

# FOISA Guidance

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## Section 35: Law Enforcement

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### Exemption Briefing



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## Glossary and abbreviations

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Term used	Explanation
<b>SIC/The Commissioner</b>	The Scottish Information Commissioner, staff of SIC (depends on context)
<b>FOISA</b>	Freedom of Information (Scotland) Act 2002
<b>Public authority</b>	In section 35(1)(g), this means public authorities covered by the Freedom of Information Act 2000. The section also applies to Scottish public authorities covered by FOISA.

# The exemption

## The exemption: the main points

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1. Section 35 of the Freedom of Information (Scotland) Act 2002 (FOISA) contains a wide range of exemptions, all relating to law enforcement. Information will be exempt if disclosure would, or would be likely to, prejudice substantially:
  - (i) the prevention or detection of crime (section 35(1)(a));
  - (ii) the apprehension or prosecution of offenders (section 35(1)(b));
  - (iii) the administration of justice (section 35(1)(c));
  - (iv) the assessment or collection of any tax or duty (or similar) (section 35(1)(d));
  - (v) the operation of immigration controls (section 35(1)(e));
  - (vi) the maintenance of security and good order in prisons, and other places of lawful detention. (section 35(1)(f));
  - (vi) the exercise by a public authority of a function listed in section 35(2) (for example, ascertaining whether conduct is improper or securing the health, safety and welfare of people at work) (section 35(1)(g)); or
  - (vii) civil proceedings brought and arising out of an investigation conducted by a public authority for any of the purposes listed in section 35(2) (section 35(1)(h)).
2. The exemptions in section 35 are all subject to the public interest test. This means that, even if an exemption applies, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosing it.
3. The exemptions in section 35 don't last forever. In general, they can't be applied to information that is more than 100 years old.
4. With all of the section 35 exemptions, a public authority can refuse to confirm or deny whether it holds the information, provided the authority is satisfied that revealing whether the information exists or is held would be contrary to the public interest (section 18 of FOISA).

## Steps in applying the exemption

5. Once an authority has located and retrieved the requested information held, it must decide whether the exemption applies:
  - (i) If the exemption does NOT apply, the information cannot be withheld under the exemption.
  - (ii) If the exemption DOES apply, the public interest test must be applied.
  - (iii) If the public interest in disclosure outweighs that of maintaining the exemption, the exemption does not apply and the information cannot be withheld under the exemption (although it may be exempt under a different exemption).
  - (v) If the public interest in maintaining the exemption outweighs that of disclosing the information, it can be withheld and notice served to that effect.

## Section 35 – overview

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6. Section 35(1) of FOISA allows public authorities to refuse to disclose information if disclosure would, or would be likely to, prejudice substantially one or more of a wide range of law enforcement functions and activities. The exemptions cover information relating to the detection and prevention of crime and prosecution of offenders, and to matters such as the operation of immigration controls, the assessment or collection of taxes and various regulatory functions.
7. Section 35 of FOISA is in two parts. Section 35(1) lists the various categories of law enforcement function or activity which can give rise to exemption. Section 35(2) lists the law enforcement purposes which are relevant when an authority is relying on the exemptions in section 35(1)(g) or section 35(1)(h).

### *“Likely”*

8. The exemptions in section 35 can only be applied where disclosure would, or would be likely to, cause substantial prejudice. There must be at least a significant probability that substantial prejudice would occur in order for the exemption to be properly applied. There must also be a genuine link between disclosure and the harm: it cannot simply be a remote or hypothetical possibility.

### *“Substantial prejudice”*

9. There is no definition of “substantial prejudice” in FOISA, but the damage caused by disclosing the information must be of real and demonstrable significance, rather than simply marginal.
10. The exemptions in section 35 need to be justified on a case by case basis and supported by evidence.
11. The effect of the passage of time may be relevant when assessing whether disclosure of information would, or would be likely to, cause substantial prejudice.

### *The public interest test*

12. If the exemption applies, the authority must go on to consider the public interest in relation to the information – see section 2(1)(b) of FOISA. This means assessing whether, in all the circumstances of the case, the public interest is better served by disclosing the information or by maintaining the exemption. The authority must identify and set out the competing arguments:
  - (i) as to why the public interest would be served by disclosing the information; and
  - (ii) why it would be served by withholding it.
13. FOISA does not define the term “public interest”, but it has been described as “something which is of serious concern and benefit to the public.” It has also been said that the public interest does not mean what is of interest **to** the public, but what is in the interest **of** the public.
14. The Commissioner has published guidance on the public interest test. See **Appendix 1: Resources**. The Appendix also details some of the decisions which have considered the public interest test.

## Section 35 - the individual exemptions

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15. The text below provides some broad guidance on the Commissioner's interpretation of each of these exemptions, and on the types of information that might fall within their scope. The examples provided are illustrative rather than exhaustive.
16. See **Appendix 1: Resources** for some decisions issued by the Commissioner in relation to section 35.

### Section 35(1)(a): prevention or detection of crime

17. Section 35(1)(a) applies to information, disclosure of which would, or would be likely to, prejudice substantially the prevention or detection of crime.
18. The term "prevention or detection of crime" is wide ranging. It encompasses actions taken to anticipate and prevent crime, or to establish the identity and secure prosecution of people suspected of being responsible for committing a crime. This could mean activities in relation to a specific (anticipated) crime or wider strategies for crime reduction and detection. It could also include information which is received from an informant.

### Section 35(1)(b): apprehension or prosecution of offenders

19. Section 35(1)(b) applies to information, disclosure of which would, or would be likely to, prejudice substantially the apprehension or prosecution of offenders.
20. There is likely to be some overlap between information relating to "the apprehension or prosecution of offenders" and information relating to "the prevention or detection of crime" (section 35(1)(a)). However, "apprehension or prosecution of offenders" is narrower and focusses on the process of identifying, arresting or prosecuting anyone suspected of being responsible for unlawful activity. This term could refer to the apprehension and prosecution of specific offenders, or to more general techniques (such as investigative processes used, information received, or guidance given) and strategies designed for these purposes.

### Section 35(1)(c): administration of justice

21. Section 35(1)(c) applies to information, disclosure of which would, or would be likely to, prejudice substantially the administration of justice.
22. Courts and tribunals are the main bodies responsible for administering justice in Scotland, alongside other non-adversarial mechanisms such as children's panels. "Administration of justice," although not defined, could refer to matters related to the working of these bodies and mechanisms. Examples might include the protection of basic principles such as the right to a fair trial and ensuring that individuals have access to justice.
23. Again, there may be some overlap between this and other exemptions in section 35. See **Appendix 1: Resources**.

### Section 35(1)(d): assessment or collection of taxes

24. Section 35(1)(d) applies to information, disclosure of which would, or would be likely to, prejudice substantially the assessment or collection of any tax or duty (or of any imposition of a similar nature).

25. This definition will include taxes raised at local level (such as council tax) as well as those raised at national level such as vehicle excise duty (road tax), income tax, lands and building transaction tax and national insurance contributions.

### **Section 35(1)(e): immigration controls**

26. Section 35(1)(e) applies to information, disclosure of which would, or would be likely to, prejudice substantially the operation of the immigration controls.
27. The term “immigration controls” can be interpreted as incorporating both the physical controls at points of entry to the UK and the procedural mechanisms for controlling entry to and residency in the UK. These mechanisms might include, for example, visa immigration for non-UK nationals, policies for preventing and investigating illegal immigration, and policies relating to asylum.

### **Section 35(1)(f): security and good order in prisons, etc.**

28. Section 35(1)(f) applies to information, disclosure of which would, or would be likely to, prejudice substantially the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained.
29. Alongside prisons, people might be lawfully detained in institutions such as police stations, young offenders institutions, local authority secure accommodation, secure hospitals, or immigration detention and removal centres.
30. “Security” implies matters such as the safe, secure and effective custody of prisoners and the safety of people in or around an institution. “Good order” suggests information about the smooth running of institutions, and about promoting a safe and orderly regime. The use of the word “and” means that both conditions must be fulfilled before this exemption can be relied on.

### **Section 35(1)(g): prejudice to public authority functions**

31. Section 35(1)(g) applies to information, disclosure of which would, or would be likely to, prejudice substantially the exercise by any public authority or by Scottish public authority of its functions for any of the purposes mentioned in section 35(2). These are looked at in more detail below.
32. The exemption covers the function of any public authority, whether it is subject to FOISA or to the (UK) Freedom of Information Act 2000, where it is carried out for one of the purposes listed in section 35(2).
33. A public authority’s functions are those things it has the power, or an obligation, to do. These functions may be set out in statute or may derive from the constitutional powers of the Crown (Her Majesty’s prerogative). Any public authority wishing to rely on this exemption must be able to show that it (or the public authority whose functions it believes will be harmed) has the power or obligation to carry out the relevant function.

### **Section 35(1)(h): civil proceedings**

34. Section 35(1)(h) applies to information, disclosure of which would, or would be likely to, prejudice substantially some civil proceedings.
35. “Civil proceedings” can refer to any non-criminal case heard before a court or tribunal. The civil proceedings must:

- have been brought by or on behalf of a UK or Scottish public authority **and**
- have arisen out of an investigation authorised by or under statute or by virtue of Her Majesty's prerogative **and**
- have arisen out of an investigation carried out for one or more of the purposes listed in section 35(2).

### The “purposes” in section 35(2)

36. Section 35(2) sets out a list of “purposes,” at least one of which must be a purpose of the public authority before sections 35(1)(g) or (h) can apply. The descriptions below are a guide to the kinds of activities that might fall within the purposes:

*“To ascertain whether a person has failed to comply with the law” (section 35(2)(a))*

37. This purpose can be engaged where an investigation is undertaken in relation to a criminal matter, such as a theft by an employee, or into a civil matter, such as whether a body has complied with its legal duties, e.g. in relation to FOISA.

*“To ascertain whether a person is responsible for conduct which is improper” (section 35(2)(b))*

38. For example, an investigation into whether someone's actions have met an expected standard, including a legal requirement or a standard set for public office holders. This might include investigations under the Scottish Ministerial Code, the Civil Service Code or the Code of Conduct for Councillors.

*“To ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise” (section 35(2)(c))*

39. Regulation is the formal process of overseeing a particular sector or activity and ensuring compliance with legal and other requirements. Regulatory activity is normally carried out by a person or organisation given specific powers to do so, for example, a local authority's environmental health, trading standards or planning service.

*“To ascertain a person's fitness or competence in relation to the management of bodies corporate” (section 35(2)(d)(i))*

40. This purpose relates to a public authority exercising its functions in assessing the fitness and competence of individuals such as company directors, shadow directors and company secretaries, who are involved in the management of corporate bodies.

*“To ascertain a person's fitness or competence in relation to any profession or other activity which the person is, or seeks to become, authorised to carry on” (section 35(2)(d)(ii))*

41. For example, considering whether to approve an application to practice in a particular profession, or investigating complaints about the fitness or competence of a member of a profession.

*“To ascertain the cause of an accident” (section 35(2)(e))*

42. This relates to any sort of accident investigation, from a minor accident in the workplace to major accident investigations carried out by the police, the Health and Safety Executive or a local authority's environmental health service.

*“To protect a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration” (section 35(2)(f))*

43. For example, investigating claims of misconduct by charity trustees.

*“To protect the property of a charity from loss or mismanagement” (section 35(2)(g))*

44. For example, taking enforcement action to protect funds from mismanagement.

*“To recover the property of a charity” (section 35(2)(h))*

45. This could involve raising proceedings against anyone responsible for breaches of trust causing loss to a charity.

*“To secure the health, safety and welfare of persons at work” (section 35(2)(i))*

46. This purpose relates to the legal and regulatory framework in relation to the health, safety and welfare of people at work including laws such as the Health and Safety at Work etc. Act 1974.

*“To protect persons, other than persons at work, against risk to health or safety where that risk arises out of, or in connection with, the actions of persons at work” (section 35(2)(j))*

47. This purpose relates to the protection of third parties from health and safety risks connected with the actions of people at work.



# Appendices

## Appendix 1: Resources

### SIC Decisions

Reference	Decision number	Parties	Summary
Section 35(1)(a) and (b)  Paragraphs 17 and 19	037/2009	The Daily Record and the Chief Constables of Central Scotland Police, Lothian and Borders Police, etc.	The Daily Record asked each police force for the total amounts paid to informants over a three year period. We accepted that, in smaller force areas, a payment could (rightly or wrongly) be linked with a specific event or the disruption of criminal activity. This would affect the Police's ability to recruit informants in these areas. We therefore accepted that sections 35(1)(a) and (b) applied. For larger forces, we did not accept that disclosure would result in harm; their larger budget head and crime statistics would allow them to mask any potential spikes in payments.
Section 35(1)(a) and (b)  Paragraphs 17 and 19	030/2006	The Evening Express and the Chief Constable of Grampian Police	We agreed that disclosing the numbers of drivers caught speeding at each fixed camera would cause substantial prejudice. Disclosure would alert the public to which cameras were not always in use, leading to speeding and, potentially, accidents.
Section 35(1)(a), (b) and (c)  Paragraphs 17, 19 and 21	222/2006	Scotland on Sunday and the Chief Constable of Northern Constabulary	We disagreed that disclosing the number of sex offenders of no fixed abode within a particular area would prejudice substantially the Police's activities or functions. Disclosure would not lead to the identification (or misidentification) of any individual. We did not accept that disclosure of the information would lead offenders to lose confidence in the Police's ability to protect them, or would result in the sort of public disorder that would drive offenders underground.
Section 35(1)(d)  Paragraph 24	234/2014	Paul Quigley and the Assessor for Glasgow City	Mr Quigley asked how council tax bandings had been set for a new housing development. The Assessor

Reference	Decision number	Parties	Summary
		Council	argued that disclosing some information (i.e. sales prices) would breach its licence agreement with the Registers of Scotland and, as a result, cause real harm to his ability to assess local taxes. We did not accept this: there was no evidence to suggest that disclosure would breach the licence agreement or that substantial prejudice would, or would be likely to occur.
Section 35(1)(f) Paragraph 28	059/2008	Richard Cookson and the Scottish Prison Service	We agreed that disclosing parts of an Office of Surveillance Commissioners report on the inspection of the SPS and the SPS's response to the report would prejudice substantially the maintenance of good order and security in prisons. Should prisoners become aware of the techniques specifically employed (or not employed), they were likely to take measures to avoid those techniques or take advantage where they were not deployed. Also, the disclosure of information about the use of intelligence and information gathering might reasonably be expected to affect the safety and wellbeing of prisoners, staff and visitors.
Section 35(1)(f) Paragraph 28	130/2016	Mr A and the Scottish Prison Service	We agreed that disclosing information about techniques or resources facilitating covert planning could allow prisoners ways to circumvent the systems and prejudice substantially the maintenance of good order and security in prisons.
Section 35(1)(f) Paragraph 28	097/2006	Mr H and the Scottish Prison Service	Disclosing health and safety policies for HMP Dumfries would prejudice substantially the maintenance of good order and security in the prison; the effective working of personnel involved in carrying out key tasks in the event of, for example, a fire would be prejudiced substantially should this information be disclosed. We also accepted that disclosing the information might lead to the targeting and intimidating of named

Reference	Decision number	Parties	Summary
			staff, prejudicing substantially the maintenance of security and good order in the prison.
Section 35(1)(g) Paragraph 31	047/2006	E Sutherland-Loveday and Scottish Borders Council	We were not satisfied that the inspection the applicant was seeking information about was one which had been conducted under the Council's statutory powers.
Section 35(1)(g) Paragraph 31	166/2007	Mr A and the University of Paisley	We did not accept that information about a grievance procedure was information gathered either for (1) the purpose of ascertaining whether a person had been responsible for conduct which was improper or (2) the purpose of ascertaining a person's fitness or competence in relation to any profession or other activity which the person was, or sought to become, authorised to carry on.
Section 35(1)(g) Paragraph 31	045/2007	Blochairn Housing Co-operative Limited and Communities Scotland	We agreed that the information about Blochairn had been gathered by Communities Scotland for the purposes of its statutory regulatory functions (section 35(2)(c)). However, the information was largely factual and disclosure would not cause substantial prejudice to this function.
Section 35(1)(g) Paragraph 31	023/2018	Graham Keith and the Office of the Scottish Charity Regulator (OSCR)	OSCR was asked about a complaint made about a particular charity. OSCR refused to disclose the information on the basis that disclosure would substantially prejudice its ability to carry out its functions in relation to the supervision of charities. We agreed: disclosing the information would greatly inhibit its ability to investigate misconduct or mismanagement in other cases.

All of the Commissioner's decisions are available on the Commissioner's website. To view a decision, go to [www.itspublicknowledge.info/decisions](http://www.itspublicknowledge.info/decisions) and enter the relevant decision number (e.g. 032/2014).

If you don't have access to the internet, contact our office to request a copy of any of the Commissioner's briefings or decisions. Our contact details are on the final page.

### Other resources

Paragraph	Resource	Weblink
Paragraph 14	Commissioner's guidance: The public interest in FOISA	<a href="http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx">http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx</a>

## Appendix 2

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### Section 35: Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially –
  - (a) the prevention or detection of crime;
  - (b) the apprehension or prosecution of offenders;
  - (c) the administration of justice;
  - (d) the assessment or collection of any tax or duty (or of any imposition of a similar nature);
  - (e) the operation of the immigration controls;
  - (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained;
  - (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);
  - (h) any civil proceedings –
    - (i) brought; and
    - (ii) arising out of an investigation conducted, for any such purpose, by or on behalf of any such authority, by virtue either of Her Majesty's prerogative or of powers conferred by or under any enactment.
- (2) The purposes are –
  - (a) to ascertain whether a person has failed to comply with the law;
  - (b) to ascertain whether a person is responsible for conduct which is improper;
  - (c) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;
  - (d) to ascertain a person's fitness or competence in relation to –
    - (i) the management of bodies corporate; or
    - (ii) any profession or other activity in which the person is, or seeks to become, authorised to carry on;
  - (e) to ascertain the cause of an accident;
  - (f) to protect a charity against misconduct or mismanagement (whether by trustees or other persons) in its administration;
  - (g) to protect the property of a charity from loss or mismanagement;
  - (h) to recover the property of a charity;
  - (i) to secure the health, safety and welfare of persons at work; and

- (j) to protect persons, other than persons at work, against risk to health or safety where that risk arises out of, or in connection with, the actions of persons at work.



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