

Guidance Note E2: Absolute FOI exemptions most relevant to the MOD

See also the Ministry of Justice Website FOI Guidance

<http://www.justice.gov.uk/guidance/freedom-of-information.htm>

Absolute Exemptions

1. If an Absolute exemption applies then there is no obligation under the Freedom of Information Act to release the requested information (although there may be scope, or obligations, for other reasons outside the Act to do so). Absolute exemptions do not require a public interest test. However, a decision to withhold information under an absolute exemption must be justified and recorded as the Information Commissioner will require an explanation if the case is appealed.

The absolute exemptions are listed in section 2(3) of the Freedom of Information Act. Some make the freedom of information right of access subject to existing legal prohibitions on disclosure (for example under the law of confidence or under statute or by reason of European law).

Section.12 the Appropriate Cost Limit and Section.16 Duty to Advise and Assist

2. In accordance with section 12 of the FOI Act, **the MOD is not obliged to comply with a request for information if the cost of doing so would exceed the appropriate limit** (currently £600.00 for central government see guidance Note D9 Charging) This exemption is often applied to broad requests asking for a large amount of information, for example, copies of all e-mails, letters, minutes and notes relating to a particular subject over the past 5 years. This type of request can be difficult to even begin a search for information held, and you should carry out a cost estimate as soon as possible. The use of this exemption must be linked to the s.16 duty to advise and assist.

The range of activities that can be taken into consideration in determining the cost is very limited.

2.1 What you can count:

It is legitimate to count the time involved in:

- determining whether we hold the information requested
- locating the information or documents containing the information
- retrieving such information or documents
- extracting the information from the document containing it (including editing or redacting information)

(the latter point of including **redaction** costs is not approved by the ICO, but is supported by the Ministry of Justice, and MOD will continue to include this).

2.2 Estimating the Cost

If you plan to use s.12 you must prepare an **estimate** of the cost, this is required in the event of an appeal. You are **not** obliged to provide this estimate to the requester (a template response letter with example of wording is available).

You should **not** comply with part of the request up to the limit - you need to consult the requester. You **must** attempt to help them refine the request- e.g. tell them what you **could** provide.

Section 12 makes it clear that a public authority does not have to make a precise calculation of the cost of complying with a request. Only an estimate is required; the costs estimates must be reasonable and only based on those activities described in regulation 4(3) listed above.

What you **cannot** count is:

- time spent on considering exemptions
- costs relating to data validation

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the determination of a reasonable estimate can only be considered on a case by case basis and any estimate should be sensible, reasonable and supported by evidence.

2.3 Section 16 Duty to advise and assist

Where a request *has been refused* on grounds of excessive cost it may well be appropriate for the public authority to assist the applicant in making a subsequent request, for example by establishing a dialogue with the applicant so that the available options can be clearly spelt out and explored.

2.4 A public authority must advise the applicant how they might be able to bring the request under the cost limit by reducing the range of information requested. The ICO considers that the purpose of providing advice and assistance in relation to section 12 is to assist the complainants in refining requests to the information of most importance to them, without public authorities making assumptions about relative importance on their behalf. In light of this the Commissioner concludes that 'providing an indication of what, if any, information could be provided within the cost' would include advising the complainant of which fields could be omitted from the request in order to bring it under the cost limit.

In summary, it is not appropriate to issue a s.12 refusal without giving any consideration to how you may assist the applicant to gain access to some information within the cost limit.

3. Section. 21 Information Accessible to Applicant by Other Means

3.1 Section 21 exempts information from disclosure under FOI if it is reasonably accessible to the applicant by another means. However, some common sense is required: the duty to assist may make it as easy to supply information as to refer the applicant to another source. Nor if the request is for a small amount of information contained in a report would it be reasonable to require the applicant to purchase the whole report. It is good practice to direct the applicant to where the information can be found, and even when providing the information you should also say that section 21 applies, say where it can be found and explain that in this instance you are able to provide the information.

3.2 The types of information covered by this exemption are:

- Information available by virtue of other legislation. FOI does not subsume other legal access rights, nor to give alternative routes for access where existing regimes are already available. Such information is deemed to be reasonably accessible to the applicant and therefore exempt. This includes information which is available only for inspection, either voluntarily or under another enactment. If the applicant makes it clear that accessibility poses problems, then you should consider any requested arrangements e.g. in Braille or a minority language. The FOI does NOT place an obligation to do this, only to *consider* doing so where it is "reasonably practical". See also Guidance Note [D5: Requests other than in English](#).
- Information which is made available in accordance with the MOD Publication Scheme. Any payment required must be specified in, or determined in accordance with, the Publication Scheme. For further information on the Publications Scheme see Guidance Note [C1](#).
- A request for information or particular documents which are already available in published sources, or in the National or other archives is also exempt. Just because MOD holds a copy of, or originated, the information, we do not have to supply a copy under FOI. It is sufficient to advise the applicant that what they seek is available in a public library or archive.
- If there is a charge for the information, for example for a copy of a report, this is still covered by s.21.

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7. S. 44 Prohibitions on disclosure

7.1 This exemption is intended to ensure that certain existing legal prohibitions on disclosure will override the general right of access (the EIRs differ from the FOI Act in that under r.5 (6) any enactment or rule of law that would prevent the disclosure of information in accordance with the EIRs **does not apply** the EIRs take precedence and the information is to be released unless another exception applies). Information is therefore exempt if its disclosure (otherwise than under the Act) by the public authority holding it is prohibited by or under any enactment; is incompatible with any Community obligation; or would constitute or be punishable as a contempt of court. If this is the case, not only is there no obligation to disclosure, but **there is no discretion to disclose** either -the prohibition must be observed. For further information on this exemption see *MOJ Guidance on s.44*.

7.2 The release of personal data relating to deceased persons may contravene the Human Rights Act Article 8: The right to respect for private and family life.

7.3 The Official Secrets Act prohibits the unlawful disclosure of information. A disclosure made fully in accordance with MOD procedures for complying with the FOI Act and EIRs is a lawful disclosure. The two regimes are to that extent complementary: if FOI requires a disclosure then the Official Secrets Act will not prohibit it. Although this is an absolute exemption, the occasions on which it applies may vary from case to case. An authorised disclosure will not be prohibited by the Official Secrets Act but it is particularly important that decisions to release hitherto sensitive or classified information is authorised at an appropriate level. If in doubt you must refer to more senior staff.