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

3. This guidance document is intended to help public authorities and practitioners, when they are considering FOIA exemptions, to decide whether disclosing information would lead to prejudice. Detailed guidance on each of the exemptions is available on our website, but this document explains in general terms what is meant by prejudice.

Overview

Some FOIA exemptions are prejudice-based. That means in order to engage them there must be a likelihood that disclosure would cause prejudice to the interest that the exemption protects.

The test of prejudice involves several steps:

- Identify the applicable interests within the relevant exemption
- Identify the nature of the prejudice. This means that the public authority must:
  - Show that the prejudice claimed is real, actual or of substance; and
  - Show that there is a causal link between the disclosure and the prejudice claimed.
- Decide on the likelihood of the prejudice occurring. This means deciding whether the prejudice would or would be likely to occur.
  - 'Would' and 'would be likely' imply different levels of likelihood.
  - Where a public authority has not specified the level of likelihood, and in the absence of clear evidence to the contrary, the Commissioner will consider that 'would be likely' applies.

The prejudice test relates to circumstances at the time when the authority received the request or within the statutory time for compliance.

The duty to confirm or deny whether information is held does not apply where to do so would or would be likely in itself to prejudice the interest protected by an exemption.

Once the exemption has been engaged on the basis of the prejudice test, it is then necessary to consider the balance of public interest.

Types of exemptions

4. FOIA gives people the right to access to information held by public authorities, but it also contains a number of 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 FOIA section 2(3); the exemptions that are not listed there are qualified.

5. Qualified exemptions can be further divided into 'class-based' and 'prejudice-based' exemptions.

6. **Class-based** means that if the information is of the type described in the exemption, then it is covered by that exemption. Some qualified exemptions (and all absolute exemptions) are class-based. The authority does not have to demonstrate that any particular harm would be caused by disclosure in order to use the exemption, but, in the case of qualified exemptions, they still have to consider the balance of public interest before deciding whether or not to disclose the information.

7. For example, section 35(1)(a) is a class-based, qualified exemption; if the information requested is held by a government department and it relates to the formulation or development of government policy, then the exemption is engaged, regardless of whether disclosure would prejudice policy development in any particular case. The department must then consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

8. Any prejudice or harm caused by disclosure may be a factor in the public interest test, but it is not relevant to engaging the exemption.

9. If the exemption is **prejudice-based**, then the authority has to satisfy itself that the prejudice or harm that is specified in the exemption either would or would be likely to occur. For example, under section 27(1)(a), information is exempt if its disclosure would or would be likely to prejudice relations between the United Kingdom or any other State. If the exemption is engaged on this basis, the authority then has to carry out the public interest test to determine whether or not the information should nevertheless be disclosed.

10. The rest of this guidance relates to prejudice-based exemptions.

Prejudice-based exemptions

11. The prejudice-based exemptions are:

    Section 26 - Defence
    Section 27(1) - International relations (but not sections 27(2) and (3) which are class-based)
    Section 28 – Relations within the UK
    Section 29 - The economy
    Section 31 - Law enforcement
    Section 33 – Audit functions
    Section 36 – Public affairs
    Section 38 – Health and safety
    Section 43(2) – Commercial interests (but not section 43(1) which is class-based)

12. These exemptions can be categorised as prejudice-based because of their wording. Most of them use the word 'prejudice'. For example:

> Section 43(2):
>
> "Information is exempt information if its disclosure under this Act would or would be likely to prejudice the commercial interests of any person (including the public authority holding it)."

13. In legal terms, the word 'prejudice' is commonly understood to mean harm. To say that disclosure would or would be likely to prejudice the interests specified in the exemption implies that it would (or would be likely to) harm those interests.

14. Other exemptions use other words with a similar meaning:

- Section 36(2)(b) provides an exemption, where, in the opinion of the "qualified person", disclosure would or would be likely to "inhibit" the provision of advice or the exchange of views. For a detailed explanation of section 36, see our guidance on Prejudice to the effective conduct of public affairs

- Under section 38, information is exempt if its disclosure would or would be likely to "endanger" the physical or mental health or safety of any individual.

Although there are some variations in wording, and these different words do not have exactly the same meaning, in our view the

approach to adopt in deciding whether there is a likelihood of prejudice, in other words the prejudice test, is the same for all of these exemptions.

The prejudice test

15. Our approach to the prejudice test is based on that adopted by the Information Tribunal in *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 and 0030, 17 October 2006) ("*Hogan*"), at paragraphs 28-34. This involves the following steps:

- Identify the *"applicable interests"* within the relevant exemption
- Identify the "*nature of the prejudice*". This means:
  - Show that the prejudice claimed is *"real, actual or of substance";*
  - Show that there is a *"causal link"* between the disclosure and the prejudice claimed.
- Decide on the *"likelihood of the occurrence of prejudice".*

Step 1 - applicable interests

16. The authority must show that the prejudice it is envisaging affects the particular interest that the exemption is designed to protect. Arguments about prejudice to any other interests will not engage the exemption. So, for example, if the exemption claimed is section 29(1)(a), economic interests of the United Kingdom, any arguments about damage to the UK's interests abroad that are not clearly economic are not relevant; they are more likely to engage section 27.

17. Where the exemption has subsections relating to different interests, the prejudice must relate to the specific subsection(s) that the authority seeks to engage. For example, section 29 distinguishes between the economic interests of the UK or any part of it in subsection (a), and the financial interests of a UK administration in subsection (b).

Step 2 – the nature of the prejudice

18. As the *Hogan* Tribunal explained, this step involves two parts.

19. Firstly, the prejudice that the authority has envisaged must be real, actual or of substance. The disclosure must at least be capable of harming the interest in some way, ie have a damaging or detrimental effect on it. If the consequences of disclosure would be trivial or insignificant there is no prejudice. However, this does not mean that the prejudice has to be particularly severe or unavoidable. There may be a situation where disclosure could cause harm, for example to commercial interests, but the authority can mitigate the effect of the disclosure, perhaps by issuing other communications to put the disclosure in context. In such a case, where the severity of the prejudice can be mitigated, the exemption may not be engaged or we may still accept that the exemption is engaged but then consider the effect of these mitigating actions as a factor in the public interest test.

20. Secondly, there must be what the *Hogan* Tribunal called a "causal link" between the disclosure and the prejudice claimed. The authority must be able to show how the disclosure of the specific information requested would or would be likely to lead to the prejudice.

Example

The Information Tribunal case of *Pauline Reith v Information Commissioner and London Borough of Hammersmith and Fulham* (EA/2006/0058 1 June 2007) concerned a request for the council's policy on towing illegally parked vehicles. The council confirmed that it targeted towing operations on certain types of illegal parking, and so in effect they partially disclosed the policy, but they withheld their more detailed criteria on the basis of section 31 (law enforcement). The relevant subsection was section 31(1)(g): prejudice to the exercise of the functions specified in 31(2)(c), which is to do with "*regulatory action in pursuance of any enactment*". The Tribunal found (in paragraphs 30-40) that the council had not demonstrated that disclosing this information would be likely to cause any prejudice to its parking enforcement functions.

The council believed, on the basis of their experience, that disclosing their detailed criteria for towing vehicles would encourage people to park illegally, but they had no actual evidence to support this.

The Commissioner had argued that people who park illegally would know, on the basis of the detailed criteria, where they could do so

and receive only a fine, rather than being towed away as well. The Tribunal however found no evidence that there were people who would take this risk, given that the fine would be substantial in any case. If there were, they could already make an 'educated guess' as to their chances of being towed from the partial information that the council had released. Furthermore, publishing the full criteria might actually reduce illegal parking if people realised that they are more likely to be towed than they had thought.

The Tribunal therefore did not accept that there was a causal link between the disclosure and the prejudice envisaged and so the exemption was not engaged.

21. Although there must be a causal link, the prejudice test relates to something that may happen in the future, if the information were disclosed. Therefore it is not usually possible to provide concrete proof that the prejudice would or would be likely to result. Nevertheless, as the above example shows, there must be more than a mere assertion or belief that disclosure would lead to prejudice. There must be a logical connection between the disclosure and the prejudice in order to engage the exemption.

Example

In *Colin P England v London Borough of Bexley and the Information Commissioner* (EA/2006/0060 and 0066, 10 May 2007) the Information Tribunal said that providing actual evidence of the link between disclosing a list of empty properties and prejudice to the prevention of crime *"… is a speculative task, and as all parties have accepted there is no evidence of exactly what would happen on disclosure, it is necessary to extrapolate from the evidence available to come to the conclusion about what is likely."*

22. Establishing the causal link means that the prejudice claimed is at least *possible*, ie there are circumstances in which it could arise. The next step in engaging the exemption is to consider how *likely* the prejudice is to occur.

Step 3 - the likelihood of prejudice

23. The prejudice-based exemptions (with the exception of section 24(1)) use the phrase "*would or would be likely to*" prejudice (or inhibit or endanger). If the authority cannot show that the prejudice would or would be likely to occur, then the exemption is not engaged.

24. The causal link shows the circumstances, or the chain of events, that could lead to prejudice. It may be possible to show that prejudice would occur even if those circumstances would only occur once or affect one person or situation. However, the more frequently those circumstances arise, the more likely the prejudice is to occur. So, while the chances of prejudice occurring in any one case may be low, if the number of cases in which it might arise is high then it may be possible to say that prejudice would or would be likely to arise.

25. In establishing whether prejudice would or would be likely to occur, it is therefore necessary to consider:

    - the range of circumstances in which prejudice could occur (for example, whether it would affect certain types of people or situations);
    - how frequently the opportunity for the prejudice arises (ie how likely it is for these circumstances to arise); and,
    - how certain it is that the prejudice results in those circumstances.

26. The terms 'would' and 'would be likely' have separate and distinct meanings in this context.

Would prejudice

27. The Tribunal in *Hogan* said at paragraph 33:

    "there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not."

28. The first limb relates to 'would' and the second to 'would be likely'. 'Would' therefore means 'more probable than not'; in other words, there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so.

29. If an authority claims that prejudice would occur they need to establish that either

- the chain of events is so convincing that prejudice is clearly more likely than not to arise. This could be the case even if prejudice would occur on only one occasion or affect one person or situation; or

- given the potential for prejudice to arise in certain circumstances, and the frequency with which such circumstances arise (ie the number of people, cases or situations in which the prejudice would occur) the likelihood of prejudice is more probable than not.

Would be likely to prejudice

30. 'Would be likely' refers to a lower level of probability than 'would', but one which is still significant. This interpretation is based on the judgment of Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin) (a Data Protection Act case) who said:

> *"Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."*
> (paragraph 100)

31. This interpretation was relied on by the Information Tribunal in *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006), who said at paragraph 15:

> *"We interpret the expression "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk."*

32. On the basis of these judgments, 'would be likely' means that there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.

33. If an authority claims that prejudice would be likely to occur they need to establish that

- there is a plausible causal link between the disclosure of the information in question and the argued prejudice; and
- there is a real possibility that the circumstances giving rise to prejudice would occur, ie the causal link must not be purely hypothetical; and
- the opportunity for prejudice to arise is not so limited that the chance of prejudice is in fact remote.

Stating the level of likelihood

34. If an authority is withholding information under a prejudice-based exemption, it should always make a choice between would or would be likely to and state this in its refusal notice.

35. If the ICO is considering a complaint where the authority has not specified the likelihood of prejudice, we will give the authority an opportunity to say whether it means would or would be likely to. If this does not lead to clarification, then we will follow the approach of the Information Tribunal in *Ian Edward McIntyre v the Information Commissioner and the Ministry of Defence* (EA/2007/0068, 4 February 2008). This case concerned section 36(2)(c) but in our view the same approach can be applied to other prejudice-based exemptions. The Tribunal said at paragraph 45:

> *"We consider that … in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level."*

36. The 'clear evidence' would include the language used by the authority. For example, we may take references to the consequences of disclosure, rather than the possible consequences of disclosure, as evidence that the authority meant 'would' rather than 'would be likely to'. In the absence of clear evidence that the authority meant 'would', we will assume 'would be likely to'. It should be noted however that this is our approach in exceptional circumstances. Situations in which the authority does not specify the level of prejudice should not arise; the authority should always be able to state whether it means 'would' or would be likely to'.

Level of likelihood accepted by the ICO

37. Cases may arise in which the authority says that prejudice would occur, but the ICO does not accept that this has been demonstrated, and considers instead that the exemption is only engaged on the basis that the prejudice would be likely to occur. In such cases we will proceed on the basis of 'would be likely'.

38. Authorities should note that this approach, of the ICO moving to a different level of prejudice, does *not* apply if they are claiming section 36(2). There is an explanation of this in our guidance on Prejudice to the effective conduct of public affairs

39. Establishing the appropriate level of likelihood is also important because it has an effect on the balance of the public interest test. For an explanation of this, see our separate guidance on the Public interest test.

Other considerations

Time at which to consider prejudice

40. A public authority's assessment of prejudice may vary depending on events while it is handling the request. Circumstances may change in the time between when it receives the request and when it answers it.

41. When considering the possibility of prejudice resulting from disclosure, a public authority can take account of the circumstances either as they were at the date of the request or as they are at the point when it actually deals with the request, provided this is within the time for statutory compliance, which is normally 20 working days.

42. This flexible approach means that the authority can make a fuller assessment of whether the exemption is engaged. However, it should not be used to disadvantage the requester unfairly, for example where information is withheld on the basis of an exemption that is engaged on the date of the request but not when the request is answered.

Neither confirm nor deny

43. 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 the information itself. This is the 'duty to confirm or deny'. However, each of the prejudice-based exemptions contains a subsection to the effect that the duty to confirm or deny does not arise where even to confirm or deny whether the information is held would (or would be likely to) itself prejudice the interest protected by the exemption.

Example

In ICO decision notice FS50150268 the requester had asked the Office of Fair Trading (OFT) for information about a case involving a named company, which the requester believed they were investigating. The OFT refused to confirm or deny whether they held such information under section 31(1)(g) and 31(2)(a)-(c); to do so would prejudice their investigatory functions. The OFT argued that routinely confirming or denying they were carrying out investigations would enable those trading illegally to take steps to avoid detection. Furthermore, they had to refuse to confirm or deny in all cases, even if they were not investigating; if they only did it when they were investigating, the use of neither confirm nor deny itself would imply there was an investigation.

The Commissioner accepted that "*there would be a real risk of prejudice to the OFT's investigative and regulatory functions if it were to confirm or deny if such information is held, since these functions are dependent on confidentiality and openness in communications between the OFT and traders.*" (paragraph 35). Therefore the exemption was engaged.

The decision neither to confirm nor deny whether information is held must therefore be taken in relation to a particular prejudice-based exemption. Furthermore, it is itself subject to the public interest test. For further information, see our guidance on the Public interest test and Neither confirm nor deny.

Misleading information

46. A public authority might argue that the harm the exemption is designed to protect against either exists or is increased

because the requested information is misleading or could be misunderstood.

47. The Commissioner's view is that it is generally possible to avoid this perceived difficulty by putting the disclosure into context.

Example

In ICO Decision Notice FS50130316 the complainant had requested information from the Food Standards Agency (FSA) about a review into the safe cooking time and temperature for burgers. The FSA argued that section 43 applied; the company had expressed the view that disclosure of the information would be misleading and could prejudice its commercial interests. It maintained that the information could be taken out of context, leading to misunderstanding and misrepresentation, which in turn could result in a loss of trust and damage to its reputation.

The FSA acknowledged that the information could have been released with an accompanying explanatory statement setting it in context. However, it took the view that this would not have removed the risk of harm, particularly as selected media bodies would have been likely to ignore such clarification in the interest of providing sensationalist and misleading headlines and reports concerning the company. The Commissioner rejected these arguments, deciding that section 43 was not engaged: "The Commissioner is generally reluctant to accept arguments for withholding information based on the contention that disclosure might result in the information being misunderstood or that certain parts of the media might seek to misrepresent the information in order to provide sensationalised news stories. His view is that it is always possible to offset the potential for this to happen by issuing an accompanying statement placing the information in context."

48. However such arguments may be relevant in a small number of cases where strong and persuasive arguments are presented which are specifically tied to the exemption claimed. The Commissioner accepts that in some cases it might not be possible to provide the necessary explanation or context, and consequently not possible to effectively mitigate the argued prejudice. An example of this might be where the only person that could provide the necessary explanation is no longer employed by the public authority.

Public interest test

48. As noted at the beginning, the prejudice-based exemptions are also qualified exemptions. Once the authority has established that the exemption is engaged because the test of prejudice is met, the next stage is to consider whether the public interest in maintaining the exemption, and hence in withholding the information, outweighs the public interest in disclosure. This is explained in our guidance on the Public interest test

Environmental Information Regulations

49. This guidance document relates to FOIA. The Environmental Information Regulations (EIR) refer to disclosures that would adversely affect, rather than prejudice, various interests. For further information on this, see our separate guidance on EIR.

More information

50. 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. .

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

52. 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.gov.uk.