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**CHAPTER 25  
SECTION 5**

**INTRODUCTION TO SUBSTANTIVE EXEMPTIONS  
UNDER THE FREEDOM OF INFORMATION ACT 2000**

**1. BACKGROUND**

**1.1. Limitations to access rights**

The Freedom of Information Act 2000 ("the Act") creates two important legally enforceable rights of access for any person making a request for information to a public authority such as the Home Office:

- 1) the right to be informed in writing whether the public authority holds the information requested (referred to throughout as "***the duty to confirm***");  
**and**
- 2) if that is the case, the right to have that information communicated by the public authority to them (referred to throughout as "***the duty to communicate***").

These are referred to collectively as the "***rights of access***" and IND must consider these two duties whenever a request for information is received.

Anyone whose request for information is refused or ignored has the right to ask the Department to review that decision and may go on to refer the matter to the Information Commissioner. Penalties may also be applied to both the Department and individual officials in IND who withhold information from the public domain unlawfully. It is therefore important, as Section 1 of this IDI Chapter makes clear, that staff follow this guidance at all times when considering the application of a substantive exemption. If staff do this, then they will not be held personally responsible if the Department is found to be in breach of the Act.

This Section explains how the substantive exemptions within the Act place limits on the rights of access to information in respect of certain categories of information requested by applicants.

Section 4 of this IDI Chapter explains the procedural grounds contained in Part I of the Act which allow for refusal of certain types of requests (vexatious, repeated, above £600 cost limit).

It is important that staff refer to Section 4 when making an initial assessment about whether they should withhold or disclose requested information. This is so that all procedural grounds are considered when refusing a request, as well as the substantive exemptions. As part of the Home Office, IND is able to limit the release of requested information:

- solely on procedural grounds; or
- solely due to the use of substantive exemptions, or
- by applying a mixture of both procedural and substantive mechanisms.

## 1.2. Scope of the substantive exemptions

Part II of the Act contains a total of 23 exemptions from the rights of access. The table at **Annex F** lists all of the exemptions covered by the Act. It is important to note the nature and feature of each exemption as well as the areas of information it covers. All of these exemptions can be applied by Government officials, with the exception of the exemption under section 36 of the Act which for IND staff requires authorisation from a Home Office Minister.

The table at **Annex F** also demonstrates the many different ways in which each exemption operates. Staff will need to consider the following factors when applying individual exemptions:

- Whether the exemption is absolute or qualified.
- If it is qualified whether it is limited to a particular prejudice test.
- The length of time which information may be withheld under the exemptions.
- Any parts of IND, other Government Departments or outside bodies who should be consulted when considering applying an exemption.
  - Who to contact in the IND Central FOI Team for further specialist advice when seeking to apply a particular exemption.

The exemptions under section 39 and section 40 of the Act do not have the effect of preventing or limiting disclosure; instead they operate by diverting a request for information through a different information access regime. A request received from an applicant, for example, which asks for their personal data is diverted through the exemption under section 40 (1) to be dealt with under the Data Protection Act 1998. Requests relating to environmental information are diverted through the exemption under section 39 and need to be dealt with under the Environmental Information Regulations 2004.

## 1.3. Key issues for staff when considering the use of substantive exemptions

IND is tasked with serving the public interest in very many different forms, not all of which are compatible with public access to some of the information which is held by the organisation. It is likely, therefore, that staff will have to consider on a regular basis the need to apply the substantive exemptions when responding to non-routine requests for information. Section 2 of this IDI Chapter provides further details on the characteristics of a non-routine request. As soon as it is identified that requested information may fall under an exemption, the template at **Annex B** entitled: *“Notifying receipt of non routine requests to the IND Central FOI Team”* must be completed and returned by fax to the IND Central FOI Team. Alternatively, it can be sent by email to the following Poise address on the Home Office global address list: Freedom of Information Team (IND).

A decision to use any of the substantive exemptions within the Act must be based on a proper analysis of all the circumstances of a given case, and should draw on concrete evidence where this may be available. Staff should bear in mind that the Act deals with requests for information and not documents, so exemptions can only be applied where the information contained in the document itself falls within the

scope of any of the exemptions. This means that staff will have to assess each distinctive piece of information contained in a document on its own merits to establish whether the information may fall to be withheld under a particular substantive exemption within the Act.

Any decision to refuse a request for disclosure and apply an exemption should be made in accordance with this guidance and the individual guidance on exemptions contained in Sections 6-13. Section 2 of this IDI Chapter makes clear that IND Directorates should ensure that authorisation of exemptions in a response to an applicant should always take place at Grade 7 or Assistant Director level within an IND Directorate. It also explains that the IND Central FOI Team should approve the use of all exemptions by IND Directorates before a final response is sent to an applicant. This is to ensure that there is a consistency of approach across IND when dealing with requests, and to assist staff with the correct application of often technically complex exemptions. The only exception to the need to seek approval from the IND Central FOI Team is when the exemption under section 21 or 40 of the Act is applied. This is because this exemption will involve a relatively straightforward decision for staff to establish whether the information requested is accessible to the applicant by other means or if it relates to personal information requested by a third party.

Advice should be obtained immediately from the IND Central FOI Team (relevant contacts are listed in **Annex F**) where issues may arise in relation to the application of individual exemptions which are not covered in this guidance or Sections 6-13 of this IDI Chapter. Advice should be sought from the IND Central FOI Team by staff where:

- a Freedom of Information Specialist within the IND Directorate is not able to provide any advice; or
- any of the central units which may have been set up in certain IND Directorates to handle such requests may not be able to provide advice; or
- the decision-making process in a given case proves difficult or complex, or
- the request seems to raise unprecedented issues not covered by this guidance.

Where advice is sought from the IND Central FOI Team, it will be helpful if the IND Directorate preparing the response has gathered together all of the relevant information requested by the applicant. Early identification should also be made, before contacting the team, of which information can be disclosed to the applicant. This will enable the IND Central FOI Team to make a focused assessment, if this is required, on whether certain parts of information may fall within the scope of any of the exemptions.

Special consideration may also need to be given where a request is received for information which may relate to IND's commercial interests or those of a third party who is contracting for IND services. Where such a request is received in an IND Directorate which has procurement or commercial expertise in dealing with such cases, it should be replied to accordingly by that Directorate. However, there may be occasions where staff in an IND Directorate receive a request for information relating to commercial issues, and there is no expertise within that IND Directorate for dealing with such requests. Staff should not answer such requests without seeking further advice as they may not be able to identify the potential damage in disclosing or withholding commercial material held within IND. Instead, they should refer the request immediately to their relevant Freedom of Information Specialist. If the

specialist has no knowledge or expertise in this area and is unsure how the case should be handled, then the request should be immediately referred to the IND Central FOI Team by fax. A short covering note should be provided from the IND Directorate and member of staff concerned entitled "*Further information required on possible commercial request*". Section 2 of this IDI Chapter also has further advice for staff on identifying such a request.

#### 1.4. Further guidance

Further details of the individual exemptions most likely to be used by IND staff can be found in Sections 6-13 of this Chapter. The content of this Section and Sections 6-13 of this IDI Chapter which cover individual exemptions will be subject to change in the light of the experience of operating the Act, and any decisions made by Ministers, the Information Commissioner, the Information Tribunal or the courts. Staff will be notified in advance where any changes are due to take place.

Sections 6-13 only cover those exemptions in the Act which are most likely to be considered and ultimately applied by IND. If staff require further guidance on applying any of those exemptions which are not covered in Sections 6-13 of this IDI Chapter then they should consult the DCA website at the following address (<http://www.dca.gov.uk/foi/guidance/exguide/index.htm>).

Guidance can be found here for Government officials on applying each individual exemption contained in the Act and if this is followed and the IND Central FOI Team approves their application then staff and IND Directorates will not be breaching any of their obligations under the Act and will receive the full support of the Department in the event of being challenged. Where staff require further information on the scope of the exemptions not covered in Section 6-13, they can also contact the IND Central FOI Team as listed in **Annex F**.

## 2. ABSOLUTE EXEMPTIONS

The **absolute** exemptions are listed below under the relevant section of the Act:

- section 21 - Information accessible by other means
- section 23 - Information supplied by, or related to, bodies dealing with
- security matters
- section 32 - Court Records
- section 34 - Parliamentary Privilege
- section 40: Personal Information (subject to certain qualifications – see the IDI Chapter 24 '*Disclosing personal information*' for further details)
- section 41 - Information provided in Confidence
- section 44 - Prohibitions on disclosure

If the requested information which is held by IND falls within the terms of any of the absolute exemptions listed, then it does not have to be released under the Act. When applying an absolute exemption staff should explain clearly and promptly (within the twenty working days of receipt of the request) the reasons why the information cannot

be made available. Staff are not required, however, to carry out a separate public interest balancing test to justify the use of an absolute exemption.

There may be some occasions (particularly when dealing with issues of national security) where it may not even be appropriate for staff to explain to an applicant why a particular exemption may apply because to do so would, of itself, involve the disclosure of exempt information. This may happen where use is being made of a neither confirm nor deny answer in response to the applicant as a result of the duty to confirm being exempted. Point 5.1 contains further details for staff on how to respond to an applicant when this is the case.

### 3. QUALIFIED EXEMPTIONS AND ASSESSING THE PUBLIC INTEREST BALANCING TEST

#### 3.1. Qualified exemptions

When seeking to apply any of the **qualified** exemptions listed at **Annex F**, staff must not only consider whether the exemption actually applies to the requested information held by IND, but must also always assess the public interest balancing test to see if the information can be withheld. This assessment must be a separate and distinct decision from whether the information held and requested in IND falls within the scope of a qualified exemption.

It is always necessary when considering the application of a qualified exemption to go on to assess, in all the circumstances of the case, whether the public interest in maintaining the exemption to the duty to confirm and/or the duty to communicate outweighs the public interest in confirming and/or communicating. The central question which staff must consider when deciding whether to apply a qualified exemption to a request for information is: ***does the public interest in withholding the information outweigh the public interest in disclosing the information?***

If it does not then even if the information held by IND falls within the scope of a qualified exemption, it must still be disclosed to the applicant.

#### 3.2. The public interest balancing test

The starting point for IND staff when considering the balance of the public interest test is that the Act establishes an overall public interest in disclosure of information held by Government Departments. In contrast, there is no general overall public interest in Government Departments withholding information.

If the public interest in withholding the information outweighs the public interest in disclosure, the applicant does not have a right of access to this information under the Act. If the arguments are evenly balanced, then the outcome should be disclosure.

This right to know must, however, be balanced against the need to facilitate effective governance by Departments, and in IND's case the need to ensure that the integrity of the UK's system of immigration control is not compromised must always be considered.

A decision to withhold or release information under one of the qualified exemptions will always require staff to carry out a careful balancing act in terms of where the public interest may lie. The decisions on the release or withholding of information

should always be made on a **case by case basis**.

The assessment of the public interest is also a judgement in which policy and legal interpretations are both required to be made in some degree by staff. The public interest test is not a fixed concept and will be subject to change, often over short periods of time. To disclose a piece of information before or shortly after a policy decision is made may, for example, place it within the terms of the exemption relating to the formulation of government policy (under section 35). But as the information itself gets older, the public interest in non-disclosure will not remain indefinitely.

The law and practice of the public interest balancing test will develop as the Act beds in and decisions are made by the Government, by the Information Commissioner, the Information Tribunal and, ultimately, the courts.

Section 3 of this IDI Chapter explains that applicants can also challenge IND's determination of a decision to withhold information, and this may often occur on the grounds that the balance of the public interest falls in favour of disclosure in respect of their information request. The Department has established an independent internal review process to deal with such challenges, but if the information is still withheld after that review has finished, the applicant can then ask the Information Commissioner to investigate the Department's decision. It is crucial, therefore, that IND staff who decide to apply a qualified exemption conduct a transparent and fully audited assessment of all aspects of their decision, so they have robust grounds on which to defend a non-disclosure decision.

### 3.3. **Prejudice based exemptions**

The table at Annex F demonstrates that several qualified exemptions also turn on the effect or likely effect of the disclosure of the information being requested. These exemptions provide that information is exempt if its disclosure would, or would be likely to, ***prejudice*** certain crucial functions of Government. Prejudice based exemptions require that the nature of prejudice or its likelihood is assessed as part of the decision to apply the exemption. This assessment is separate to and distinct from the public interest balancing test which must be carried out.

There are two issues that always need to be considered when assessing whether prejudice-based exemptions are applicable to the information held by IND and requested by the applicant. Firstly, it is necessary to establish the nature of the prejudice (or other stated harm) that might result from disclosure of the information requested. Secondly, if prejudice (or harm) is not certain from actual disclosure, the *likelihood* of it occurring from potential disclosure can also be assessed. Information cannot be deemed to be prejudicial and withheld simply because it is felt its release would embarrass the Department, Ministers or officials.

### 3.4. **Extending time limits when assessing the public interest balancing test**

The Act places an obligation on IND to reply promptly to requests. It sets a maximum time limit of responding to applicants within 20 working days of their request being first received in either IND or the Home Office. This 20 day target is not stopped or reset just because the request have initially been sent to the incorrect part of the Home Office or IND Directorate for providing an answer.

If the information requested falls within the terms of a qualified exemption and staff require additional time in order to properly conduct the public interest balancing test, the time for complying with the request can be extended beyond the 20 day target by what the Act describes as a “*reasonable period*”. This additional time is only available where qualified exemptions are being considered and more time is needed to carry out the public interest balancing test. Staff must, however, within the initial 20 working day period of receiving a request, inform the applicant which exemptions are believed to apply to the requested information, and provide an estimate of the date by which the decision on the public interest balancing test will have been made.

Where staff believe that requested information falls to be withheld under section 36 of the Act but extra time is needed to consider the public interest balancing test, this will require a Home Office Minister, as a qualified person, to also approve that the information, in their reasonable opinion, is in scope of this exemption **before the time limit is extended**. This is the only exemption where such Ministerial authorisation is necessary and IND Directorates should contact the IND Central FOI Team for advice immediately if an extension of time is considered necessary under this exemption. Further details on this exemption can be found in Section 11 of this IDI Chapter.

IND Directorates should ensure they have collated or attempted to collate all of the information requested before they decide to write back to applicants and take additional time to consider the public interest test. This initial collating of the information will allow staff to consider whether the request could fall to be refused on the basis that it may exceed the £600 cost limit outlined in Section 4 of this IDI Chapter. IND Directorates should not apply substantive exemptions if a request exceeds the £600 cost limit as this will result in a disproportionate use of resources and staff time.

A standard template for such a response is contained at **Annex G** entitled: ‘**Standard letter template to applicant where staff are notifying them of the need to consider extra time for consider public interest balancing test**’. This can be adapted for further use by IND Directorates where there may be a need to extend a response beyond the 20 day limit to consider the public interest test for a qualified exemption.

When deciding how much time will be needed to carry out a public interest test, IND Directorates should bear in mind not only how many qualified exemptions they need to assess and the staffing resources available to do this, but also the need to consult:

- with any third parties or other Government Departments;
- within IND and seek approval on the use of an exemption from the IND Central FOI Team;
- with LAB through the IND Central FOI Team if a case is complex, sets precedents or relates to in-confidence or legal professional privilege issues;
- if a case is likely to result in the disclosure of non-routine information. Point 5.1 in Section 2 of this IDI Chapter has further details on notifying Ministers of this.

IND Directorates should not, however, delay their final responses to applicants unreasonably.

If a qualified exemption applies to the information requested and IND Directorates anticipate that additional time will be required to answer a request then they should also notify the IND Central FOI Team of this for monitoring purposes. The template at **Annex**

**B** entitled: '**Notifying receipt of non routine requests to the IND Central FOI Team**' must be completed and returned by fax to the IND Central FOI Team. Alternatively, it can be sent by email to the following Poise address on the Home Office global address list: Freedom of Information Team (IND). There is no need to provide a copy of the request itself from the applicant.

Staff should be aware that where an exemption may be claimed to the **duty to confirm** and/or the **duty to communicate**, it may be necessary to consider carefully not only the substantive response made to the applicant but also any preliminary or interim response. Section 17(4) of the Act states that a public authority is not obliged to make a statement in response to an applicant which would involve the disclosure of information which would of itself be exempt information. See Point 5.1 for further details on applying the effects of section 17(4).

## 4. APPLYING EXEMPTIONS TO REQUESTED INFORMATION

### 4.1. Purpose-blind decision-making

It is important that staff remember when assessing whether or not to use exemptions that the Act permits anyone, anywhere, to make a request. It does not allow staff to distinguish between members of the public, journalists, companies or Non-Governmental Organisations when applying conditions around the operation of exemptions, assessing the public interest test or judging the harm of disclosure.

This purpose-blind quality of the Act should be considered at all times by IND staff when assessing the application of exemptions. The only exception to this is the operation of the exemption under section 40 which deals with requests where the applicant may be requesting their own personal data. Staff should consult IDI Chapter 24 '**Disclosing Personal Information**' for further guidance on this matter.

Where a request for information is received, the identity of the applicant should play no part in any decision when seeking to assess whether or not to apply a particular exemption. In considering disclosure of any requested information under the Act, staff should always assume that disclosure to any applicant is in effect disclosure to the public as a whole and carry out a risk assessment of the resulting prejudice or potential harm of releasing requested information on the basis of disclosing that information into the public domain. Similarly when information has been disclosed it must be assumed by staff to be available in the public domain irrespective of who it has been disclosed to or how it may be used by the applicant.

### 4.2. When to use an exemption

The two distinctive rights of information access which IND is under a duty to meet and which must be considered by staff at all times when seeking to apply exemptions are:

- **the duty to confirm**, and
- **the duty to communicate**.

If staff receive a request for information, then the information requested does not need to be released if it is determined that either:

- an absolute exemption applies to the information requested; and/or
- that a qualified exemption applies to the information requested and the public interest in maintaining the exemption outweighs that in disclosure

#### 4.3. Exempting information from both duties

All but one of the exemptions (section 21 which exempts information accessible to the applicant by other means) enable IND staff to exempt information from both the duty to confirm whether information is held by IND and the duty to communicate information to applicants.

If the exemption which is being applied is a qualified one, then it will be necessary to consider the public interest balancing test both in respect of the exemption from the duty to confirm and the exemption from the duty to communicate.

When considering the application of exemptions, most IND staff will make an initial decision about whether to gain an exemption from the duty to communicate the information to applicants. But staff may then need to go on to make a separate assessment about whether to also exempt the information requested from the duty to confirm.

In many cases staff will wish to gain an exemption from the duty to communicate but will be able to satisfy the duty to confirm by informing the applicant whether the requested information is held in IND.

There may be circumstances, however, in which even to meet the duty to confirm to the applicant and tell them that the information they have requested is held by IND could result in the very information which is being withheld under a particular exemption being disclosed in a response. In these cases a neither confirm nor deny answer should be given to the applicant. There will be a particular need, for example, to consider the use of a neither confirm nor deny response to an applicant when national security needs to be safeguarded. Similarly, where IND holds information which may relate to or have been supplied by the security and intelligence agencies (the Security Service, the Secret Intelligence Service or GCHQ) or the other security bodies listed in section 23 of the Act, the use of a neither confirm nor deny response may also be necessary.

The decision to refuse to confirm or deny whether information is held is a distinct decision from the decision made to exempt information from the duty to communicate and always needs to be taken entirely on its own terms.

Exempting IND from the duty to confirm is a significant step and is likely to be subject to challenge. Staff should not take this decision without seeking the appropriate authorisation (Grade 7/Assistant Director or above) within their IND Directorate. The IND Central FOI Team must also approve the use of any such exemption where a neither confirm nor deny response is engaged before a final response is sent to the applicant. Details of who to contact in the team when using relevant exemptions are included in the table at **Annex F**.

Staff should note that where they exempt information from the duty to confirm whether the information is held by IND, there is no need to go on to consider the duty

to communicate.

Examples of how to apply exemptions when considering both of these duties is contained at point 4.4.

#### 4.4. When to exempt information from each duty

The majority of exemptions engaged by IND will result in staff applying an exemption from the duty to communicate information to the applicant, but being able to comply with the duty to confirm in their response that the information is held by IND.

For example:

***Please note: This scenario is an example for illustrative purposes only and the decisions made here should not be used or repeated in any way by IND staff when dealing with any requests for information. Each request must be considered on a case by case basis and an exemption must be engaged according to the circumstances of the individual case.***

*A request is received in IND asking for details of how many Immigration Officers are on duty on an evening shift at a Terminal in a particular airport. Even though this information is held, IND may be able to apply an exemption here from the **duty to communicate** this information as disclosure could have a harmful effect on the operation of immigration control. The most likely exemptions which can be applied to the requested information are those under section 30 or 31. The information requested here falls outside the scope of the exemption in section 30 as it does not related to investigations and proceeding conducted by IND or any other part of the Home Office. However, the information requested clearly falls within the scope of section 31 (1) (e) of the Act which exempts information which would, or would be likely to, prejudice the operation of the immigration controls under the general law enforcement provision. Disclosure of such information to an applicant would clearly prejudice the operation of immigration controls and the assumption is that on the particular circumstances of the case the public interest test assessment here would not favour disclosure.*

*When assessing separately the **duty to confirm**, the same prejudice to the operation of the immigration controls would not result from telling the applicant whether the information is held by IND.*

Staff should respond to this type of request by:

- confirming that the information on shift numbers at the Airport is held; and
- refusing to communicate the numbers to the applicant.

An example of a response to the applicant is available for illustrative purposes only at **Annex H** and is entitled: '**Example letter to an applicant where the duty to communicate has been exempted but the duty to confirm has been complied with**'. IND Directorates will still be able to use this example letter as a framework to set out their own responses where they are exempting information from the duty to communicate.

On some occasions, however, even informing the applicant that the information requested is held by IND could in itself result in the very information which is being withheld under that particular exemption being disclosed in a response. A standard letter template is available for responding to applicant at **Annex G** 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**'. This template should be adapted for use by IND Directorates where the situation may arise where

they need to reply to an applicant exempting IND from the duty to confirm and use a neither confirm nor deny response.

Where a decision is made to neither confirm nor deny that IND holds the information requested it is likely that the provisions of section 17(4) of the Act could apply and there will be no duty to give reasons for withholding information requested under the Act. Staff will be required however to inform the applicant under which exemption they are withholding information. Point 5.1 below explains where the effects of section 17(4) of the Act may also be appropriate in other types of responses which may not engage the use of a neither confirm nor deny response.

#### 4.5. Using more than one exemption

The exemptions under the Act take many different forms:

- sometimes focusing on the content of the information; or
- sometimes on the prejudice or harm of its disclosure

In most cases, it is possible to exempt requested information held by IND through more than one exemption when responding to an information request. Often where qualified exemptions are being applied this will help strengthen the argument as to why disclosure would be against the public interest. However, where this is done each exemption must be considered on its own merits and satisfied on its own terms.

There are some very specific provisions within the Act where it is not possible to rely on two exemptions at the same time to justify the withholding of a piece of information. For example, section 36 (prejudice to the effective conduct of public affairs) expressly states that it only applies if the information is not exempt under section 35. Further information on the mutually exclusive relationship between some exemptions is contained in Sections 6-13 of this IDI Chapter.

### 5. REPLYING TO APPLICANTS WHERE AN EXEMPTION IS USED

Responses to the applicant must usually meet the requirements of section 17 of the Act when an exemption is engaged. Section 17 requires that IND should, if applying an exemption, clearly state in its response to the applicant:

- that it is relying on an exemption;
- which particular exemption or exemptions are being relied upon;
- why the exemption applies if this would not be otherwise apparent; and
- explain, where necessary, the reasons for claiming that the balance of the public interest in maintaining the exemption outweighs the public interest in disclosing.

This requirement reinforces the importance of the quality of the decision making process when applying exemptions. A failure by staff to analyse and articulate a decision to claim any exemption puts at risk the prospect of successfully defending that decision against challenge. It may also constitute a failure to comply with the requirements of section 17. The example letter at **Annex H** is an illustration of a response which meets all of these requirements and is entitled: '**Example letter to an applicant where the duty to communicate has been exempted but the duty to confirm has been complied with**'. IND Directorates will be able to use this as a starting template to set out their own responses where they are exempting

information in similar circumstances, and should also ensure that the response provides applicants with details of the Department's internal review process.

### 5.1. Removing the duty to give reasons for withholding information

There is a narrow, but important, limitation on the duty to give reasons for withholding information requested under the Act. Section 17(4) provides that a public authority is not obliged to explain in a response to an applicant why an exemption applies or if the public interest balance comes down against disclosure if to do so would itself involve the disclosure of exempt information.

**This exemption from the duty to explain must be considered with great care by staff:**

- It must be fully justifiable in its own right as falling within the terms of an exemption.
- Even where section 17(4) applies, it will still be necessary to be able to defend a non-disclosure decision fully should it be challenged by the Information Commissioner. A clear and internal audit trail must therefore be retained at all stages by staff to explain why they have applied an exemption.

Staff should not hesitate to consult with the IND Central FOI Team at any stage of preparing an exemption related response where they believe that section 17(4) may need to be applied in a response to an applicant where an exemption is being applied. Relevant contact details for each exemption can be found at **Annex F**.

It should be noted that section 17(4) potentially applies whether an exemption is being claimed to either the duty to confirm **or** the duty to communicate. It is also important for staff to bear in mind that it can apply to **any** information in a response to an applicant which may fall under the scope of any of the 23 exemptions contained in the Act.

Where a neither confirm nor deny answer is used it may be more likely that section 17(4) will have to be applied in the response to an applicant setting out the reasons for using the exemption. If IND is unable to say whether or not it holds the requested information it is likely to be far more limited in its ability to describe the underlying reasons for this without disclosing exempt information.

Staff should note that the standard letter template at **Annex G** (for where an exemption is claimed from the duty to confirm) foresees the possibility that section 17(4) may need to be applied with regard to the underlying reasons. This template is 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**'.

Section 17(4) may also, on occasions, be relevant to a response claiming an exemption to the duty to communicate i.e. where IND states that it holds the information but considers that it is exempt from communicating it. There may be narrow circumstances where even describing the underlying reasons around why information will not be communicated may lead to the disclosure of exempt information. However, in these circumstances where only an exemption from the duty to communicate is being applied, it may be possible to give limited reasons to the applicant as to why the exemption applies in the response without disclosing exempt

information. Staff should endeavour in these cases to give applicants the fullest explanation possible as to why an exemption may apply, rather than seeking to apply the effects of section 17(4) in a blanket manner.

## 5.2. **Responding to an applicant where a document may contain a mixture of disclosable and non-disclosable information.**

Where documents contain a mixture of information that can and cannot be released due to the application of exemptions, the exempt information may be withheld from any final copy of a document which is released, for instance by black-penning the exempt information: this is commonly referred to as '**redacting**' or '**making redactions**'.

Whether IND Directorates choose to redact information will depend largely on the format of documents that the withheld information is contained in. Where information which is being withheld is largely contained in electronic format, it may be more appropriate to simply cut and paste the necessary disclosable information into a response and provide this to the applicant, while stating clearly to the applicant whether any exemption has been applied and why. This will avoid the large scale and often unnecessary disclosure of a large number of photocopied documents to an applicant.

Where the majority of information requested is held only in hard copy format, it may be less resource intensive for an IND Directorate to simply photocopy this material and then make redactions to the withheld information contained in the photocopy of a document.

It is also important to bear in mind that applicants making a request under the Act are entitled to information rather than documents themselves. Many parts of documents which will be disclosed are irrelevant to the information requested and can be deleted in the response to the applicant if summary information is being prepared in a new electronic document, or redacted if contained in hard-copy format. Where an IND Directorate decides to disclose photocopies of documents to applicants with redactions, there will still need to be an explanation as to why all of these have taken place in a response to an applicant. This is to ensure that the applicant is not confused between information being withheld because it is not relevant to the request, and information withheld because an exemption applies.

If an applicant has requested all of the information in a particular document but it is necessary to redact some of that information because it is exempt in hard-copy format or delete it if it is being supplied in a new electronic document, then the relevant exemption(s) being used should be referred to under the Act in the covering letter to the applicant. An explanation should also be given as to why the information has been redacted and why the exemption applies, and if a qualified exemption is being engaged then this will require an explanation as to why the public interest justifies non-disclosure. Point 5.1 above explains the limited circumstances under section 17(4) of the Act in which staff are not required to explain to the applicant why the exemption applies or to demonstrate the public interest test that has been carried out to justify non-disclosure.

Usually the most convenient way to cite exemptions where large amounts of copies of documents are being disclosed to an applicant is to provide a summary page at the front or appendix to the response and state which exemptions are being relied upon and why.

In circumstances where all of the information requested is held electronically, staff

may want to consider copying the relevant information to a new document and making an indication where information has been withheld and citing the relevant exemption and sending this new document to the applicant.

Staff need to be aware when removing information from electronic documents and sending out a final document electronically to applicants that technological advances may allow deletions to be reversed. It is, therefore, always more secure to copy the information being disclosed to an applicant in a new electronic document.

### 5.3. Disclosure of staff details

One issue that will occur frequently for Directorates when using exemptions and disclosing sensitive information to applicants is whether the personal details of IND staff which may be contained in documents should be withheld or disclosed. It should be remembered when considering this that the Act gives access rights to information and not to documents. In many cases it will be possible to disclose the information requested without disclosing the personal details of staff, as this may be of no relevance to the substance of the information requested. In such cases references to staff names and their telephone numbers should be removed, although details of the IND Directorate or the grade of a staff should not. Where a redaction has taken place on a hard copy document, an explanation should be given in the response that the information has been removed with the following standard wording:

*“We have withheld the names of staff contained in the information disclosed to you because we do not regard this information as relevant to the substance of your request”.*

Where a document refers to a Minister’s name then this should not be removed unless it falls to be withheld under an exemption.

However, IND may also receive requests for information which specifically request information about the names and positions of IND staff in a Directorate or details of their pay. In these cases this information may need to be withheld by applying an exemption and there will be a need for the public interest to be weighed in supplying such details depending on the circumstances of the request.

IND Directorates should take into account the following points when making a decision about what to disclose when they receive a direct request about staff details:

- Personal details such as names, addresses or internal disciplinary matters should not normally be disclosed.
- There will be a strong public interest in disclosing official information about staff acting in their official capacity e.g. grades or general salary levels for a particular grade.
- There is less of a public interest argument for disclosing any personal details of staff in lower grades. In contrast, the more senior a person is the less likely it will be unfair to disclose information about them acting in an official capacity.
- Where basic personal information about a member of staff already exists in the public domain through virtue of their own official duties (for example through appearance before a parliamentary select committee) then disclosure of these is less likely to breach their rights under the Data Protection Act.
- Where staff in lower grades deal on a regular basis with case-working, operational decisions or contentious policy issues, disclosure of their basic

- personal details could be more likely to put them at risk of personal distress.
- Where specific requests are made about particular members of staff and their performance, this may fall to be a vexatious request as defined in Section 4 of this IDI Chapter.

When making decisions about disclosure of personal information relating to staff, Directorates should always ensure that relevant staff are consulted about this before a decision is taken if this is possible. Although a refusal to have personal details placed in the public domain will not be a determinative factor in deciding whether to disclose information, it will in most instances be a key consideration in the assessment which should be made about the public interest in disclosure of that person's details.

In the event that any personal information about staff is disclosed in response to a request under the Act, IND Directorates must ensure that they inform staff immediately about the disclosure if they are still working within that Directorate or IND.

Where IND Directorates are unsure about whether to disclose or exempt personal information relating to staff, they should contact the IND Central FOI Team for further advice.

#### **5.4. Staff details to be included on covering letters and responses to applicants**

The guidelines in point 5.3 about the disclosure of staff names do not apply to any covering letters or responses which staff send out to applicants under the Act informing them of whether information will be disclosed or withheld. All covering letters or responses sent out by IND staff to applicants must provide details of the relevant member of staff who has prepared or authorised the response to the request. These should also include the full name of the IND officer, the IND Directorate which they work in, and their work place address. These details must be provided to ensure that there is an audit trail within IND if the applicant requests an internal review of the way their request is handled. It is important that staff note that this is for audit trail purposes only; the Department will always assume liability for any potential breaches of the Act unless staff have failed to follow the guidance in this IDI Chapter.

## **6. SECURITY CLASSIFICATIONS AND EXEMPTIONS**

The protective marking system used by IND has been developed to protect sensitive information in Government and is defined by the Cabinet Office Manual of Protective Security.

There are four main classifications, sometimes augmented by additional caveats and/or handling instructions:

- RESTRICTED
- CONFIDENTIAL
- SECRET
- TOP SECRET

The principle is that information is marked according to the harm that would result from its unauthorised disclosure and it is then protected by the appropriate marking to avoid this harm.

The Act does not refer to the protective marking scheme because the fact that a document has a protective marking does not, in itself, mean that information cannot be disclosed.

A protective marking may indicate that an exemption is likely to apply and should at least be considered, but it does not mean that the information is automatically exempt from disclosure under the Act. Conversely, although information that needs to be safeguarded for reasons of effective governance would normally be expected to bear a protective marking this may not always be the case.

- Protective markings may indicate that an exemption should be considered;
- The current applicability of the protective marking should be checked; and
- Refer to the originator of the document wherever possible.

Any disclosure of information marked Secret or Top Secret must be authorised at Grade 7/Assistant Director level or above in the relevant IND Directorate before a response is sent to an applicant. Staff should inform the IND Central FOI Team of this disclosure (if it does not involve the use of any exemptions) by filling in the template provided at **Annex B** entitled: '**Notifying outcome of non-routine FOI requests to the IND Central FOI Team**' and faxing it. Alternatively, this can be sent by email to the following Poise address on the Home Office global address list: Freedom of Information Team (IND). Alternatively, this template can also be sent by email to the following Poise address on the Home Office global address list: Freedom Of Information Team (IND).