

# Public audit functions (section 33)

## Freedom of Information Act

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### Introduction

1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.
2. An overview of the main provisions of FOIA can be found in [The Guide to Freedom of Information](#).
3. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and promote good practice.

4. This guidance explains to public authorities the main provisions of section 33, which relates to information on audit functions, and how to apply the exemption.

## Overview

- Section 33 provides an exemption for information on public audit functions.
- It applies to public authorities that carry out audits or audit-type inspections of other public authorities.
- The exemption is engaged in respect of information whose disclosure would or would be likely to prejudice the authority's audit functions, and where the balance of the public interest favours the maintenance of the exemption.
- The duty to confirm or deny does not apply where confirming or denying that information is held would or would be likely to prejudice audit functions.

## What FOIA says

5. Section 33 states:

**33.-(1)** This section applies to any public authority which has functions in relation to—

- (a) the audit of the accounts of other public authorities, or
- (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

(2) Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).

(3) The duty to confirm or deny does not arise in relation to a public authority to which this section applies if, or to the extent that, compliance with section 1(1)(a) would, or would

be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).

## Authorities and the section 33 exemption

### Who can claim the exemption?

6. Section 33 only applies to those public authorities that have public audit and other inspection functions specified in section 33(1), in relation to other public authorities. Such functions may have been granted by statute or informally.
7. The definition includes public audit bodies such as:
  - The National Audit Office;
  - The Audit Commission for Local Authorities and the National Health Service in England (closure of the Audit Commission is planned for 2015; please see <http://www.audit-commission.gov.uk/about-us/future-of-local-audit/>); and
  - The Northern Ireland Audit Office.
8. It also includes other bodies whose "functions" include the "examination of the economy, efficiency and effectiveness with which other public authorities use their resources" in section 33(1), such as:
  - Ofsted;
  - The Education and Training Inspectorate;
  - Estyn;
  - HM Inspectorate of Constabulary;
  - HM Inspectorate of Prisons;
  - The Care Quality Commission; and
  - The Office of Government Commerce (OGC) (now part of the Efficiency and Reform Group within the Cabinet Office).
9. When considering the application of the exemption, it is important first to establish whether the authority in question "has audit functions" as specified in section 33(1). FOIA does not require these to be statutory functions.

10. Section 33(1)(a) relates to financial audits of public authorities, with the aim of ensuring sound financial management and the proper use of public money.
11. Section 33(1)(b) concerns the way public authorities use their resources when carrying out their functions, examining “economy, efficiency and effectiveness”. This expression is not further defined, but will encompass information about inspections of the use of resources such as staff and premises, as well as the standard of services provided by the authority being audited.

### **Example**

In [FS50070196](#) the complainants had requested information on the traffic light status of Gateway Reviews carried out by the Office for Government Commerce (OGC) in relation to plans to introduce ID cards; the requests were refused under sections 33 and 35.

The Commissioner considered whether section 33 applied to the information: *“Gateway reviews take place at key decision points in major acquisition programmes and procurement projects in civil central government. The OGC has explained that one of its functions is to examine and review the ID card programme, at critical stages in its lifecycle, to assess whether it can progress successfully and to make the necessary recommendations in order for it to do so. The Commissioner is therefore satisfied the OGC does examine the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions. Therefore the Commissioner is satisfied that OGC is a public authority to which the exemption at s.33 of the Act applies”*.

The Commissioner’s view was that all stages of Gateway Reviews are audit functions for the purposes of section 33.

### **Example**

In decision notice [FS50123184](#) the Commissioner considered arguments put forward by Ofsted in support of the application of s33. In particular, Ofsted explained how its functions met

the definition in s33(1)(b).

He concluded: "through the school inspection process the public authority does have functions relating to *"economy, efficiency and effectiveness"* with which other public authorities use their resources and the Commissioner accepts that the public authority has functions relevant to section 33(1)(b) and can, therefore, cite this exemption.....

The withheld information was recorded in the course of a school inspection and the Commissioner further accepts that this information was generated in the course of the public authority carrying out the functions described in section 33(1)(b)."

### **When can't the exemption apply?**

12. The following are examples of situations in which the exemption cannot apply:
  - Internal audit functions carried out by public authorities; it only applies to audit or audit-type functions in respect of **other** public authorities.
  - Public authorities that are the subject of an audit cannot claim the exemption in s33; for example in respect of papers or correspondence they hold about their audit. Other exemptions may be available to them instead.

### **What the exemption is designed to protect**

#### **Information protected by the exemption**

13. Section 33 exempts information if its disclosure "would, or would be likely to, prejudice the exercise of any of the authority's functions"; those functions are specified in s33(1)(a) and (b).
14. These might include not only functions such as annual audit and value for money studies, but also the appointment of auditors under the Audit Commission Act.

15. Examples of the types of information which may be covered by the exemption include:
- draft reports;
  - audit methodologies;
  - correspondence between auditors and bodies subject to audit; and
  - information provided to auditors by whistleblowers or other informants.
16. Clearly information which has been placed in the public domain, for instance published audit reports, will not be covered by the exemption.

### **Would or would be likely to prejudice**

17. The exemption is prejudice-based. It only applies if disclosure of the requested information “would, or would be likely to, prejudice the exercise of any of the authority’s functions in relation to any of the matters referred to in subsection (1)”. This could potentially cover any information the auditing authority holds.
18. The term “would... prejudice” means that it is more likely than not to occur (ie a more than 50% chance) that prejudice would occur. “Would be likely to prejudice” is a lower threshold; this means that even if there is below a 50% chance, there must be a real and significant likelihood of prejudice occurring. The likelihood of prejudice arising must be decided on the facts of each case.
19. For more details on this, please see our guidance [the prejudice test](#).
20. The assessment of prejudice is relevant to the public interest test. Note that the choice between “would” and “would be likely” is important because it affects the balance of factors in the public interest test. The greater the likely prejudice to the public audit function, the stronger the public interest in not disclosing the information requested. Please see [arguments in favour of maintenance of the exemption](#) at paragraph 26 in this guidance.

## Nature of the prejudice

21. The types of prejudice that may arise from disclosure are those relating to “the exercise of the authority’s functions” as set out in section 33(1):

- (a) the audit of the accounts of other public authorities, or
- (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

This would include, for instance, prejudice to a specific audit which is taking place, or to processes such as the appointment of auditors.

22. The timing of the request is also relevant. The early release of an audit report, either before the auditing exercise has been completed or even where the report is still at draft stage, might cause prejudice to that particular audit. For instance, this could provide a premature indication of the findings in the report before they have been checked or agreed, affecting the behaviour of the organisation being audited. On the other hand, once an audit has been completed and the final report published, it would be hard to argue that prejudice would be caused by disclosure.
23. It could also include more general prejudice to audit functions. For instance, numerous standard audit methodologies are in the public domain, and it would be difficult to argue that disclosure of such information would prejudice audit functions. However, the arguments would be stronger if the information was about specific audit techniques or methods which weren’t already public and revealing details about them would reduce their effectiveness in future, thereby prejudicing audit functions.

### **Negative effect on the supply of information**

24. This is a further scenario where disclosure might be prejudicial to audit functions. Sometimes public authorities carrying out audits and inspections within the definition of s33 receive valuable information from others which helps them to carry out those functions. In our guidance Impact of disclosure on the voluntary supply of information, which mainly focusses on

section 31, we acknowledge the similarities with the section 33 exemption. For instance, where information has been provided voluntarily to an auditor by a whistleblower, an authority might wish to argue that disclosure of the information would discourage co-operation with the auditor in the future, thus prejudicing the audit function. Please refer to that guidance for further details of the factors to consider.

### **Example**

ICO decision notice [FS50364933](#), concerning the government's e-Borders programme, found that the Cabinet Office had dealt with the request in accordance with FOIA when it cited section 33.

In order to reach his decision, the Commissioner analysed whether disclosure would result in prejudice to the authority's audit function. This took the form of a three stage process: whether the authority had identified a prejudicial outcome inherent in the exemption; whether that prejudicial outcome would be insignificant; and the likelihood of the prejudice arising. He determined that disclosure would have had an impact on the voluntary supply of information and that, due to the need to make progress on the audit in a timely manner, this would have been likely to give rise to prejudice to the authority's audit function.

## **The public interest test**

25. Section 33 is a qualified exemption; therefore the public authority must apply the public interest test to the requested information. For more details, please refer to our guidance on [the public interest test](#).

### **Arguments in favour of maintenance of the exemption**

26. Inherent in the overall purpose of public audit is the auditors' role in checking that public bodies are able to account for public funds allocated to them, and that their work delivers value for money. Factors against disclosing audit information therefore include the following requirements:



- ensuring that auditors can effectively carry out their duties
- protecting the integrity of the audit.

### **Arguments in favour of disclosure**

27. However those very factors are also relevant to and overlap with the factors in favour of disclosure.
28. The work of auditors is aimed at improving the accountability of public bodies and enhancing transparency in relation to their work. In favour of disclosure are factors including:
  - furthering public understanding in decisions made by public bodies;
  - improving public participation in debate;
  - promoting accountability and transparency in relation to decision making; and
  - promoting accountability and transparency in the use of public funds by public bodies.

#### **Example**

In [OGC v Information Commissioner \(EA/2006/0068 & 0080, 19 February 2009\)](#) the tribunal discussed the public interest in maintaining the exemption and in disclosure, agreeing with the Commissioner that considerations under sections 33 and 35 were likely to be similar.

In relation to section 33, the tribunal attached little weight to the public interest inherent in the exemption.

The OGC had claimed that the information added “nothing” to the debate on the merits of identity cards; the Tribunal however dismissed this argument since the public interest lay in knowing how the project had been implemented, not just in the merits or otherwise: *“there was a clear public interest in analysing the benefits of the ID card scheme, seeing how the scheme had evolved and how the Government has or may come to a decision as to how to deliver the scheme”*.

The tribunal also rejected the argument that the information might be hard to understand, commenting that it had no difficulty in doing so.

The tribunal considered the timing of the potential disclosure; the OGC had argued that untimely disclosure would threaten the Gateway Review process by discouraging interviewees and reviewers from being candid. It found that non-attribution of comments would protect interviewees and that publication of the reports would be an incentive to interviewees to participate in the system and be more candid: *"reviewers would have a greater incentive to be candid and complete in the carrying out of their functions in the knowledge that their actions might at some stage be subject to public scrutiny. The Tribunal regards this as a very telling consideration"*.

The tribunal ordered the disclosure of the two Gateway Reports in question, subject to the redaction of names.

### **Example**

In [FS50364933](#) mentioned above, when applying the public interest test the Commissioner considered that factors in favour of disclosure included transparency and accountability arguments. However arguments weighing against these included the need to protect the flow of relevant information from interested parties to the auditors. It was important to preserve the integrity of the audit, especially since it was time-limited.

The Commissioner's decision was that the balance of the public interest in maintaining the s33 exemption outweighed the public interest in disclosure.

## **The duty to confirm or deny**

29. Section 1(1)(a) of FOIA requires a public authority to inform the requester "whether it holds information of the description specified in the request". This is known as the duty to confirm or deny. This duty applies even if the information itself is

exempt from disclosure, unless that duty is excluded. In the case of information on audit functions, section 33(3) removes the duty to confirm or deny:

if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the exercise of any of the authority's audit functions referred to in subsection (1).

30. For further details of the duty to confirm or deny, see the ICO's guidance: [When to refuse to confirm or deny information is held](#).

## Other considerations

31. You might also want to consider whether other exemptions are relevant, such as section 34 (Parliamentary privilege), section 40 (personal information), section 41 (information provided in confidence) and section 43 (commercial interests).
32. This guidance relates only to FOIA. If the information is environmental it must be considered under the Environmental Information Regulations 2004 (the EIR). There is no direct equivalent in the EIR to the public audit exemption and public authorities will therefore need to consider whether any of the exceptions in regulations 12(4) or (5) apply.

## More information

33. Additional guidance is available on [our guidance pages](#) if you need further information on the public interest test, other FOIA exemptions, or EIR exceptions.
34. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.
35. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

36. If you need any more information about this or any other aspect of freedom of information, please [contact us](#), or visit our website at [www.ico.org.uk](http://www.ico.org.uk).