there was *"significant public controversy as to the value of such study within a university. In this case, that factor standing alone would have persuaded us that the balance of public interest favoured disclosure"*.

Example

People for the Ethical Treatment of Animals Europe (PETA) v Information Commissioner and University of Oxford ([EA/2009/0076](#), 13 April 2010), concerned a request for information on experiments carried out on a macaque monkey, including information about the project licences. PETA argued that there was a public interest in the public being informed on this issue and in the transparency of the regulatory system for animal experiments.

The First-tier Tribunal found at paragraph 60 that there was already sufficient information in the public domain to enable the public to assess the costs and benefits of the experiments. Furthermore, at

paragraph 62 they considered that the system of internal scrutiny was already sufficiently rigorous:

"The Tribunal recognized that the opportunities for external scrutiny are limited, however they accepted the evidence of Professor Phillips that the "internal" scrutiny involved in the 3 stage process of: grant application, ethical approval and Home office licence was rigorous. This was not a public process, however, those involved were drawn from a wide variety of backgrounds including scientists in other fields, ethicists, statisticians and those opposed to animal experimentation. Whilst it was accepted that no regulatory system was flawless and there would be individual cases where the system broke down, there was no evidence that as a system it is malfunctioning."

The interests of people in other countries

51. Where information is about events in another country or the actions of a foreign government, it may be argued that the public interest test should consider the interests of the people of that country. In our view, the purpose of FOIA is to promote transparency about the UK government and the public authorities defined in section 3(1). So, any interest that people of another country have in greater transparency about their government and their public authorities is not relevant to the public interest test under FOIA.
52. If citizens of other countries wish to understand more about the actions of the UK government, they can submit FOIA requests in the same way as UK citizens - a FOIA requester does not have to be a UK national or resident, as clarified in the [Explanatory Notes on the Freedom of Information Act](#) at paragraph 49. The public interest test is not about whether it is in the specific interests of the people of a foreign country to hold the UK government to account but rather, that it is in the general public interest that there is transparency about what the UK government does. The public interest test is about what is in the best interests of society in general, and this includes citizens of other countries.

Attaching weight to the public interest arguments

53. Once the public authority has identified the relevant public interest arguments for maintaining the exemption and for disclosure, it must then assess the relative weight of these arguments, to decide where the balance of public interest lies. This is not an exact process, but the authority should try to approach it as objectively as possible. If the Commissioner is dealing the case, we will consider these arguments, or consider other public interest arguments that the authority did not include, and may reach a different conclusion.

54. Certain factors can add weight to the arguments on either side and these will help decide where the balance of public interest lies. These factors include the following.

- Likelihood of prejudice

55. A key factor is the public authority's assessment of the likelihood of prejudice. Likelihood is discussed in detail in our guidance on the Prejudice test. Briefly, in engaging a prejudice-based exemption, the authority has to decide whether disclosure would or would be likely to cause the prejudice described in the exemption. 'Would' means more probable than not (a more than 50% chance). 'Would be likely' means that there must be a real and significant chance of the prejudice occurring, even though the probability may be less than 50%.

56. 'Would' is a higher standard to meet than 'would be likely'. So, if the authority can establish that prejudice *would* happen, the argument for maintaining the exemption carries greater weight than if they had only established that prejudice *would be likely* to happen. This does not mean that where prejudice would happen, the public interest will always be in favour of the exemption - there may be equally weighty arguments in favour of disclosure - but it does make it more likely that the balance of public interest will be in favour of maintaining the exemption.

57. There may be cases in which the Commissioner does not accept that the authority has shown that prejudice *would* happen and instead proceeds on the basis of *would be likely*. This proviso does not apply in the special circumstances of section 36 (prejudice to the conduct of public affairs); for further explanation of this, see our separate [guidance on section 36](#).

- Severity

58. The severity of the prejudice that may happen also affects the weighting. This is about the impact of the prejudice when it happens and not about how frequently the prejudice may happen; that is part of the likelihood of it occurring. Prejudice may still happen, even if its impact would not be severe. However, if the prejudice has a particularly severe impact on individuals or the authority or other public interests, then this will carry considerable weight in the public interest test. This would be relevant if, for example, there is any risk of physical or mental harm to an individual.

Example

In People for the Ethical Treatment of Animals Europe (PETA) v Information Commissioner and University of Oxford [EA/2009/0076](#), 13 April 2010, the University argued that publishing certain information about animal experiments would be likely to endanger the physical and mental health and safety of University staff and visitors, given the activities of animal-rights extremists. Section 38 FOIA, relating to health and safety, was therefore engaged.

The First-tier Tribunal said at paragraph 68:

"... the University argued that there was significant additional weight in favour of withholding the disputed information because of the nature of the threat (in this case an increased risk of indiscriminate and extreme acts of bombing and arson). It was not suggested that the nature of the risk has the status of turning section 38 into an absolute exemption but that it requires a very strong public interest to equal or outweigh it. The Tribunal agrees with this assessment of the weight that should be given to the nature of the additional endangerment in this case, and in light of the history ... considers that section 38 is engaged, and that significant and conclusive weight should be given to the factors weighing against disclosure of the disputed information in this case."

59. In our view, severity and likelihood together indicate the impact of the prejudice, and this in turn will affect the weight attached to the arguments for the exemption.
60. This is shown in the following diagram, where 1 represents the lowest relative weight and 4 represents the highest relative weight:

severe	3	4
not severe	1	2
	would be likely	would

61. This indicates that a severe prejudice that would be likely to happen would attract greater weight in the public interest test than a prejudice that would occur but would not be severe.

- Age of the information

62. Generally speaking, the public interest in maintaining an exemption will diminish over time, as the issue the information relates to becomes less topical or sensitive and the likelihood or severity of the prejudice diminishes. However, this is not necessarily true in every case; for example an investigation may be closed for a long time and it may be argued that the weight of public interest in disclosure has increased, but if the investigation is re-opened, the weight of the public interest argument for the exemption may be restored. So, the weight of the arguments on either side can depend on the age of the information and the timing of the request.

63. FOIA recognises the effect of the passage of time - under section 63 (as amended) some exemptions cease to apply altogether after a certain number of years, when the information becomes a 'historical record'. However, if information is several years old but not yet at the point of becoming a 'historical record', this doesn't mean there is a stronger argument for disclosure simply because the information is nearing the point at which the exemption no longer applies.

- The specific information and the public interest in disclosure

64. In assessing the weight of arguments for disclosure, it is important to consider how far disclosing the requested information would further the public interests identified. The information may be relevant to a subject of public interest, but it may not greatly add to public understanding - in such cases the public interest in maintaining the exemption may outweigh that in disclosure. On the other hand disclosure may help inform that debate, and if so the public interest in disclosure is strengthened. The weight of the argument for disclosure will depend on the content of the information and the nature of the public interest identified. This is shown in the following examples.

Example

In *Paolo Standerwick v Information Commissioner* ([EA/2010/0065](#), 27 July 2010), the Appellant had made a request to the Financial Services Authority for legal advice they had obtained on the time limit for making complaints about financial advisers (the so-called "15 year long-stop"). The FSA had withheld the advice under section 42 because it was legally privileged.

The First-tier Tribunal said at paragraph 6:

"Disclosure of the advice would undoubtedly have given the public some additional understanding of the operation of a public authority with significant responsibilities and of its decision-making process in relation to the 15 year long-stop issue, which would tend to foster transparency and accountability. Having seen the advice in question, however, we can say that it would have contributed to such understanding in a very modest way, adding very little to the contents of the board paper already provided to Mr Standerwick, which itself focuses on the policy issues surrounding whether or not to introduce a 15 year long-stop rule."

So there was little weight in the argument for disclosing this information, compared with the substantial inherent weight in preserving legal privilege.

Example

The Information Tribunal case of *Office of Government Commerce v the Information Commissioner* ([EA/2006/0068](#) and [EA/2006/0080](#), 19 February 2009) concerned a request to the OGC for Gateway Reviews (a type of project management document) of the Government's identity cards programme. These were withheld under section 35 (formulation and development of government policy) and section 33 (audit functions). The Tribunal found that there was a public interest in debating the benefits and costs of the scheme, and in seeing how the scheme had evolved and how government policy on ID cards had developed. The OGC claimed that the information in the Gateway Reviews would add nothing to the public debate on the merits of ID cards. The Tribunal however said at paragraph 159:

"...the disputed information itself needs to be carefully

examined to see whether it would have "materially added" to any debate. It is enough for this Tribunal to confirm that on examining this information, it would, in the Tribunal's view, undoubtedly make an important contribution to the debate for the reasons which have been set out above, namely that there must be an assumption that an interested and educated observer would be likely to glean something material from the Reports."

- Information already in the public domain

65. It may be necessary to consider whether similar information is already available in the public domain, and what effect this has on the public interest test. If similar information is already available and the requested information would not significantly add to it, the public interest arguments about furthering debate and increasing accountability may carry little weight. If the requested information contains new material that would help inform public debate, then the weight of the specific public interest argument is not reduced. Moreover, there is always some weight in the general argument for transparency and having the 'full picture'.
66. The factors discussed above will help in assigning relative weight to the public interest arguments on each side but they are not intended to be a complete list. Other factors may also be relevant, depending on the circumstances of the case.

The balancing exercise

67. Public authorities must then carry out a balancing exercise to decide whether the public interest in maintaining the exemption outweighs the public interest in disclosure. If it does not, the information must be released.
68. The following case is an example of how the Information Tribunal has approached the balancing exercise. The arguments on each side and the weight attached to them reflect the particular circumstances of this case. This case is unusual because in cases involving section 42, the strong inherent weight in preserving legal privilege often means that the public interest in maintaining the exemption outweighs the public interest in disclosure. In this case it did not, and the reasons for this are shown in the balancing exercise.

Example

Mersey Tunnel Users' Association v Information Commissioner and Merseytravel ([EA/2007/0052](#), 15 February 2008) concerned a request for legal advice received by Merseytravel, who operate the Mersey tunnels. Merseytravel had previously met losses on operating the tunnels by increasing the levy on the Merseyside district councils. When the tunnels started to make a profit the issue arose as to whether the profit should be used to repay the councils (treating the levy increase as a loan) or whether it could be used to reduce toll charges. After getting legal advice, Merseytravel used the money to repay the councils. The advice was legally privileged and hence FOIA section 42 was engaged. This is a qualified exemption, so the question was whether the public interest in maintaining legal privilege outweighed the public interest in disclosure.

The balance of public interest, as described by the Tribunal, can be summarised as follows:

Public interest in maintaining the exemption	Public interest in disclosure
The significant inbuilt weight of public interest in maintaining legal privilege. The Tribunal said that the inbuilt weight would have been even greater if the advice had significantly affected individuals.	The specific need for transparency in this case because of Merseytravel's lack of clarity about their legal duty to repay the district councils, in addition to the general public interest in transparency.
The advice was still 'live', in the sense that it was still being relied on.	The amount of money involved (tens of millions of pounds)
The age of the information (it was 14 years old) diminished the impact on legal privilege and reduced the weight of the argument for the exemption.	The numbers of people affected (all users of the tunnels)

The outcome depended on the relative weight of the arguments on each side, not the quantity of those arguments. The Information Tribunal said at paragraph 51:

"Weighed in the round, and considering all the aspects discussed above, we are not persuaded that the public interest in maintaining the exemption is as weighty as in the other cases considered by the Tribunal; and in the opposing scales, the factors that favour disclosure are not just equally

weighty, they are heavier.”

The lack of transparency about the basis for the authority’s actions seems to have been a crucial factor in tipping the balance.

69. The *Mersey Tunnel* case is an example of how the public interest test was carried out in that particular case. The relative weight of the public interest arguments will always depend on the circumstances of the case.

Other considerations

Neither confirm nor deny

70. The public interest test is also relevant to the duty to confirm or deny. Authorities normally have a duty under section 1(1)(a) to say whether they hold the requested information, even if they are going to withhold it. This is described in section 1(6) as the ‘duty to confirm or deny’. However FOIA recognises that there are circumstances where it would be inappropriate for a public authority even to confirm or deny that they hold information. For example, the police may give a ‘neither confirm nor deny’ response if a request is about whether they are investigating something.
71. Most exemptions¹ contain a sub-section setting out the circumstances where there is no duty to confirm or deny. If the exemption is prejudice-based then the question is whether stating that the information is or is not held would or would be likely to prejudice the interests that the exemption protects. If the exemption is class-based, then the duty to confirm or deny does not arise if the information (whether held or not) would engage that exemption.
72. If the exemption (whether prejudice-based or class-based) is qualified, then the decision to give a ‘neither confirm nor deny’ response is subject to the public interest test. The effect of section 2(1)(b) (see [What FOIA says](#) above) is to release the authority from the obligation to confirm or deny that they hold the information if the public interest in neither confirming nor denying outweighs the public interest in disclosing whether they hold the information.

¹ The ones that do not are section 21 (information accessible by other means) and section 43(1) (trade secrets)

Example

Decision Notice [FS50128245](#) concerned a request to the Department for Business, Enterprise and Regulatory Reform (DBERR) for information about an investigation into a named company. DBERR refused to confirm or deny whether it held such information. One of the exemptions cited was section 43(3) which deals with 'neither confirm nor deny' in relation to prejudice to commercial interests. In considering the public interest test, the Commissioner recognised the public interest in information about possible investigations and in knowing about the activities of regulatory bodies. On the other hand, he accepted the authority's arguments about the potential commercial damage to companies if the public knew whether or not they had been investigated. The Commissioner considered that the balance of public interest lay in neither confirming nor denying that the information was held.

73. If the authority is issuing a neither confirm nor deny response under a qualified exemption, it should indicate in that response that it has considered the public interest test specifically on the issue of whether to confirm or deny.
74. 'Neither confirm nor deny' is a complex area, and further information is available in our separate guidance on this topic.

Environmental Information Regulations

75. This guidance document is about the public interest test under FOIA. The Environmental Information Regulations (EIR) also include a public interest test but there are some differences in how it works. For information on the public interest test under EIR, see our [separate guidance](#).

More information

76. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

77. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
78. If you need any more information about this or any other aspect of freedom of information or data protection, please [Contact us](#) – see our website www.ico.org.uk.