

Impact of disclosure on the voluntary supply of information

Freedom of Information Act

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Introduction

The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.

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 help public authorities to fully understand their obligations and promote good practice.

This guidance explains the approach that public authorities should adopt when considering whether disclosure of information under FOIA will have an impact on the voluntary supply of information to them in the future.

Overview

- There may be circumstances where disclosure of information under FOIA has a negative effect on the voluntary supply of information to certain public authorities in the future.
- Factors to take into account when considering whether disclosure would have this negative effect include the content of the information, the nature of the request, the timing of the request and evidence of lower levels of engagement post-FOIA disclosure.
- The reduced flow of information may prejudice the functions of public authorities, in particular those performing regulatory functions.
- This subject is most likely to relate to the exemption in section 31 of FOIA and relevant regulatory functions, but the same principles may apply when considering the public interest test in the context of other exemptions.

Voluntary supply of information to public authorities

Public authorities often rely on the voluntary co-operation of individuals and other organisations, including the voluntary supply of information, to enable them to carry out their functions. The Commissioner is aware of the arguments put forward by some public authorities, generally those who exercise regulatory functions, that the future volume and quality of information provided voluntarily could be affected by its disclosure under FOIA. This in turn would mean that the authority would not have the required information to carry out its functions effectively.

In terms of exemptions, section 31(1)(g) and (2) will be of particular relevance to these arguments, as this issue is likely to be raised in the context of regulators. For example, it has been argued by the Financial Services Authority that the disclosure of information supplied on a voluntary basis by the firms it regulates would prejudice the exercise of its functions for the purposes listed in section 31(2)(c), that is, "...ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment may arise".

Public authorities should be aware that, in order for the exemption at section 31(1)(g) to be engaged, the function identified should be designed to fulfil one of the purposes listed in section 31(2) and be specifically imposed on that authority by statute (or by the Crown in the case of a government department). A general duty imposed on all public authorities would not meet these requirements.

However, the issue of the impact of disclosure on the voluntary supply of information is not restricted to these circumstances, and it may be relevant in considering the public interest test in relation to other exemptions and other public authorities. Consequently, although this guidance concentrates on scenarios involving regulators and the exemption at section 31(1)(g), the approach described can apply equally to other public authorities, where appropriate.

The Commissioner's approach

When a public authority is seeking to argue that the disclosure would prejudice the exercise of its functions by decreasing the amount of information supplied voluntarily from the organisations it works with, it will first need to establish that those functions are designed for one or more of the purposes specified in section 31(2). It will then need to consider the following two aspects:

- whether the disclosure would be likely to have an impact on the voluntary supply or free flow of information; and
- if so, would the impact on the voluntary supply of information be likely to prejudice a function of the public authority?

Impact on the voluntary supply of information

In considering whether the disclosure would (or would be likely to) have an impact on the voluntary supply of information, the following factors will be relevant, depending on the circumstances of each individual case:

- the content of the information;
- the timing of the request, for example, in relation to the stage of the investigation being undertaken by the public authority. For instance, if information was disclosed under FOIA during the early stages of an investigation, it may unfairly expose the voluntary supplier of information to adverse publicity or criticism,

even though a conclusion to the investigation may not have been reached. In addition, the potential reputational risk may be likely to deter organisations from co-operating on a voluntary basis;

- the public authority's statutory powers to compel engagement in the investigatory process (for example, the power to issue information notices, sanctions for non-compliance or search powers). Although voluntary supply may be affected by disclosure, where the public authority has powers to compel engagement, it may reduce the likelihood of prejudice to a function occurring. On the other hand, the use of formal powers may require the use of extra resources, but this will not necessarily prejudice the exercise of its statutory function;
- incentives that encourage third party engagement;
- the nature of the damage caused by disclosure that the third party foresees. The more damaging the disclosure, the more likely it will discourage provision of information in the future;
- whether there is evidence of lower levels of engagement following disclosure of information under FOIA; and
- whether there is a statutory bar which prevents the disclosure of information provided in circumstances where the provider would not expect disclosure. An absence of statutory protection for the information implies a greater likelihood of prejudice.

Prejudice to a function of the public authority

If there is evidence to suggest that the voluntary supply of information is likely to be affected, the public authority will then need to consider whether this would, or would be likely to, prejudice one of its functions. The following factors are relevant in this context:

- what the impact of the disengagement and loss of information would be (in other words, what the nature of the prejudice to the function is). The public authority will need to show that the prejudice is more than trivial and that there is a causal link between the proposed disclosure and the prejudice being claimed;
- the likelihood of the identified prejudice occurring;
- the timing of the request in relation to the stage of the investigation. This is also relevant in assessing the level of

likelihood and nature of the prejudice. For example, disclosure at an early stage will probably be more prejudicial because continued co-operation with an organisation is likely to be more crucial during the early stages of an investigation.

The following examples will help to illustrate how these factors apply in practice. The factors that are relevant and the weight that is applied to them are dependent on the circumstances of each case, as well as the specific regulatory context. The two stage process will also not always be strictly adhered to.

Example

In the case of the *Financial Services Authority (FSA) v Information Commissioner (EA/2008/0061, 16 February 2009)* heard by the First-tier Tribunal (Information Rights), the FSA put forward the argument that "*if information like the disputed material had to be disclosed under the Act, firms would be less likely than at present to be open with the FSA and voluntarily supply information raising possible regulatory issues about themselves*" and that firms "*would be less likely to supply information about their competitors or about developments or conditions in the market generally.*" (paragraph 23).

The Tribunal was not satisfied that the disclosure of the requested information would create a real and significant risk of decreasing the amount of information voluntarily provided to the FSA by firms about themselves, and so found that the functions at section 31(2)(c) and (d) would not be prejudiced. This conclusion was based on the following factors:

- **incentives that encourage engagement** – the FSA's Principles for Business require firms to supply information and generally co-operate with the FSA. Firms will also have a natural desire to avoid action being taken against them, such as enforcement action. Even if regulated firms believed that the FSA's views on the information they had voluntarily supplied may be disclosed in response to future requests under FOIA, these incentives to co-operate with the FSA would still remain in place.
- **existing risk of publication** – firms regulated by the FSA will be aware that if they supply information about themselves voluntarily there is a risk that the information will then be published by the FSA under section 391(4) of the Financial Services and Markets

- Act 2000 (FSMA).
- **level of engagement post-FOIA** – there was no evidence that the introduction of FOIA had led to firms being less willing to supply information to the regulator.
- **whether there was a statutory bar to protect information supplied** – section 348 of the FSMA exists to protect any information provided on a confidential basis, and so requests for such information would be exempt from disclosure under section 44 of FOIA.

The Tribunal concluded that section 31 was not engaged. However, it emphasised the importance of considering the circumstances of each case by saying that this "*does not mean that section 31 can never be relied on to resist disclosure of internal FSA views based on information supplied [to it].*" It noted that there may have been a different outcome if the request had been made during an ongoing investigation or the disclosure "*would...have risked the identification of a confidential source or revealed something novel about the FSA's methods of investigation.*"

The following is an example where the Commissioner considered that the specific circumstances of the case meant that the majority of the requested information was exempt under section 31(1)(g) by virtue of section 31(2)(f) and (g). He also concluded that the public interest test favoured maintaining the exemption.

Example

ICO decision notice [FS50184898](#) concerned a request to the Charity Commission for all documents relating to complaints about a school run by a registered charity. The Charity Commission argued that disclosure would prejudice the exercise of its functions for the purposes referred to in section 31(2)(f) and (g) – the protecting of charities against misconduct or mismanagement in their administration and protecting the property of charities from loss or misapplication.

The Commissioner applied the following relevant factors, identified above, in his consideration of this argument:

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- **stage of the investigation** – the Commissioner noted that as the investigation had been concluded recently, the likelihood of disclosure affecting the public authority's ability to gather information from organisations remained relatively high.
- **powers to compel, and incentives that encourage, engagement** – although the Charity Commission has only limited powers to compel trustees of charities to provide information, there are strong incentives for trustees and their advisors to communicate openly with it to ensure that the requirements of charity law are complied with.
- **level of engagement post-FOIA** – the Charity Commission provided no evidence that charities had been less willing to provide it with information since FOIA came into full force in January 2005.
- **whether there was a statutory bar to protect information supplied** – as there was no statutory bar preventing the disclosure of information supplied voluntarily to the Charity Commission, the Commissioner concluded that this increased the likelihood of a negative impact, following disclosure under FOIA, on the future supply of information.

Consideration of these factors led to the conclusion that disclosure of the requested information would have an impact on the voluntary supply of information in the future.

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 - The prejudice identified was the potential to slow down the Charity Commission's regulatory process, resulting in less timely regulatory action.
 - The Charity Commission argued that although trustees would still communicate with it, the nature of these communications would change. This change would affect the Charity Commission's formal and informal methods of operation as well as its ability to gather and receive wider intelligence.

The Commissioner considered the significant number of

charities that the Charity Commission regulates and concluded that even if only a small percentage altered their behaviour following the disclosure under FOIA, there would be a real and significant impact on its ability to carry out the functions described at section 31(2)(f) and (g).

The Commissioner has also issued a decision notice which concluded that disclosure under FOIA would not have an adverse effect on the future voluntary supply of information.

Example

ICO decision notice [FS50193437](#) concerned a request to the Financial Services Authority (FSA) for information relating to any concerns it may have about the management of a credit union. In relation to section 31, the FSA argued that if it were to confirm or deny that it held the information, the companies it regulates would in the future be less likely to engage with it on an informal basis which would prejudice the exercise of its functions for the purposes listed at section 31(2)(a)–(d).

The relevant factors considered in this case were as follows:

- **incentives that encourage engagement and the existing risk of publication** – the Commissioner took into account the Tribunal's findings from the FSA case mentioned previously (EA/2008/0061) concerning incentives to supply information and the provisions of section 391(4) of the Financial Services and Markets Act 2000 regarding publication of information. He said that these factors carried even more weight in this case as they related to possible prejudice as a result of confirming or denying that information was held and not disclosure of the information.
- **stage of the investigation** – the Commissioner said that even if he were to accept that disclosure would lead to a lack of co-operation, it is unlikely this would cause significant prejudice to an investigation which was likely to be at an advanced stage.

The Commissioner was not satisfied that regulated firms would be less likely to engage with the public authority as a result of confirming or denying that the requested information was held and so decided that section 31(3) was not engaged.

Other considerations

Section 31(1) is not the only exemption which may be considered when assessing the effect of disclosure on the future voluntary supply of information.

Section 33

The exemption for audit functions may be used by certain public authorities if they consider that disclosure of information could have a negative impact on the voluntary supply of information in the future. The wording of this exemption is very similar to section 31(1)(g) as it refers to information being exempt "if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1)", that is, "...the audit of the accounts of other public authorities...or...the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions."

As with section 31(1)(g), this exemption will only be available to those public authorities who exercise functions in relation to the purposes or matters specified, such as the National Audit Office, Ofsted, the Care Quality Commission and HM Inspectorate of Constabulary.

These authorities may wish to argue that the function of audit would be prejudiced if the disclosure of information supplied on a voluntary basis to an auditor would discourage co-operation with the auditor in the future. For example, if information has been supplied by a whistleblower or other informant and this has prompted audit activity.

In general the factors to consider in determining whether the exemption can be engaged are those relating to section 31(1)(g). For example, whether there is any evidence that disclosures under FOIA have had the effect of discouraging the voluntary supply of information in the future, or what the effects are of any powers the auditors have to compel engagement with their processes.

This guidance is relevant to requests made under FOIA, but does not apply to the Environmental Information Regulations. Regulation 12(5)(f) covers similar issues and separate guidance on this regulation is available on our website.

Additional guidance is also available if you need further information on:

- Exemptions under FOIA
 - ⇒ see [The exemption for law enforcement](#)
 - ⇒ see [The exemption for public audit functions](#)
 - ⇒ see [The exemption for information provided in confidence](#)

More information

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.

It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

If you need any more information about this or any other aspect of freedom of information, please [contact us](#): see our website www.ico.gov.uk.