

SECTION CONTENTS

CHAPTER 25 SECTION 11

**APPLYING AN EXEMPTION IN RELATION TO THE FORMULATION OF
GOVERNMENT POLICY OR WHERE DISCLOSURE MAY PREJUDICE THE
EFFECTIVE CONDUCT OF PUBLIC AFFAIRS**

1. **BACKGROUND**
2. **USING THE EXEMPTION WHERE INFORMATION RELATES TO THE FORMULATION OR DEVELOPMENT OF GOVERNMENT POLICY AND MINISTERIAL COMMUNICATIONS**
 - 2.1 Scope of the exemption
 - 2.2 The formulation or development of government policy
 - 2.3 Ministerial communications
 - 2.4 Disclosing background statistical information
 - 2.5 Disclosing factual information
 - 2.6 Public interest balancing test
 - 2.7 Applying the public interest balancing test to factual information
 - 2.8 Ministerial communications and particular considerations in assessing the public interest balancing test
 - 2.9 Applying the exemption
3. **DURATION OF THE EXEMPTION AND PAPERS BELONGING TO PREVIOUS ADMINISTRATIONS**
 - 3.1 Consultation with other bodies
 - 3.2 Relationship with other exemptions
4. **EXEMPTING INFORMATION WHERE DISCLOSURE MAY PREJUDICE THE EFFECTIVE CONDUCT OF PUBLIC AFFAIRS**
 - 4.1 Background
 - 4.2 Key elements of the exemption
 - 4.3 Scope of the exemption
 - 4.4 Statistical information
 - 4.5 Public interest balancing test
 - 4.6 Applying the exemption
 - 4.7 Duration of the exemption

APPENDIX A: GUIDANCE AS TO THE MEANING OF STATISTICAL INFORMATION

APPENDIX B: STANDARD LETTER TEMPLATES

1. BACKGROUND

The exemptions under sections 35 and 36 of the Freedom of Information Act 2000 (“the Act”) are closely related and should always be considered together. They are aimed specifically at the work of Government Departments and their proper use is essential to protecting the processes of creating, delivering and administering policy and ensuring that these processes can be delivered effectively. At the same time, it is necessary to be responsive to the public interest in IND, and ensure that where possible information is made available about the process of governance.

Section 35 is designed to exempt information likely to be found in four particular contexts which relate to ***the formulation of government policy***. Section 36 is a broader exemption in that it is not restricted to information of any particular description; instead, it focuses on the actual or likely *effects* of disclosure where this may prejudice ***the effective conduct of public affairs***.

Both of these exemptions are qualified and so for each to apply it is required that the public interest considerations in not releasing the information requested must outweigh the public interest considerations in favour of disclosure. Staff should consult Section 5 of this IDI chapter if they have not had previous experience of applying qualified exemptions.

One of the key features of the relationship between the exemptions under section 35 and 36 is that information which falls to be withheld under section 35 **cannot** be exempted under section 36. If it is thought that information held by a Government Department might be exempt under section 36 then a judgement should first be made by staff as to whether or not the information is exempt under section 35. If it appears that it is, section 35, rather than section 36, should be used.

Requirement for a Home Office Minister to authorise the use of section 36

The exemption under section 35, in common with nearly all of the other substantive exemptions contained in the Act, can be applied by Government officials and does not require the prior authorisation or approval of Ministers. Where IND Directorates are seeking to apply the exemption under section 35, this must be authorised at Grade 7/Assistant Director level or above and the IND Central FOI Team must also approve its use.

Section 36, however, can only be applied if it is the ***reasonable opinion of a qualified person*** that the effective conduct of public affairs would or would be likely to be prejudiced by disclosure,. In relation to information held by IND, this qualified person must be a Home Office Minister who authorises the use of an exemption under section 36. The only exceptions to this is in respect of:

- statistical information which if it falls to be exempt under section 36 does not require authorisation from a Home Office Minister and can be applied by officials (see point 4.4 for further details).
- any information relating to the work of previous administrations of a different political party to the current one. If it is considered that section 36 may apply to such information then the qualified person will be the Attorney General. All such cases

should be referred immediately to the IND Central FOI Team for handling. Section 2 of this IDI Chapter has further details on requests relating to a previous administrations of a different political party to the current one.

2. USING THE EXEMPTION WHERE INFORMATION RELATES TO THE FORMULATION OR DEVELOPMENT OF GOVERNMENT POLICY AND MINISTERIAL COMMUNICATIONS

2.1 Scope of the exemption

Information is exempt under section 35 (1) if it is held by a Government Department, and relates to one of the four areas below:

- (a) the formulation or development of Government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
- (d) the operation of any Ministerial private office.

Information which relates to one of these four areas will include:

- any substantive information falling within the descriptions- for example, information which describes a new Government policy, or is contained in a Ministerial communication; and
- will also include other information which is about that information - for example, papers related to Ministerial communications would include the record of the communication itself, a note of a meeting, or a reference to a conversation in correspondence to a third party.

It is also possible for information to fall within more than one of these four areas. It could, for example, relate to both the formulation of Government policy and at the same time to Ministerial communications.

For IND's purposes only two of these four areas will need to be considered when seeking to apply this exemption:

- The formulation or development of Government policy -section 35(1)(a).
- Ministerial communications -section 35 (1)(b).

This guidance provides advice to IND staff on applying this exemption in relation to each of these two areas. It also explains the special factors contained in this exemption regarding the release of both **statistical** and **factual** information.

The other two areas captured by this exemption relating to the operation of Ministerial private offices and the provision of advice by any of the Law Officers are not covered here as they are unlikely to have a significant impact on the daily work of IND staff. Further guidance for officials on applying these parts of the exemption can be found at Department for Constitutional Affairs website at:

<http://www.dca.gov.uk/foi/guidance/exguide/sec35/index.htm>

Definition of a Government Department

The exemption under section 35 relates **only** to information held by a Government Department (including a Northern Ireland Government Department) or by the

National Assembly for Wales. It does not apply to information held by any public authority other than a government department (e.g. local authorities) and cannot be used by any public authority other than a government department to withhold information.

It is important to note that IND related information contained in copies of documents held by public authorities which are not government departments cannot be withheld under section 35. Such information may, however, be exempt under other sections, particularly section 36. By way of an example, information contained in a draft policy paper on financial grants provided by IND to local authorities for the support of asylum seekers might be exempt under section 35 if held by IND. In contrast, a copy of the same document held by a local authority cannot be exempt under section 35 (because it is held by a public authority other than a government department), though it may still be exempt under section 36.

2.2 **The formulation or development of Government policy**

The types of information which make up the formulation or development of government policy and so may fall to be exempt under this part of section 35 will be found in a wide range of documents such as:

- submissions to ministers,
- correspondence with other departments and public bodies in connection with policy development,
- minutes and proceedings of both ministerial and officials' committees
- internal Departmental correspondence.

Drafts of the documents included here are also likely to be covered, as well as supporting documents such as e-mails discussing points arising on drafts.

It is important for IND staff to remember that under the Act it is not the nature of the document itself which will determine whether or not to release it, but the substance of the information contained within it. For an entire document to be withheld under section 35, all the relevant parts of that information must relate to the formulation or development of Government policy or Ministerial communications. It is not possible under the Act to exempt an entire document under section 35 just because one part of information may fall within its scope.

The Act does not provide a definition of what constitutes Government policy within the terms of this exemption. The exemption should, therefore, not be confined to strategic policy, such as long-term reform and could equally include decisions on responding to more immediate challenges – so long as it involves policy development or formulation. It can also apply to early ideas that are discarded as policy evolves, as well as to a policy which is ultimately agreed by either Ministers or across Government. A suggestion or advice received from a third party in the course of policy development from outside of Government can also be covered by the exemption. In many areas of IND work there is a close integration of policy-making functions with the operation of policy. Where policy development continues to be refined as a result of operational feedback, this will also be covered under this part of the exemption.

It is important when applying this part of the exemption to distinguish between the *formulation or development* of policy and the *implementation or operation* of existing policies. Particular care will be needed in deciding whether information is related to continuing policy development or is in fact related solely to the operation of the policy. It is crucial, therefore, that staff make this assessment on a case by case basis and consult with the IND Central FOI Team for advice.

2.3 Ministerial communications

The definition of Ministerial communications under the Act needs to be considered under two headings: the general definition, and Cabinet proceedings.

General Definition

The exemption under section 35 states that Ministerial communications means **any communication between**:

- (a) Ministers of the Crown,
- (b) Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) Assembly Secretaries, including the Assembly First Secretary.

The term **any communication** is important to note in this context as it shows that when applying this part of the exemption Ministerial communications are not confined to formal correspondence, but would, for instance, include records of telephone conversations, meetings and references to Ministerial discussions.

For this part of the exemption to apply, the communications in question must be between Ministers of the Crown or between Ministers of the same administration. Information relating to communications between a Minister of the Crown and Ministers of devolved administrations, do not fall within the terms of this exemption, although they may fall within other exemptions such as section 28 which covers relations within the UK. Section 8 of this IDI Chapter has further details.

Not only will the content of Ministerial communications fall within the scope of this part of the exemption, but so will information about either the fact or the content of such communications. This could include for example:

- correspondence between officials setting up a Ministerial meeting; or
- meetings at official level relating to matters to be discussed by Ministers; or
- internal correspondence such as a submission to a Minister proposing that he or she writes in certain terms to a Ministerial colleague; or
- papers prepared for discussion at Cabinet or at Cabinet Committees.

Cabinet proceedings

The exemption places a clear emphasis on the need for Ministerial communications to apply to Cabinet, committees of the Cabinet, and the two executive committees of the devolved administrations in Northern Ireland and Wales.

Cabinet government and the confidential nature of Cabinet proceedings are important and long-standing aspects of the United Kingdom's constitution and the exemption here reinforces this.

The reference to committees of Cabinet in this part of the exemption includes both standing committees and ad hoc committees. Proceedings of other meetings of Cabinet Ministers, such as, for instance, minutes of bilateral meetings could also fall within this.

Proceedings of Cabinet and other meetings covered by this part of the exemption are not confined to the formal minutes of the meetings, but include information relating to timing, agendas, memoranda and other tabled papers. Where a committee does much of its business by correspondence, this will also be covered under this part of the exemption.

2.4 **Disclosing background statistical information**

Statistical information which is used by IND officials or others to provide an informed background to decision taking is treated differently from other types of information covered by the exemption under section 35. Staff should refer to **Appendix A** for an explanation about what information may constitute statistical information. Under the wording of section 35 (2) it is made clear that ***once a decision as to Government policy has been taken***, statistical information should no longer be regarded as exempt, even if it falls under the category of formulation of Government policy or Ministerial communications. Statistical information can continue, however, to be exempt under other exemptions with the Act. In particular, it may fall to be exempt under section 36 if its disclosure meets the prejudice and inhibition tests set out by this exemption. Point 4.4 has further advice for staff on this.

The Act does not define when *a decision as to Government policy has been taken*. Where a public announcement of policy has been made, it will be clear that the conditions are likely to be fulfilled. For example, publication of a White Paper or Green paper or announcement of a policy change to Parliament would be a clear signal that a policy decision has been taken and that any statistical information no longer falls to be exempted under section 35.

There will be situations, however, where it is less clear cut to IND staff as to whether a policy decision has been actually taken, for example:

- Interim or incremental decision-making.
- Conditional or contingent decisions, and decisions which are a small part of a wider policy issue,
- Unannounced or unrecorded decisions.

If there is an interim decision necessary to proceed to the next stage of the formulation of policy, then statistical information may still fall to be captured under this exemption as this will still be an integral part of the policy development.

A decision not to proceed with a policy which has been under consideration should be regarded as a decision taken about Government policy. In such cases statistical information should not be subject to this exemption once a decision has been taken not to proceed with a policy, although again it could be the subject of other exemptions in the Act, in particular under section 36.

Making a decision about the release of statistical information will be a matter of careful judgement for staff, who should always consider the following questions:

Q. *Has the policy-making process reached a point at which the statistical information essentially becomes a part of the historical explanation?*

A. If it has then the statistical information should be disclosed unless another exemption applies.

Q. *Is the statistical information a continuing and integral part of the policy-making itself?*

A. If it is then the exemption here may continue to apply to statistical information.

Even if a decision is made not to disclose statistical information in this context, it may be that there are certain forms of statistical information which also constitute factual information and so will need further consideration in favour of disclosure when assessing the public interest balancing test. More advice about applying the public interest balancing test to factual information is contained at Point 2.5.

When considering these issues it will be important for staff to be as clear as possible about their decision-making processes. If the nature of those decisions is properly identified and recorded at the time, decisions about the application of this exemption on background statistical information are likely to be much easier to take.

2.5 **Disclosing factual information**

This exemption also creates conditions with regard to the particular public interest in the disclosure of factual information used, or intended to be used, to provide an informed background to decision-taking as far as the formulation and development of government policy is concerned. This does not apply to the consideration of the public interest test where information may be exempted due to falling within the Ministerial communications category.

In contrast with the specific conditions on disclosing statistical information, the condition on factual information refers to information *which is intended to be used* in providing an informed background to the development or formulation of policy making. There is no condition that a policy decision must have been taken as there is with the disclosure of statistical information.

There is no definition of what constitutes factual information in the Act. Advice from officials to Ministers is not covered by the term, although that advice could, and normally should, be supported by evidence which may well fall within the scope of the term of factual information. Thus a report submitted by an external body or research commissioned by a government department may be factual information. Poor quality or inaccurate factual information should be treated the same as any other factual information and will still be subject to strong disclosure arguments.

It is important to remember that factual information may still be subject to being exempted if it discloses information which is exempt under any of the other exemptions. In particular in the development or formulation of policy it may be the case that factual information could fall to be exempted under section 36.

2.6 **Public interest balancing test**

Section 35 is a qualified exemption and so it is necessary for staff to consider not just whether the requested information falls within scope of the exemption, but also to assess whether or not the public interest in withholding this information outweighs the public interest in disclosing it.

This public interest balancing test which staff are required to carry out in assessing whether the information can be withheld under this exemption may prove to be particularly difficult. A fine balance needs to be struck between protecting the space within which Ministers are advised and policy is formulated and disclosing sufficient information to allow informed public debate about important issues.

The public interest considerations common to all categories are therefore considered first followed by particular considerations for factual information and Ministerial communications.

General public interest considerations in favour of disclosure

Considerations which may weigh in favour of a decision to disclose in respect of information which is covered by the formulation of Government policy and Ministerial communication, include:

- the general public interest in disclosure;
- greater transparency makes Government more accountable to the electorate and increases trust;
- as knowledge of the way Government works increases, the public contribution to the policy making process could become more effective and broadly-based;
- the public interest in being able to assess the quality of advice being given to ministers and subsequent decision making;
- the greater the impact on the country or on public spending the greater the public interest may be in the decision making process being transparent.

These considerations will need to be examined on a case by case basis and not all of them will apply to every request for information which falls under this exemption.

General public interest considerations in favour of non-disclosure

Considerations which may weigh against a decision to disclose information in respect of information which is covered by the formulation of Government policy and Ministerial communication include:

- good Government depends on good decision making and this needs to be based on the best advice available and a full consideration of all the options;
- advice should be broad based and there may be a deterrent effect on external experts or stakeholders who might be reluctant to provide advice because it might be disclosed;
- the impartiality of the civil service might be undermined if advice was routinely made public as there is a risk that officials could come under political pressure not to challenge ideas in the formulation of policy, thus leading to poorer decision making;

- Ministers and officials also need to be able to conduct rigorous and candid risk assessments of their policies and programmes including considerations of the pros and cons without there being premature disclosure which might close off better options;
- there needs to be a free space in which it is possible to ‘think the unthinkable’ and use imagination, without the fear that policy proposals will be held up to ridicule;
- the factual information in the public domain (discussed at point 2.7, may be sufficient to demonstrate that appropriate factors are or have been taken into account;
- disclosure of interdepartmental consideration and communications between ministers may undermine the collective responsibility of the Government.

Again, these considerations will need to be examined on a case by case basis and not all of them will apply to every request for information which falls under this exemption.

2.7 Applying the public interest balancing test to factual information

Point 2.5 explained that the exemption under section 35 creates special conditions for assessing the public interest in withholding information which could be classified as factual background information if it relates to the formulation or development of policy. These conditions do not apply to the factual information used as a background to decision taking covered in any Ministerial communications.

Staff will need to apply clear evidence to demonstrate that disclosure of factual information would be contrary to the public interest. If it is considered not to be in the public interest to release such factual information it is likely to be for one of two reasons:

- Because the information is exempt under one of the other sections of the Act, as well as under the part of the exemption here relating to the formulation or development of Government policy.
- Because the factual information is so intimately integrated in the advice that it forms part of the argument, rather than informed background to the decision-making. This may particularly be the case in relation to information created before the passage of the Act, when the distinction was less relevant. In the future, advice to Ministers will be constructed using a new Home Office submission template so that it is possible to identify clearly relevant background factual information and the likelihood of its disclosure.

2.8 Ministerial communications and particular considerations in assessing the public interest balancing test

As well as the general public interest considerations outlined in point 2.6, there may also be some specific factors which weigh in favour of a decision to disclose information relating to Ministerial communications. These include:

- The decisions that ministers make have a significant impact on the lives of citizens and there is a public interest in their deliberations being transparent;

- It is no secret that there can be differences between Ministers – disclosure would merely confirm that decisions are made after healthy debate.

However, there are also a number of significant considerations (as well as the general consideration outlined at point 2.6) which may weigh against a decision to disclose information when assessing the public interest, including:

- Collective responsibility is a constitutional convention which is described in the ministerial code. If ministers feel inhibited from being frank and candid with one another because of the risk of subsequent disclosure, the quality of debate lying behind the collective decision will be diminished.
- Ultimate responsibility for government decisions lies in the Cabinet. Collective responsibility seeks to ensure that decisions do not become personalised.

All of these factors both for and against disclosure must be weighed up on a case by case basis.

Using a neither confirm nor deny answer

Section 35(3) provides for an exemption to the duty to confirm in relation to information which is (or if it were held by the public authority would be) exempt information under s35(1).

But reliance on this exemption from the duty to confirm is also subject to the public interest test balance and it must be the case that the public interest was in favour of not revealing whether to confirm or deny that the information was held. The public interest balance also requires here that particular considerations are made when considering disclosure of factual information. A standard template for IND Directorates to adapt for their own use when adopting a neither confirm nor deny answer can be found attached at **Appendix B** entitled: '***Standard template letter for use to an applicant where the duty to confirm has been exempted and a neither confirm nor deny response is engaged.***'

2.9 Applying the exemption

Where staff have decided to apply this exemption and not to communicate the information requested, there will still be another separate public interest assessment to be made. This will involve considering whether confirmation or denial in response to an applicant's request would, in itself, involve supplying information to the applicant to which this exemption applies.

If staff decide that confirming or denying whether the information is held by IND **would not** disclose any of the information being exempted under section 35(1), a reply should be sent to the applicant adapting the standard template at **Appendix B** entitled: '***Applying an exemption under section 35 where the duty to communicate has been exempted***'.

3. Duration of the exemption and papers belonging to previous administrations

The public interest in withholding information under this exemption is likely to diminish with the passage of time. In any case, the exemption cannot be used if the

information is in a document or file over 30 years old, although it is of course possible that information contained in the classes of records covered by the exemption here will be exempt for longer than 30 years under a different exemption.

There is an important interaction here with the long-standing convention that governments are not permitted to see Ministers' papers of a previous administration of a different political persuasion. The purpose of this convention is the same as that on collective responsibility: to give Ministers and their officials a secure space in which to develop and document their thinking on policy options. In this case, the particular danger which the convention guards against is the risk of exposing Ministers to improper political attacks by their opponents in the future. Requests for papers of a previous administration (within the 30-year period) should therefore be considered on the same public interest principles as papers of the current administration.

To ensure consistency, such requests received in IND should be referred to the IND Central FOI Team who will refer these on to the DCA. The Attorney-General will handle those cases requiring Ministerial intervention.

Any decision to release information requested relating to decisions made by Ministers from previous administrations of a different political persuasion than the current one should lie with the Permanent Secretary and not current Ministers in order to ensure this convention is not breached.

3.1 Consultation with other bodies

Given the wide range of the information covered by this exemption, there are potentially a number of bodies that should be consulted when considering whether it should be applied.

Where a request is received for information relating to information about the formulation and development of policy, this should be referred to the Department with lead responsibility for the policy even if IND holds some of the information requested. Similarly, requests for information which relates to communications between Ministers should be referred to all the departments whose Ministers were party to the communications.

Where disclosure of requested information would affect the interests of a third party outside of Government, the views of the third party should be sought if possible, to ensure that adequate consideration is given to those interests, and to avoid the effect possible disclosure may have on their future co-operation with the Department.

If the request relates to sensitive or high profile information staff should consult immediately with the IND Central FOI Team and the Chief of Staff Office for further advice.

3.2 Relationship with other exemptions

When considering withholding information under this exemption, it is likely that almost any of the other exemptions contained in the Act may also be relevant. If there is uncertainty about how far the information requested relates to either the formulation of government policy or ministerial communications, then staff should also give consideration as to whether or not it may fall under one of the other exemptions. As has already been noted there is a particularly close relationship between all of section 35 and section 36

Information which falls within section 35 may also fall within:

- The exemption in section 21 on information available elsewhere.
- The exemption in section 22 on information which it is planned to publish in the future (for example where a department has been developing a White Paper).

Section 6 of this IDI Chapter for further details on applying these exemptions.

So far as the content of the information is concerned, staff should be alert to the possibility that it may be covered by the following exemptions in:

- Section 27 on international relations.
- Section 28 on relations within the United Kingdom.
- Section 31 in particular in relation to 31 (1) (e) and prejudice to the operation of the system of immigration control.
- Section 40 on personal data.

Sections 8,9 and 13 of this IDI Chapter have further details on applying these respective exemptions.

4. EXEMPTING INFORMATION WHERE DISCLOSURE MAY PREJUDICE THE EFFECTIVE CONDUCT OF PUBLIC AFFAIRS

4.1 Background

The exemption under section 36 of the Act is, like that under section 35, central to protecting the delivery of effective central government. It is both a prejudice and qualified exemption. This means that the disclosure of information must have certain harmful effects, and even where this is established the exemption can only be applied if the public interest considerations in not releasing the information requested outweigh the public interest considerations in favour of disclosing the information.

Point 1 of this guide makes clear that if requested information held by IND might fall to be exempt under section 36, a judgement should first be made by staff as to whether or not the information is exempt under section 35. If it is not, then section 36 may be applied to the information requested.

Point 1 also explains that this exemption can only be applied if a Home Office Minister authorises its use. The only exceptions to this is in respect of statistical information (see point 4.4 for further details) and information relating to previous administrations of a different political party than the current administration. All IND Directorates will need to exercise the utmost caution in using this exemption in order to protect the work-loads of Ministers. It should be used only in circumstances where no other exemptions apply to the information requested, and also where IND Directorates are of the opinion that a disclosure would result in significant harm to the effective conduct of IND's affairs.

In order for a Home Office Minister to authorise the use of this exemption, their decision must be based on all the available evidence and must take into account relevant factors and the particular circumstances of the case. It is extremely important, therefore, that staff document thoroughly the reasons why information falls within section 36 when they seek the opinion and approval of a Home Office Minister for application of the exemption.

Ministerial agreement and authorisation to apply this exemption does not require the issuing of a ministerial certificate. However, the application of an exemption must clearly be documented by both IND and the relevant Minister's Private Office and the submission must be drawn up in conjunction with the IND Central FOI Team.

Any IND Directorates who believe that they need to apply section 36 to the information requested should ensure that this has been authorised at Grade 7/Assistant Director level or above and should immediately contact the IND Central FOI Team.

4.2 Key elements of the exemption

The key elements of this exemption which IND staff need to be aware of are reproduced here from the Act as follows:

36 (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

4.3 Scope of the exemption

Information falls within the terms of the exemption under section 36(2)(a)(i) if its disclosure would, or would be likely to, prejudice the maintenance of the ***convention of the collective responsibility of Ministers of the Crown***.

The convention of collective responsibility is a constitutional convention of long standing. It means that decisions of the Government are just that – decisions of the Government and not of individual Departments/individual members of the Cabinet. The maintenance of this convention is fundamental to the continued effectiveness of Cabinet government. The public interest in maintaining it is recognised by its inclusion not only in this exemption but also in the special provision made by the exemption in section 35 (see point 2.3) for the protection of information relating to Cabinet proceedings themselves.

Information will fall within this exemption if its disclosure would or would be likely to cause some harm or prejudice to the convention described above. Staff will therefore

need to consider what effect disclosure of information would have on the maintenance of collective responsibility. For example:

- Would it reduce confidence in or the effectiveness of a final decision taken by ministers?
- Would it make it less likely that decisions will be taken collectively?
- Would it inhibit discussions between Ministers?
- Would it make it more difficult for Ministers and departments to act collaboratively and cohesively?
- Would it, by revealing differences in opinion within Government increase the extent to which some individual ministers can be held responsible for Government decisions (and reduce it for others)?
- Would it encourage the exploitation of differences of opinion for political or personal purposes?

The sort of information most likely to come within this part of the exemption would be that which revealed the positions which individual Ministers had taken or continued to take on issues of Government policy. Information about which Ministers were personally involved in a particular decision is also likely to engage the exemption. For example, it may be relevant to correspondence between IND officials reporting on their Ministers' views on individual policy questions, or submissions to Ministers from their officials reporting the views of other Ministers.

Free and frank provision of advice, or exchange of views for the purposes of deliberation

Information is exempted under section 36(2)(b) if its disclosure would, or would be likely to inhibit:

- **the free and frank provision of advice or**
- **the free and frank exchange of views for the purposes of deliberation.**

The inclusion of these terms in the Act explicitly recognises the role free and frank discussion plays in effective Government. '**Provision of advice**' may be internal (for example the provision of advice by IND officials to Home Office ministers), or external – IND either receiving advice from outside or itself providing advice to third parties. The term '**exchange of views**' is limited only by being '**for the purposes of deliberation**' and could include the processes of decision-making, opinion forming or evaluation made by IND officials, but is likely to exclude very casual or trivial exchanges.

It will not be enough here for staff to decide that disclosure would result in someone's temporary embarrassment and so apply the exemption. Staff must consider, in respect of each request for information, what effect disclosure would have on the provision of advice or the exchange of views. For example:

- Would it make it more likely that the person or any other offering advice will be unwilling to do so in future?
- Would it inhibit that person or any other from offering unwelcome advice?

- Would it make it more likely that the person being advised will not ask for advice in future?
- Would it have a similar inhibiting effect on other people in future?
- Would it make it more likely that advice will be given that is materially different because of the possibility of disclosure?
- Will it make people less likely to engage in discussion (oral or written) as part of the deliberative process?
- Would it distort or restrain that discussion?
- Would it result in pressure being brought to bear on officials to provide particular advice?

When seeking to apply this part of the exemption there will be a number of issues for IND staff around where information might be found to contain the provision of advice and exchange of views which could have a potential inhibiting effect if disclosed. Such information could, for example, be found in: formal minutes, submissions, recorded in the minutes of a meeting, or even through an indirect reference.

The information need not even refer to the provision of advice or an exchange of views. It is the effect of disclosure which triggers the application of this exemption. The provision of advice and the exchange of views protected by this exemption is not limited to that given by officials to Ministers but includes advice and discussion which takes place at official level and within public authorities outside Central Government Departments.

It is important to note that this part of the exemption will be applicable to other areas of advice which Ministers receive and officials provide in addition to the formulation or development of policy (which will usually be covered by section 35). IND, for example has extensive management, delivery and operational functions and important decisions have to be taken in the performance of those functions by Ministers. These decisions will be informed by advice received from officials and third parties and so could be subject to the exemption here if they are likely to be significantly inhibited by disclosure.

The effective conduct of public affairs

Information can also be withheld under section 36(2)(c) if it would, or would be likely to ***prejudice the effective conduct of public affairs***. This element of the exemption deals with situations **other** than those outlined above relating to collective responsibility, free and frank provision of advice, or exchange of views for the purpose of deliberation. It is broadly expressed to ensure that information can be withheld if it is in the interests of good government. Due to the broad nature of this part of the exemption, a clear explanation will have to be given by staff in any case in which this is relied upon. Crucially, staff must show how the conduct of public affairs would be prejudiced by disclosure in order for the exemption to fall within the scope of the exemption.

4.4 Statistical information

Like the exemption under section 35 (see point 2.4), section 36 creates particular conditions for the disclosure of statistical information. Guidance as to the meaning of statistical information is provided in **Appendix A**.

In relation to statistical information there is no need for Home Office Ministers to become involved in the decision-making process and to conclude that in their reasonable opinion prejudice would be caused. The test as to whether or not to exempt statistical information becomes one which can be carried out by officials in the same way as they carry out the application of other exemptions under the Act.

The scope of this provision in relation to statistical information is potentially wide-ranging. Even where statistical information may cease to be exempt information under section 35 (see point 2.4) it may fall to be exempt under section 36, if its disclosure meets the prejudice and inhibition tests in this section.

4.5 **Public interest balancing test**

The need for each non-disclosure, aside from statistical information, to be authorised by a Home Office Minister can be taken as an indication that reliance on this exemption by staff to withhold information requires a particularly high threshold to be reached. In most cases where the effective conduct of public affairs would be likely to suffer as a result of the disclosure of information, those circumstances are more likely to be addressed under another separate exemption in the Act. Ministers accepted during the debates on the Bill that one of the purposes of section 36 was to provide for individual situations which had not yet been envisaged but where it became clear, on the facts, that disclosure might not be in the public interest.

In weighing the competing public interests in order to determine whether information ought to be disclosed, it will be necessary for staff to consider the extent of the harm caused to the relevant interest against the background of the general public interests set out here. Where there is no more than minimal prejudice or harm caused or likely to be caused by disclosure of the information in question, the public interest is more likely to come down in favour of disclosure.

The following considerations, dependent on the specific facts of the case, which may weigh in favour of disclosure include:

- open policy making may lead to increased trust and engagement between citizens and government;
- the desirability of citizens being confident that decisions are taken on the basis of the best available information;
- knowledge that the arguments relating to a debate will be disclosable will in fact improve the quality of those arguments. Far from inhibiting the frank provision of advice, there might be circumstances where the prospect of disclosure would enhance the quality of advice;
- the response to new policy initiatives may improve, and government generally become 'better';
- more open policy making can result in better policy formulation. A wider range of views and opinions, including expert knowledge, is canvassed;
- as knowledge of the way government works increases, public contribution to the policy making process could become more effective and broadly-based, rather than being limited to a possibly unrepresentative minority who 'know their way around';
- the public interest in knowing that Ministers are adhering to the Code which regulates their conduct.

- the information would expose wrongdoing on the part of government;
- the information would demonstrate that wrongdoing had been effectively dealt with;
- the substance of the information may relate closely to a matter of public importance about which public debate could be informed by its disclosure.

Considerations which may weigh in favour of withholding information, dependent on the specific facts of the case, include:

- Ministers and their officials need space in which to develop their thinking and explore options in communications and discussions with other Ministers;
- There needs to be a free space in which it is possible to 'think the unthinkable' and use imagination, without the fear that policy proposals will be held up to ridicule;
- Ministers and their officials need to be able to think through all the implications of particular options. In particular, they need to be able to undertake rigorous and candid assessments of the risks to particular programmes and projects;
- Premature disclosure of preliminary thinking may end up closing off better options because of adverse public reaction;
- Disclosure of the process of interdepartmental consideration may undermine the collective responsibility of the Government;
- The decision-making process may not be properly recorded to avoid creating information which is disclosable;
- Appropriate expert advice is not sought because of the reluctance of those who might supply it to engage in a debate where their contribution might be disclosable.

4.6 Applying the exemption

Where IND Directorates wish to obtain Ministerial consideration of applying the exemption here and recommend that the Department should not to communicate the information requested, there will still be another separate public interest and prejudice assessment to be made. This will involve considering whether confirmation or denial in response to an applicant's request would, in itself, involve supplying information to the applicant to which this exemption applies.

If staff recommend in their submission to the Minister that confirming or denying whether the information is held by the Department **would not** disclose any of the information being exempted under section 36(2), the submission drawn up by the IND Central FOI Team and IND Directorate concerned will include a draft reply to be sent to the applicant by the Minister along these lines.

Use of a neither confirm nor deny response

If it is decided, however, by staff to recommend in their submission to a Minister that confirming or denying whether the information is held in IND in response to an applicant would in itself disclose the information being exempted under section 36 (2), then a neither confirm nor deny (NCND) answer can be used in response to the

applicant citing section 36 (3) of the Act. But reliance on this exemption from the duty to confirm is also subject to the public interest test balance and it must be the case that the public interest was in favour of not revealing whether to confirm or deny that the information was held.

4.7 Duration of the exemption

Information which is exempted here by virtue of the application of section 36 ceases to be exempt under the Act when it becomes a historical record, that is 30 years after it, or the most recent paper on the file in which it is contained, was created. The use of 'neither confirm nor deny' also ceases to be exempted under section 36 once they become historical records. This does not mean, however, that there may not be other exemptions which continue in force.

Even before the information becomes a historical record, the prejudice caused by its disclosure is likely to reduce with time. This should always be a factor to be taken into consideration by staff when deciding whether or not the information is exempt. A timespan of two administrations (that is Governments of different political parties) is a good rule of thumb about whether information held by central Government is likely still to be sufficiently sensitive that its disclosure would have the effects referred to in the exemption here.

APPENDIX A

GUIDANCE AS TO THE MEANING OF STATISTICAL INFORMATION

The Act gives no formal definition of statistical information. The National Statistics Code of Practice sets out a best practice framework for standards for official statistics. Information produced to the standards in this Code is in every case statistical information for the purposes of section 35. A distinguishing feature of statistical information is that it is founded to at least some degree on accepted scientific or mathematical principles. Statistical information is therefore distinguished by being:

- i) derived from some recorded or repeatable *methodology*, and
- ii) qualified by some explicit or implied measures of *quality*, *integrity*, and *relevance*.

However, *any* statistical information used to provide background to decision taking, regardless of the content or quality of that information, or the methods used to collect it, is also likely to constitute statistical information and be subject to the disclosure issues outlined in points 2.4 and 4.4.

Policy papers prepared by officials and Ministerial communications may contain headline statistical information, but are less likely to contain all the available methodology and qualifications that support the statistics, nor the underlying observations or facts from which the statistics are derived. Therefore it is good practice when producing such papers and communications to include a footnote or annex containing an outline of the statistical methodology, any available qualifications of quality, relevance and integrity, and the source of the underlying observations or facts. When the headline statistical information is disclosed to an applicant, the footnote or annex should be disclosed simultaneously.

CHAPTER 25
SECTION 11STANDARD LETTER TEMPLATESSTANDARD TEMPLATE FOR APPLYING AN EXEMPTION UNDER SECTION 35 WHERE
THE DUTY TO COMMUNICATE HAS BEEN EXEMPTED

[Insert details of relevant Directorate address here]

Our Ref
Your Ref

Date

Dear [enter applicant name here],

Thank you for your *letter/fax/email* [delete as appropriate] of [insert date of letter from applicant] where you have requested information about [insert type of information requested by the applicant]. This falls to be dealt with under the Freedom of Information Act 2000.

I can confirm that this information is held by *IND/IND Directorate* [delete and/or insert relevant Directorate name as appropriate].

I have decided, however, not to communicate this information to you pursuant to the exemption under section 35 (1)(a)/35(1)(b) [delete as appropriate 35 1 (a) to be used if information exempted because it relates to the formulation or development of government policy/ 35 1(b) to be used if the information exempted relates to Ministerial communications] of the Freedom of Information Act 2000. This allows us to exempt information if it relates to *the formulation or development of Government policy/Ministerial communications* [delete as appropriate]. The information being exempted here clearly falls into this category [IND Directorates need to give reasons why the exemption applies]

The use of this exemption requires us to consider whether in all the circumstances of the case the public interest in maintaining the exemption stated above outweighs the public interest in disclosing the information.

We have considered the public interest there may be in the circumstances of this case in disclosing the information to you. There may be a public interest in [IND Directorates to insert the public interest test argument in favour of disclosure on particular request. See points 2.6-2.8 for details]

We have also considered the public interest there may be in maintaining the exemption to the duty to communicate. **[IND Directorates to insert the public interest considerations against disclosure on particular request. See points 2.6-2.8 for details]**

We have considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. We have concluded that the balance of the public interests identified lies in favour of maintaining the exemption **[IND Directorates need to insert reasons for concluding that the arguments for withholding the information requested outweighs the arguments for disclosure]**.

[If a policy decision has been taken and statistical information is to be disclosed IND Directorates should use the following: *Under section 35 (2) of the Freedom of Information Act 2000 we are also required to disclose any statistical information where a decision as to Government policy has been taken. We are therefore disclosing the following information....*]

We have also considered under section 35 (4) the particular public interest in the disclosure of factual information to an informed background to decision-taking and have decided *to disclose the following information to you:/to also withhold information this for the following reasons [delete as appropriate] . [If IND Directorates decide to withhold factual information they should state clearly the reasons why they have done this with reference to point 2.5 above and the arguments against disclosure]*.

If you are dissatisfied with this response you may request an independent internal review of our decision to turn your request down. During the independent review the department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. An internal review can be requested by submitting your complaint to:

IND Complaints Unit
11th Floor, West Wing
Block 'C'
Whitgift Centre
Wellesley Road
Croydon
CR9 1AT

Should you remain dissatisfied after this internal review, you will have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely,

[Signature of staff member]

[Insert full name of IND staff member dealing with request]

[Insert IND Directorate]

Dec/04

IMMIGRATION DIRECTORATES' INSTRUCTIONS

STANDARD TEMPLATE LETTER FOR USE TO AN APPLICANT WHERE THE DUTY TO CONFIRM HAS BEEN EXEMPTED AND A NEITHER CONFIRM NOR DENY RESPONSE IS ENGAGED.

[Insert details of relevant Directorate address here]

Our Ref:

Your Ref:
Date

Dear **[insert name of applicant]**,

Thank you for *your letter/fax/email* **[delete as appropriate]** of **[insert date of letter from applicant]** where you have requested information about **[insert type of information requested by the applicant]**. This falls to be dealt with under the Freedom of Information Act 2000.

I have considered your request carefully and have decided that we are not obliged to inform you whether the IND holds the information of the description specified in your request.

We are not obliged to inform you whether or not the requested information is held pursuant to section 35 (3) of the Freedom of Information Act 2000 which exempts information which relates to the formulation of government policy, etc. **[IND Directorates to insert under which part of 35 (1) information being withheld e.g 35 1 (a) to be used if information exempted because it relates to the formulation or development of government policy/ 35 1(b) to be used if the information exempted relates to Ministerial communications]**

[IND Directorate to insert explanation for using the exemption under section 35 to the extent this is possible without disclosing exempt information.]

[IND Directorate give reasons for the public interest balancing test concluding that the public interest in the maintenance of the exemption outweighs the public interest in disclosing – to the extent this is possible without disclosing exempt information.]

You should not infer from this response that the information you request is or is not held.

If you are dissatisfied with this response you may request an independent internal review of our decision to turn your request down. During the independent review the department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. An internal review can be requested by submitting your complaint to:

IND Complaints Unit
11th Floor, West Wing
Block 'C'
Whitgift Centre
Wellesley Road
Croydon
CR9 1AT

Should you remain dissatisfied after this internal review, you will have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely,

[Signature of staff member]

[Insert full name of IND staff member dealing with request]

[Insert IND Directorate]