

Negotiating and Campaigning with the Freedom of Information Acts

(Scotland and UK)



This guide was jointly produced by UNISON and the Campaign for Freedom of Information. The production and printing of this guide was funded by a grant from UNISON's General Political Fund.

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Introduction

The Freedom of Information (FOI) Acts came into full force on 1 January 2005 and give the public the right to obtain an enormous range of information from public authorities, including much information that has traditionally been kept secret. It is an important addition to our toolbox for campaigning and negotiating.

This guide is designed to give local UNISON representatives, branch officers and full-time staff an overview of the acts and practical guidance on how to get the best out of them.

There are two FOI acts:

- the Freedom of Information Act 2000 (the “UK act”) covers the whole UK except Scotland
- the Freedom of Information (Scotland) Act 2002 (the “Scottish act”) just covers Scotland and is slightly better

This guide will just refer to “the act” unless there is a difference between the two.

The Freedom of Information Act can now lift the lid on how our public services are being privatised and on reports into the bungling of PFI contractors, which were previously kept secret.

Public authorities are already making more information available to pre-empt requests, and many also have “disclosure logs” of information released under FOI on their websites. This can include lists of contracts, the contractors and the contract’s value.

Practical advice

Use the act strategically, and remember to

- adopt an organising approach – how does getting the information fit into a campaign that will involve stewards and recruit members?
- develop your collective bargaining – ask for information at your Joint Negotiating Committee first.
- encourage your employer to automatically include all documents of public interest in their ‘publication scheme’.

The FOI Act is a sledgehammer to keep in reserve if employers, or other public authorities, refuse to disclose vital information.

Freedom of Information Act – what it gives you

What information can you get?

The Freedom of Information Act and The Freedom of Information (Scotland) Act cover all recorded information held by a public authority, including:

- paper information (photocopies, printed material and hand-written notes)
- computer based information (such as emails)
- photographs, audio or video tapes and
- microfiche, maps, plans and drawings.

There are a few exemptions (covered later in this guide) and information that is known to officials but not recorded is not covered. Destroying information is illegal if it has been requested under FOI, but not if it is destroyed before the request.

You can apply to any public authority for information and you don't have to say why you want it. The act is fully retrospective and applies to all information recorded in the past.

Practical advice

- If UNISON has recognition use existing collective bargaining channels first.
- Remember to ask other UNISON branches, service groups, and head office departments for information first, as it may already be available.
- Examples of the act's use include equal opportunities monitoring, details of a job evaluation process, numbers of staff at different locations and grades, the use of casual or agency staff, details of contracts, and pay increases of senior managers.
- You might also use the act to survey how various public bodies handle an issue and find out what arrangements they have in place.

Asking about contracts

Information about contracts an authority has entered

into (including PFI contracts) is one of the main areas opened up by the act. In the public sector unions should be consulted about contracting¹ but if information is not forthcoming, then use the act.

Specific details about bids may be exempt from the FOI Act during the tendering process itself due to commercial confidentiality, but you should also be able to see the information that the authority has sent to those interested in tendering.

After a contract is signed you should be able to obtain information including:

- the value of the contract
- precise details of what is being provided under it
- arrangements for managing and monitoring the contract
- incentives for meeting targets and penalties for exceeding them
- arrangements for dealing with disputes
- payments that have been made, and
- the actual level of service delivered under it.

Much of the correspondence between the authority and contractor itself should also be disclosable.

Information which is most likely to be exempt, even after a contract has been signed, includes: details of how a contractor's price has been made up, showing precisely how it managed to undercut its competitors; details of its profit margins; and trade secrets, showing techniques which are not known to competitors.

Although you are less likely to be able to see detailed information about unsuccessful bids, certain information may be available in anonymised form.

Practical advice

- Try to agree a corporate procurement policy with your employer giving UNISON the right to be fully involved in the tendering process.² This should begin before the tendering even starts and include interviewing short-listed bidders.

¹ Under the "Code Of Practice On Workforce Matters In Public Sector Service Contracts" (issued by the Cabinet Office 2000), "Best Value Code of Practice" in Local Government, or the Scottish Protocol on Public Private Partnerships.

Asking about proposals

If your employer or another public authority is making new proposals you may want to know the implications for workers and standards of service. This might include:

- internal materials describing the nature of a problem
- the case for the change
- expected benefits and drawbacks
- the likely costs and savings
- difficulties that have been identified and proposed solutions to them.

Authorities may try to argue that the information about proposals is exempt from the act because it is part of its 'thinking process'. In this case, highlight any factual information you want (eg numbers of complaints, current costs, estimated savings) about such issues, as this information is likely to be available.

You can ask to see what other people have said about new proposals. A summary of comments may already be available but you may want the individual responses or correspondence between the authority and the public or with other authorities. You could ask for correspondence or minutes of the meetings.³

Make it clear that you don't expect to see personal data about individual members of the public when you request this information.

Practical advice

- If consultants have examined the issue you could ask for their brief, any interim or final report, and the cost of their work.
- Again, use your collective bargaining mechanisms first.

Who can you get the information from?

The (UK) Freedom of Information Act applies to a wide range of public authorities including:

- local authorities
- health authorities and NHS Trusts
- schools (including foundation schools), FE colleges and universities
- the police, fire and ambulance services and
- any company which is wholly owned by a public authority – such as Arms Length Management Organisations (ALMOs).

It also applies to UK central government departments, agencies and regulators, ministers and parliament, plus the Welsh Assembly and (if it is reconvened) Northern Ireland Assembly. The Scottish Act covers similar bodies in Scotland, and includes the Scottish parliament, executive, government agencies like Scottish Enterprise and public corporations like Scottish Water.

An authority will either be subject to the UK act or the Scottish act, but not to both. For example, UK government departments which operate in Scotland are covered by the UK FOI act. Links to lists of bodies covered are at the end of this guide. Courts and tribunals, the security and intelligence services and the royal family are excluded. Courts and tribunals in Scotland are not covered by the Act, but other bodies with roles in the justice system are. For example the Scottish Courts service – who administer most Scottish Courts, the Crown Office and Scottish Executive Justice Dept.

Information from non-public organisations

Non-public organisations are not generally covered by the Act, however information about non-public bodies (including trade unions) which an authority holds is subject to the act, including:

- information about contractors or suppliers
- information about bodies which the authority inspects or regulates, and

² Further information is available in UNISON's guide to the Best Value Code of Practice on Workforce Matters in Local Authority Service Contracts, which is useful beyond just local authorities.

³ In local authorities some of this will be available under the Local Government (Access to Information) Act.

- information supplied by outside bodies during consultations about proposed policies or decisions.

An authority must deal with a request that it receives even if the information concerned was supplied to it by someone else, including another public authority. It cannot refuse your request and tell you to apply to the body which supplied the information instead. However, it can consult the body which supplied the information to ask for its views on whether the information may be exempt.

The government has the power in future to extend the FOI act to non-public bodies that carry out the functions that a public authority would normally provide or which provide services on behalf of a public authority under a contract.

NB Contractors working for a public authority may be subject to EIRs – see that section on page 10.

Information from regulatory bodies

Many public authorities have to comply with various statutory requirements imposed by other regulatory bodies such as the Audit Commission, Audit Scotland, Health and Safety Executive, Environment Agencies, OFSTED etc.

These regulators are subject to the act so you can ask for details such as:

- information obtained during inspections of your authority's premises
- the results of investigations into accidents
- correspondence or minutes of meetings with your authority, or
- information about the numbers and kinds of incidents or complaints at a particular workplace.

If a prosecution is due to take place, or enforcement action is being considered, some information may be exempted from a FOI disclosure (see below).

Practical advice

- Employees and safety reps should already be consulted about matters affecting health and safety.
- Ask both the regulator and the regulated organisation for the information.

Information held on behalf of a public authority

Information which someone else holds on behalf of the authority is also covered. You should ask the authority for this. This could include information a contractor holds about its performance under a contract with the authority. It would also apply to information held by lawyers, researchers, consultants or agents.

However information held on the authority's premises on behalf of someone other than the authority is not covered by the act. This would include party political information held by a councillor or information about trade union business held by a union representative.

Other sources of information

Use the Freedom of Information Act strategically and not as a first step. Developing relations with an employer is usually more helpful than resorting to the law. Branches already have existing rights to information, UNISON itself has access to a wide range of information, and there is also the internet.

Consider what you want to use the information for and which method for getting it will best involve stewards and members in a campaign. What will give the union the highest profile?

UNISON

Your own union is the first point of contact for most issues.

- Branches and regions have access to a wide range of information and practical experience.
- National service groups and specialist sections (bargaining support, health and safety, legal, pensions, etc) provide regular circulars, newsletters, specialist factsheets and guides and have access to specialist publications to research specific queries. Check out UNISON's website – www.unison.org.uk and www.unison-scotland.org.uk
- The Bargaining Information System (BIS) – accessible by regions or the Bargaining Support Group - holds a wealth of information about organisations, contracts and agreements. The RMS membership system can also be helpful.
- In Scotland regular briefings, newsletters, guides and booklets are produced by the Policy and information team. They also research queries and monitor Scottish legislation and policy. UNISON Scotland policy and information: www.unison-scotland.org.uk/briefings/piteam.html

Publication schemes and disclosure logs

Every public authority must issue a 'publication scheme' describing the information it publishes so check it out before making an FOI request. Some authorities have a 'disclosure log' of responses to earlier FOI requests on their website.

Also see what other authorities have published on the topic as well. If another authority has published the kind of information you want from your authority it will be harder for them to resist disclosure.

On the following page is an extract from the publication scheme of Lambeth Council.

London Borough of Lambeth

PUBLICATIONS SCHEME - LIST OF DOCUMENTS

Category	Title or class of document	Update frequency	Medium & location	Charge?	Owner	Owning directorate
In alphabetical order	In alphabetical order for each category	All available on web-site unless otherwise stated				Optionally owning Business Unit or post will be included in this column
Advice, benefits and emergencies	Data Protection - Guidance to officers and members	Occasional	Web	No	A Seaton	CS Data Protection Officer
Advice, Benefits and Emergencies	Emergency Planning in Lambeth	Publication	Document		Paul Randall	DES - Operations (Em. Planning Response Officer)
Council & Democracy	Best Value Reviews	Occasional	Web	No	Beverley Bramwell	OACE - Performance
Council & Democracy	Service Plans	Annual	Web	No	Dez Adey	OACE - Performance
Council & Democracy	Council Committee Agenda / Minutes	Weekly	Web	No	Tim Stephens	CS - Democratic Services
Council & Democracy	Equal Opportunities Policy, EOP Employment, EOP Service Delivery	Occasional	Web	No	Carole Litchmore	OACE - Equalities & Diversity Unit
Council & Democracy	In House - Directorate review (in progress)	Occasional	Paper	No	Matt Kempen	DHS - Publicity and Communications Officer
Council & Democracy	Race Equality Scheme	Annual	Web	No	Carole Litchmore	OACE Equalities & Diversity Unit
Council & Democracy	Service Level Agreement - Buy Back	Annual	Document	No	Diane Burton	DEd
Council & Democracy	Strategic Review	Annual	Web	No	Kevin McDonnell	CS - Performance
Education	Monthly Budget	Monthly Monitor Report	Document	No	John O'Keefe	DEd
Environment	Best Value and Sustainable Development Guidance	Occasional	Paper	No	J Currie	DES
Environment Report	Environment Quarterly	Quarterly	Paper	No	Richard Godfrey	DES
Social Care	Performance digest	Monthly	A4 report	No	Doreen Redwood	DSS - Assistant Director Performance Management
Transport and Streets	Travel Plan	Being rewritten	—	—	Abu Barkatoolah	DES

Below is an extract from the disclosure log of Norfolk and Norwich University Hospital NHS Trust

Freedom of Information requests and responses

Request #1 received by post 24/12/04, from the Eastern Daily Press.

1.1 Specifically, we request access to correspondence between the former Norwich Health Authority, hospital consultants, the hospital and Government ministers surrounding the decision not to site the new Norfolk and Norwich University Hospital at Hellesdon and move it instead to Colney.

1.2 We also request details held of the final contract of the PFI deal for the Norfolk and Norwich University Hospital.

1.3 In addition we request access to minutes of the infection control committee/group meeting of the Norfolk and Norwich University Hospital for 1998 and 1999.

Responses to Request #1

1.1 There is extensive written correspondence, from the late 1970s to the late 1980s, relating to this issue and it has been made available to the EDP. The files are available by contacting our Freedom of Information Officer on 01603 287712.

1.2 The PFI documents are:

PFI Summary - NNUH <http://www.nnuh.nhs.uk/TrustDoc.asp?ID=96>

PFI - Project Agreement <http://www.nnuh.nhs.uk/TrustDoc.asp?ID=102>

PFI - Facilities Management Agreement <http://www.nnuh.nhs.uk/TrustDoc.asp?ID=103>

PFI - Supplemental Agreement (Dec 2003) <http://www.nnuh.nhs.uk/TrustDoc.asp?ID=104>

PFI - Supplemental Agreement (May 2004) <http://www.nnuh.nhs.uk/TrustDoc.asp?ID=105>

1.3 Infection Control Committee minutes, 1998/99 <http://www.nnuh.nhs.uk/TrustDoc.asp?ID=106>

Environmental Information Regulations

At the same time as the FOI Act, Environmental Information Regulations (EIR's) were introduced. These are similar but give even greater access to information. They are not covered by the 'cost limits' and there are fewer exemptions. They cover:

- the state of the air, water, land, landscape, natural sites and living organisms
- substances, energy, noise, waste and radiation released into the environment and in the workplace

■ measures and activities which are likely to affect the environment, whether or not they are intended to. This means that information about things like planning, road building and transport are covered by the EIRs

■ information about the effect of any of these things on human health and safety, food safety, buildings or people's living conditions.

The EIRs would also apply to chemicals or agents in the workplace; diseases which people working in hospitals or laboratories might be exposed to; and local authority food hygiene inspections.

Don't worry about the difference between the EIRs and the FOI act. You don't need to say which piece of

legislation you're applying under. Just describe the information you want and the authority must deal with it under the appropriate legislation.

Environmental information directly from contractors

Contractors working for a public authority on a project that affects the environment will be subject to the EIRs in their own right. You can ask the contractor itself to supply you with environmental information about the contract and details of what should be or has been done under it. This includes contractors:

- dealing with domestic or industrial waste for a local authority
- disposing of clinical waste for an NHS trust
- dealing with other environmental, transport, planning or energy issues.

Companies that are partly or wholly owned by a public authority or otherwise controlled by it are also covered. You should be able to obtain information about the effect of these activities on the environment directly from the companies.

Practical advice

- Ask both the authority and the contractor for information.

Existing legal rights to information

1) Union recognition

Where a union has recognition (whether voluntary or statutory recognition) the Trade Union and Labour Relation (Consolidation) Act 1992 gives it the right to information for collective bargaining purposes. The code of practice drawn up by ACAS states that trade unions are entitled to information on:

- pay and benefits, including pay structures
- job evaluation systems
- earnings and hours, analysed according to work

group and gender

- distribution and make up of pay, and total pay bill
- details of fringe benefits and non-wage labour costs
- conditions of service
- staffing – numbers employed analysed according to grade, sex, age, labour turnover, absenteeism, overtime and future plans and
- productivity and efficiency data on performance.

2) Information and consultation of employees (ICE)

Under the Information and Consultation of Employees Regulations 2004 employee representatives, who may include trade unions, have rights to be informed and consulted if an ICE body has been set up. The 'standard provisions' say employees or their representatives should be:

- informed about an organisation's economic situation
- informed and consulted about employment prospects, and
- informed and consulted about decisions likely to lead to substantial changes in work organisation or contractual relations.

3) Redundancies and transfers

Under the Trade Union and Labour Relations (Consolidation) Act 1992, unions (or workers' representatives where there is no recognised union) have the right to be informed and consulted where collective redundancies are planned (20 or more within 90 days). The Transfer of Undertakings (Protection of Employment) (Amendment) Regulations⁴ give unions (or workers' reps) the right to be informed and consulted by the current and new employers where staff are being transferred or there is a service provision change. This applies to all affected workers, even if they are not being made redundant or transferred themselves.

⁴ The 'TUPE' regulations are currently under review, and may be amended towards the end of 2005.

4) Health and safety

Union safety representatives (or workers representatives or the workers themselves where there is no recognised union) must be informed and consulted on health and safety matters under the Safety Reps and Safety Committees Regs (SRSCR) 1977 and Health and Safety (Consultation with Employees) Regs (HSCER) 1996.

5) Pensions

Draft regulations under the Pensions Act 2004 are likely to mean that from April 2006 recognised trade unions or other employee reps will be entitled to be consulted by employers on changes to pension schemes. This includes closing a scheme partially or completely, changing from a defined benefit scheme to a defined contribution scheme and significantly reducing an employer's contributions.

6) Local authority meetings

The public can attend and receive (in advance) papers for a wide variety of local authority committees and sub-committees under the Local Government (Access to Information) Act 1985. In England, the public can access meetings, documents and decisions where a 'key' decision is to be taken and a forward plan of the 'key' decisions in the following four months must be produced.

Practical advice

- Meetings and papers on labour disputes, commercially confidential issues or those that would breach data protection of individuals are exempt. This can mean a line of exempt information results in a whole document being withheld. But now you can use the FOI act with only specific FOI exempt information not disclosed.

7) European Works Councils

Under the Transnational Information and Consultation of Employees Regulations 1999 where a European Works Council exists, workers representatives should be informed and consulted on matters relating to operations spanning more than one European Union country. This includes:

- the business structure, economic situation, and probable development
- the situation and probable trend of employment, investments, and substantial changes concerning organisation
- introduction of new working methods
- transfers of production, mergers, cut backs or closures of undertakings
- and collective redundancies.

8) Company reports

The Companies Act 1985 requires directors' reports for companies employing more than 250 people to include actions taken to introduce, maintain or develop arrangements on information/ communication to employees; consultation with employees; economic awareness of employees about the company; and financial participation of employees in the company (share ownership, etc).

Freedom of Information Acts – how to use them

How do I make a request?

Making a request couldn't be easier – just write to the authority describing the information that you want.

- Your request can be made by letter, email or fax.⁵
- You don't have to say why you want the information.
- You don't have to mention the FOI act, but it's a good idea to do so.
- You can ask for information in a specific form, as long as this is 'reasonably practicable'. You might want photocopies of documents, email, a summary or to have details read out to you or inspect the records in person.
- Your request can be sent to anyone in the authority, but it's best to send it to the person you would normally deal with on a particular issue or to the authority's FOI officer (see the authority's website).

The duty to advise and assist

Making a request can be difficult if you don't know what kind of information the authority holds. However the act requires public authorities to provide reasonable advice and assistance to people seeking information from them. For example if your request is rejected on grounds of cost (see below), the authority should help you limit your request to fit the criteria.

How does the authority have to respond?

Authorities are required to provide information 'promptly' and in any case within 20 working days of receiving a request. They cannot deliberately delay disclosure.

Different extensions are available to authorities under the UK and Scottish Acts.

Extended time limits: the UK act

The 20 working day period can be extended in certain circumstances:

- It can be extended by a 'reasonable' time if it is required to consider a public interest test involving complex issues. You must be informed of this and of how long the extension is for. Non-exempt information must still be disclosed within the 20 working-day limit. If you think the delay is excessive you can complain about it to the Information Commissioner (see below).
- Requests to schools have to be answered within 20 school days, or 60 working days, whichever is shorter.
- Requests for old records which have been transferred to historical archives can be answered within 30 working days.

Extended time limits: the Scottish act

- The only extension is for old records which have been transferred to the Keeper of Records of Scotland, where 30 days is allowed for a request.
- No extra time is allowed for public interest tests or school records.

How much information can be requested?

Authorities can refuse requests if dealing with them would cost more than a set limit – even if you are prepared to pay. Alternatively, they can decide to let you have the information if you pay the full costs. Costs should be 'reasonable' and government guidance says photocopying should not exceed 10p a sheet. Costs may have to be paid in advance, and you should do so straight away or the request may be delayed.

⁵ If you are applying to a Scottish public authority, a request left on voice mail will probably also be valid, though it's a good idea to confirm the request in writing.

There are different limits under the UK and Scottish acts.

Cost limits: UK act

The cost limit:

- for most UK authorities is £450; this is about two and a half working days of staff time at a set rate of £25 an hour
- is £600 for UK government departments and agencies, Parliament and the Welsh and Northern Ireland Assemblies, or about three and a half working days.

In calculating the cost, the authority can only take into account the time needed to:

- find the requested information
- extract it from the records
- delete any exempt information, and
- put it into any special form that you have asked for it in.

It cannot include the time it spends considering whether the information is exempt or whether it should be disclosed under the public interest test.

If a request can be dealt with for less than the £450 or £600 limit, the only charge an authority can make is for the cost of any photocopies or printouts provided and for postage. It cannot charge for processing the request.

Practical advice

- If you split a large request up into several smaller requests, or submit a co-ordinated request by different people who are working together, the authority can refuse them if the total amount exceeds the cost limit. But the slate will be wiped clean after 60 working days and then you can ask for more information on the same issue. That's why it is important to be strategic in using the Freedom of Information Act.

Cost limits: Scottish act

The cost limit:

- is £600. This is about 40 hours (six days) of staff time at £15 an hour.

The first £100 of any request - including staff time and photocopying charges - is always waived. If it would cost between £100 and £600, a Scottish authority can charge 10% of the costs of locating, retrieving and providing the information. It cannot take into account the time needed to decide whether to disclose the information. Staff time is £15 an hour, so you could be charged £1.50 an hour, plus photocopies, printouts and postage.

If you make two or more requests for related information they have to be answered even if the combined cost exceeds £600. A Scottish authority can only refuse these requests if it publishes the information anyway within 20 working days.

If the cost is more than £600 the authority can decide to provide the information but is then able to charge the full costs for any cost over £600. They must tell you what can be provided for under £600.

Drafting your request: make it specific

The cost limits mean if you ask for too much information, your request may be refused. So try to target the specific information that will be most useful to you - a request for 'all information you hold about' something is unlikely to succeed.

- If you are after a particular report or document give its title if you know it. Otherwise, describe it as well as you can.
- If you want the minutes of the meeting of a particular body, give the title of the body and the date of the meeting. Alternatively, you could apply for the minutes of the last, say, six meetings of the body. Or you could ask for any minutes at which a particular subject was discussed during a given period.
- If you want correspondence, emails or records of discussions between the authority and someone

else, be as specific as you can about the subject matter, the bodies or people involved and the timescale.

- You can also ask for particular statistics, cost figures, monitoring results or other kinds of data.
- You could also ask for any analysis or assessment the authority has done or received about the expected or actual effect of a particular decision or policy.

If you are refused on cost grounds, ask the authority to explain why finding the information would cost so much. This can help you submit a better targeted request.

For example:

- you may have assumed that there was just a single file on the subject but discover that there are actually many files, each held at a different location.
- you may want to shorten the period of time covered by your request. For example, ask for information about the last two years rather than five years
- instead of asking for information about all the authority's premises concentrate on those which you are most concerned about.

What information can be refused?

Your request might be refused if:

- the cost of finding and extracting the information exceeds the cost limits
- the authority has already provided you with the same or substantially similar information. In this case you may have to wait a 'reasonable' time before applying again. However, if the information has changed since you last asked for it, the authority may not be able to refuse your request on these grounds
- your request is "vexatious" - for example, it is intended to disrupt the authority's work
- the information is covered by one of the act's exemptions. However, most exemptions involve a public interest test that requires exempt information to be released if on balance disclosure is in the public interest.

would 'prejudice' (i.e. harm) a particular interest, such as commercial interests or law enforcement. Under the Scottish Act a stronger test of 'prejudice substantially' is applied

- absolute exemptions apply whether or not 'prejudice' might occur.

However many exemptions are subject to a 'public interest' test, where information has to be disclosed if the 'public interest' in withholding it is greater than the public interest in disclosing it.

The public interest test

For example, if an authority believes that releasing certain information would harm its own commercial prospects, it would have to show that:

- disclosure would be likely to prejudice its commercial interests (or, in Scotland, prejudice these substantially) and
- the public interest in preventing that prejudice was greater than the public interest in disclosing the information.

Exemptions and the public interest

An authority can withhold information if it falls within one of the act's exemptions. There are two types of exemptions:

- qualified exemptions apply where disclosure

If the information revealed a risk to public safety, or misconduct, there would be a strong public interest in disclosure, even if it harmed the authority's commercial interests.

In general, there is likely to be a public interest in disclosing information which:

- helps to hold authorities accountable for decisions which they have made
- reveals how much public money has been spent and whether value for money has been obtained
- helps to promote informed public debate about issues of the day
- allows people to understand and influence decisions that directly affect their lives
- helps to expose or deter misconduct
- reveals possible threats to health and safety or the environment or demonstrates that appropriate measures to prevent these have been taken
- protects people against arbitrary or discriminatory behaviour by public authorities
- helps to correct misleading information about public matters
- helps to dispel unjustified suspicion about the conduct of public authorities
- ensures that public authorities carry out their responsibilities effectively.

Some of the factors that do not justify withholding information include:

- possible embarrassment of government or other public authority officials
- the seniority of persons involved in the subject matter
- the risk of the applicant misinterpreting the information
- possible loss of confidence in government or other public authority.⁶

Who decides if information is exempt or in the public interest?

Initially, the authority itself decides whether it believes that information is exempt and if so, whether the

public interest favours disclosing or withholding it. But you can appeal against these decisions to the authority and then to the Information Commissioner (or Scottish Information Commissioner).

What are the exemptions?

The main FOI exemptions you are likely to come across are below:

1. Commercial interests

Information is exempt if its disclosure would be likely to 'prejudice' commercial interests ('prejudice substantially' in Scotland). This can be used to protect either a company's commercial interests or the authority's. Another exemption protects trade secrets. These exemptions are subject to the act's public interest test.

2. Confidential information

Information that would allow someone to successfully take action in court against the authority for breach of confidence is also exempt. For example, information is exempt if a company or person gives confidential information to the authority and it is agreed to keep it confidential (for example, by signing a contract with a confidentiality clause). However there is a public interest test, so even with a confidentiality clause the information might still be disclosed.

3. The authority's internal 'thinking process'

Information whose disclosure would inhibit the 'free and frank provision of advice' or the 'free and frank exchange of views for the purposes of deliberation' (ie the evaluation of options or development of policy), is exempt. But it is also subject to the public interest test, so if authorities can't show that disclosure is likely to be harmful, the information should be released.

Practical advice

- These exemptions are most likely to be used to withhold opinions, advice and recommendations. Factual information is more likely to be disclosable, as is information about development of government policy.

⁶ *Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities Under the Freedom of Information (Scotland) Act 2002.*

4. Personal information

Personal information about an identifiable individual is exempt if its disclosure would breach the data protection principles set out in the Data Protection Act 1998. Any disclosure must be lawful and fair.

'Fairness' involves a number of factors such as potential harm or distress to the individual; whether they expected the information to remain confidential and whether they refused permission for it to be disclosed. The 'fairness' part is subject to a public interest test.

The Information Commissioner's guidance suggests that:

Likely to be fair to disclose

- what officials do in their official capacity
- names of officials, grades, job functions or decisions which they have made in their official capacities
- details of expenses incurred in the course of official business, information about pay bands, salaries of senior staff.

Unlikely to be fair to disclose

- information which affects someone's private or family life
- a home address or information about internal disciplinary matters
- bank account details of staff, confirming the work address of a member of staff who has been physically threatened.

Practical advice

- The Information Commissioner's guidance also states that the seniority of staff may also be relevant, "the more senior a person is the less likely it will be that to disclose information about him or her acting in an official capacity would be unfair."

5. Investigations and law enforcement

Information obtained by the police or bodies like the Health & Safety Executive, which can bring prosecutions, is exempt if it has been obtained during an investigation into a possible offence or even during a routine inspection. This could apply to potential evidence that might be used during a prosecution - but it could also apply even where no prosecution is due or after any prosecution is over.

There is a 'prejudice/prejudice substantially' test so disclosure of the information has to have negative consequences for it to be exempt, and it is also subject to a public interest test. If the authority cannot show that revealing the information is likely to cause some form of harm, disclosure is likely to be required.

Practical advice

- The names of whistleblowers and 'confidential sources' are highly likely to be exempt.

6. Legal advice and court documents

The legal advice which an authority obtains will normally be exempt and so will other types of material which have been produced primarily for use in litigation. This exemption is subject to the public interest test.

7. Danger to health and safety

Information whose disclosure would be likely to endanger an individual's health or safety - for example, by exposing members of staff or the public to risk of attack - is exempt. This exemption is subject to the public interest test.

8. Already available or due to be published

Information that will be published at a future date is exempt under the UK act if it is reasonable to withhold the information until that date. Under the Scottish act, this only applies if it will be published in the next 12 weeks. These exemptions are subject to the public interest test.

Information which is already accessible to the applicant because it has been published is exempt and the public interest test does not apply.

Other exemptions

Information whose disclosure would 'prejudice/prejudice substantially' the 'effective conduct of public affairs' is exempt, but the government said this was only for unforeseen rare circumstances which were not covered by another exemption.

Other exemptions, subject to the public interest test, apply to information which would 'prejudice/prejudice substantially' auditing functions, the economy, defence, international relations, relations between the devolved administrations or between them and the UK government, information about the royal family or honours and to national security.

Absolute exemptions apply to information whose disclosure is prohibited by other laws, information about security and intelligence bodies, and to parliamentary privilege.

If information is withheld

An authority cannot withhold the whole of a document just because part of it is exempt. It must supply you with all the non-exempt information. It could do this by giving you a photocopy with the exempt information blacked out. If the information is held on computer, it could delete the exempt information and print out the rest.

If the authority withholds information it must tell you:

- which exemption it is applying and why it thinks it applies
- its reasons for believing that on balance the public interest favours withholding rather than disclosing the exempt information (for exemptions subject to the public interest test)
- about your rights of appeal.

In certain cases, an authority can refuse to confirm or deny whether it holds particular information, if to do so would be harmful.⁷ You can complain to the Information Commissioner if you think these provisions are being misused.

Practical advice

- You may be able to use the Environmental Information Regulations (EIRs) to get information that is exempt under the FOI – try to be creative!

Appeals

If you are unhappy with the authority's response to your request, ask it to review its decision under its internal complaints process. You can appeal about anything that does not meet the act's requirements, such as:

- withholding information
- an unreasonable delay in dealing with your request
- a claim that your request would cost too much
- the authority's failure to provide you with advice and assistance.

There are no time limits for this under the UK act, but in Scotland you must request a review within 40 working days of the authority's decision.

If you are still dissatisfied after the authority has completed its review, you can appeal to the Information Commissioner (or Scottish Information Commissioner). They can issue legally binding notices, requiring the release of information.

Under the UK act (but not under the Scottish act), you can appeal against the Information Commissioner's decision to the Information Tribunal. In both acts there is then a very limited right of appeal to the courts.

There is also a special right for Ministers to overrule the Information Commissioner if they disagree with a decision requiring disclosure on public interest grounds by a UK government department, the Welsh Assembly government, Scottish Ministers or the Scottish Executive. This right could be judicially reviewed if it is abused.

Practical advice

- Appeals against FOI refusals should go to the UK Information Commissioner or Scottish Information Commissioner. At the time of writing this guide, over three-quarters of appeals to the UK commissioner were upheld.

Questioning refusals

Don't assume that there's no point asking the authority to reconsider a refusal or that it will merely 'rubber stamp' its original decision. Your complaint should be dealt with by someone more senior than the original decision-taker, who was not involved in the original decision.

Practical advice

- If the authority recognises that its case is weak, it may release the information now rather than be forced to do so by the commissioner.

If you are questioning a refusal:

- Make sure the authority has told you not only which exemption applies but why it applies. It should specify what harm the disclosure will cause.
- Is it likely the harm will occur? If the chance is remote, the information should be disclosed.
- Has more information been withheld than is necessary? An authority shouldn't withhold the whole of a document if only part of it is exempt.
- Has the authority overlooked any part of your request? It should deal properly with each item that you requested.
- Does the authority really believe that releasing the information would cause harm or is it merely trying to avoid setting a precedent which it thinks might force it to disclose other information in the future?
- Information often loses its sensitivity with time. If your request relates to a past event, the information may now no longer be sensitive.
- Could the authority have provided more information by releasing anonymised or aggregated data? Can the names of individuals or other identifying information allow it to be released to you?
- If information has been withheld under one of the exemptions that protects an authority's 'thinking process' (see above) how likely is it that the authority's internal discussions really would have

been significantly affected if those involved had known at the time that disclosure was likely?

- If one of the "thinking process" exemptions has been used has the authority nevertheless disclosed factual information about the issue?
- Has the authority properly taken account of the public interest in disclosure? If you are not satisfied with its explanation, explain why you think disclosure is in the public interest.

Questioning 'commercial confidentiality'

If the commercial prejudice exemption has been cited, check whose commercial interests are thought to be at risk - the authority's or those of a contractor or other company? The exemption can apply to either.

Has the authority explained, at least in general terms, how any commercial prejudice would be caused? For example, in the case of a company would disclosure:

- reveal how it has managed to do something more cheaply or more effectively than its competitors?
- reveal information which the company normally sells?
- damage the company's reputation?

The public interest arguments for and against disclosure will be different in each case. You need to know what the exact reasons are if you are to appeal successfully. Also, if the authority doesn't know why disclosure would be harmful, it probably hasn't satisfied itself that the information is genuinely exempt.

The authority will probably have asked the company if it believes an exemption applies, but it should not refuse just because the company objects. It should justify any decision by reasoned argument and, where practicable, by empirical evidence. A document cannot simply be marked 'commercial in confidence' to be exempt.

Although details of contract bids are normally confidential during the tendering process, once the contract is signed some authorities routinely publish

its price and details of what is being provided under it. This should not be exempt.

If the authority says disclosure is prohibited by a confidentiality clause in a contract, ask to see the confidentiality clause itself. If it applies to all information supplied by the contractor or all information about the performance of the contract, it is probably unenforceable. Only exempt information can be withheld and even this may be disclosed on public interest grounds.

If the authority says that information is exempt because disclosure would be a breach of confidence, check whether all the elements needed for an obligation of confidentiality apply. The main elements are that:

- the information itself must be confidential to start with - if it has been disclosed in the past it won't be
- there must be an agreement between the authority and the person supplying the information to keep it confidential, or the information must have been supplied in circumstances which any reasonable person would have understood as implying agreement
- disclosure must be capable of harming the interests of the person who supplied the information - information which is trivial or not a matter of real concern to the supplier will not be confidential in law
- the public interest test under the law of confidence applies - confidential information may have to be disclosed if the public interest justifies it.

Practical advice

- In Scotland it would be useful to draw the authority's attention to the Code of Practice on the Discharge of functions by public authorities under the Freedom of Information (Scotland) Act 2002: This has been sent out by Scottish Ministers and contains strong advice to them not to sign up to confidentiality clauses or to restrict their application.

Practical examples

Commercial confidentiality and the public interest

Part of the development plan of a UNISON branch based around a health trust in south Wales involved recruiting new members in services that had been contracted out. One part of this involved running a campaign against privatisation, specifically to bring the cleaners back 'in-house'.

The names of the contractors and the dates and value of the contracts were already publicly available as part of the trust's FOI publication scheme and more information came from UNISON's Bargaining Support Group but not from the trust. Using the Freedom of Information Act the branch applied for further details of an evaluation of the existing contract.

The trust refused to disclose the criteria and claimed that it was commercially confidential information. However the branch appealed using the 'public interest test' - they claimed that the public interest in disclosing the information outweighed the commercial benefit in withholding it. On appeal, the trust agreed to disclose the evaluation. If this had not happened, the branch could have appealed to the Information Commissioner.

Bargaining information

Catering staff at a Scottish university were contracted out to a private sector company, although UNISON still has recognition at the new employer. The local UNISON branch wanted information to help them bargain with the new employer. Although the contractor provided a summary of staff on different grades and their pay scales, they would not reveal any details of the contract itself. The branch was able to use the Freedom of Information Act to get details of the contract from the university.

Right to assistance with requests

UNISON members in local authorities are under threat because all local authorities are now expected to make annual efficiency savings of 2.5%. The UNISON branch in an English county council wanted to find out where the savings were being made and used the Freedom of Information act. Under the act, public bodies are under an obligation to assist applicants in finding the information they want and the council's freedom of information officer advised them to check the councils 'disclosure log' of information already released under the act. In addition, he suggested they ask for a copy of the "annual efficiency statement" that the council has to provide for the Office of the Deputy Prime Minister. The FOI act applies retrospectively and the branch was able to get a copy of the report for the previous year as well.

The 'thinking process'

The branch secretary of a local government branch in the East Midlands found out that district councils across their county were considering jointly outsourcing their human resources departments to a single service provider. However their employer refused to discuss the matter because there were no firm proposals. The branch applied for copies of internal discussion documents using the Freedom of Information Act but was refused because such a disclosure would inhibit the authority's 'thinking process'. However they contacted a neighbouring branch that was able to get more details as they had consultation rights under the Information and Consultation of Employees (ICE) Regulations.

Using UNISON

A voluntary sector care organisation bid for, and won, the contract for home helps in a west London borough. The UNISON steward for the members

involved wanted to find out more about the contractor.

Although the FOI Act does not apply to private companies, it does apply to information held about private companies by public authorities. She tried using the Freedom of Information Act to get details of the contract from the council before it was signed but was refused on grounds of commercial confidentiality. However when she made a similar request after the contract was signed it was successful, on the grounds of public interest.

She also got information from UNISON's Bargaining Information System (BIS) about other contracts and agreements the organisation had and used the bargaining guide to recognition in the voluntary sector to start talks about recognition in conjunction with the regional officer. The consultation process about the TUPE transfer and branch's access to the RMS membership system also provided a list of members being transferred.

Briefing – FOI and public authority workers

For all public authority workers:

All authorities should have procedures in place for dealing with Freedom of Information Act requests. If you haven't been informed of the procedure for dealing with a request, inform your union rep and ask for a copy.

Any written or emailed request for information now has to be dealt with under the FOI Act (or the Data Protection Act or Environmental Information Regulations) even if the requester doesn't mention the legislation. Even an oral request for environmental information is a valid EIR request.

Be careful not to alter or destroy any record which has been requested. This is an offence if done to prevent disclosure.

Bear FOI in mind when recording information. Be professional in the way you write, because your comments may be disclosed.

If your job involves dealing with information requests:

Ensure the authority provides you with proper written guidance and training.

Be clear about the kinds of requests you are authorised to deal with yourself and those that should be referred to someone else, such as the authority's FOI officer.

Remember that the act requires the authority to advise and assist applicants. This may involve helping someone identify the types of records held by the authority. If a request is for too much information, suggest how it could be narrowed or what could be obtained without exceeding the act's cost limit.

Remember that requests can only be refused if an exemption applies. Responses such as 'this is for internal use only' or 'this is not intended for publication' are not valid. If you do refuse information make sure you give the applicant the required information about which exemption has been used and why, why the public interest test (where it applies) favours confidentiality and how they can appeal.

Workload

If workload generated by FOI requests is excessive, talk to your union representative. The authority should properly resource the processing of FOI requests. It could be that the authority is being unnecessarily secretive, or could put more information on its website to save time on individual requests.

Briefing - FOI and trade unions

A trade union is not a public authority and there is no right of access under the act to information held by it or by its representatives, even if the information is kept on an authority's premises.

However, information which a trade union has supplied to the authority could be requested under the act. This also applies retrospectively to all documents from the past. It could include:

- minutes of meetings
- copies of agreements between the union and management.

Whether these are released depends on whether any exemption applied.

If you are concerned about the possible disclosure of information which you have supplied to a public authority in confidence then:

- make sure that the authority knows that you regard it as confidential and that documents or emails containing confidential information are marked as such
- ask the authority to consult you if a request for access is made, so you can make your views known about any possible exemption that might apply
- if necessary, ask the authority to agree in writing to do so.

Bear in mind that that an authority may have to disclose information, regardless of any agreement, unless an exemption applies.

Model request letter

You can use or adapt this letter to help you apply for information

Your address

*Address your request either
to the authority's FOI officer
(contact details should be on its website)
or to the person at the authority
you normally deal with on the matter
concerned*

Date

Dear

This is a request under the Freedom of Information Act. *(If your request is for environmental information, say "This is a request under the Environmental Information Regulations" instead. If it's for a mixture of ordinary information and environmental information say, "This is a request under the Freedom of Information Act and the Environmental Information Regulations." Don't worry too much about the distinction - your request will be valid even if you mention the wrong law.)*

Could you please supply me with *(describe the information you want as specifically as possible*

Please include copies of information which you hold on paper or in electronic form.

(This is worth saying if you're asking the authority to search their records for particular types of information. Its not necessary if you're asking for specific named documents.)

I would be grateful if you would supply this information in the form of *(state your preferred format if you have one - eg by providing me with photocopies / by email / by allowing me to inspect the records etc. If you have no particular preference omit this paragraph.)*

If I can help to clarify this request please contact me by *(give your phone number and/or email address, if you're happy to be contacted that way.)*

I look forward to hearing from you promptly, as required by the legislation, and in any case within 20 working days.

Yours sincerely

(Your name, position, and branch)

FAX BACK

– sharing experience of FOI requests

Let us know if you have made a request under Freedom of Information legislation, and the result of it. That way we can spread best practice throughout UNISON and help other stewards, branches, and regions.

Name

Position in UNISON

Contact details (phone and email
or address)

Date

About the request

Date of request

What organisations does it involve?

What services (eg cleaning) does it involve?

What UNISON service group does it involve?

What UNISON region does it involve?

Give brief details of your FOI request

Give brief details of the reply to your request

Fax this form back to 0207 5511 766 or return your reply to Bargaining Support Group, UNISON, 1 Mabledon Place, London, WC1H 9AJ or bsg@unison.co.uk

Further information

UNISON resources

Bargaining Zone

www.unison.org.uk/bargaining

Bargaining Information System

Detailed information on organisations, contracts and agreements from your regional office or the Bargaining Support Group bsg@unison.co.uk.

Guide to local bargaining (stock number 1801)

www.unison.org.uk/acrobat/11251.pdf

Guide to statutory recognition

www.unison.org.uk/doc_view.asp?did=482

Factsheet on information and consultation of employees

www.unison.org.uk/acrobat/B1462.pdf

Factsheet on Freedom of Information

www.unison.org.uk/acrobat/B1803.pdf

Guide to the Best Value Code of Practice in Local Authorities and Police Authorities (stock no. 2239)

www.unison.org.uk/acrobat/13612.pdf

Toolkit on Strategic Service Delivery Partnerships

www.unison.org.uk/acrobat/B1460.pdf

Guide to the Scottish Protocol on PPPs

www.unison-scotland.org.uk/briefings/pppprotocol.htm

Other resources

ACAS Code of Practice on Disclosure of Information to Trade Unions for Collective Bargaining Purposes

www.acas.org.uk/publications/pdf/CP02.pdf

Labour Research Department (LRD)

www.lrd.org.uk

Campaign for Freedom of Information

www.cfoi.org.uk

Campaign for Freedom of Information in Scotland

www.cfoi.org.uk/scotland.html

The UK Freedom of Information Act

Information about the FOI act

www.foi.gov.uk

Authorities covered by the act

www.foi.gov.uk/coverage.htm

Information about the Environmental Information Regulations

www.defra.gov.uk/corporate/opengov/eir/index.htm

UK Information Commissioner

Information Commissioner's Office

Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF

Telephone: (01625) 545 700, Fax: (01625) 524 510

www.informationcommissioner.gov.uk

www.informationcommissioner.gov.uk/eventual.aspx?id=3783 (for FOI guidance)

The Scottish Freedom of Information Act

Information on the Freedom of Information (Scotland) Act

www.scotland.gov.uk/Topics/Government/FOI

Authorities covered by the act

www.itspublicknowledge.info/foiact8.htm

Information on the Environmental Information (Scotland) Regulations

www.scotland.gov.uk/library5/environment/aeig-00.asp

Scottish Information Commissioner

Office of the Scottish Information Commissioner

Kinburn Castle, Doubledykes Road, St Andrews, Fife

KY16 9DS Telephone: (01334) 464610, Fax: (01334)

464611 www.itspublicknowledge.info

Code of Practice on the Discharge of functions by public authorities under the Freedom of Information (Scotland) Act 2002

www.scotland.gov.uk/library5/government/sedfpa00.asp

Your right to know

a guide to Freedom of Information Law in Scotland produced by the Scottish Information Commissioner and Scottish Consumer Council

www.itspublicknowledge.info/yourrights

**For help when you need it or to join UNISON
call UNISONdirect on 0845 355 0845.**

For information visit www.unison.org.uk

