FOI Exemptions: Policy, Advice and the Conduct of Public Affairs

Sections 35 and 36 of the Freedom of Information Act 2000 protect the space in which public bodies develop policy and take advice. They are easy to confuse, and they apply to different authorities. Section 35 is for government departments and the Welsh Government only. Section 36 is available to every public authority, but it needs the reasonable opinion of a qualified person. Both are qualified, so the public interest test applies.

AT A GLANCE

	Section 35	Section 36
Subject	Formulation of government policy, ministerial communications, Law Officers' advice, ministerial private offices	Prejudice to the effective conduct of public affairs
FOISA equivalent	Section 29	Section 30
Environmental information	Regulation 12(4)(d) and (e)	Regulation 12(4)(d) and (e)
Who can use it	Government departments and the Welsh Government	Any public authority
Type	**Qualified. Class based**	**Qualified. Prejudice based, on the reasonable opinion of a qualified person. Absolute for information held by the House of Commons or House of Lords**
Neither confirm nor deny	Section 35(3)	Section 36(3)

1. Can your authority use section 35?

Probably not, unless you are a government department or the Welsh Government. The section applies to information held by those bodies, and covers the formulation or development of government policy, ministerial communications, advice from the Law Officers and the operation of any ministerial private office. A council, NHS body or university that wants to protect its own internal policy discussions needs section 36 instead.

Even for the bodies that can use it, section 35 has a built in nudge towards disclosure. Once a policy decision has been taken, statistical information that provided background to it is no longer treated as relating to policy formulation. In addition, when weighing the public interest for policy formulation, particular weight must be given to the disclosure of factual information that was used, or intended to be used, as background to a decision.

2. What does section 36 protect?

Section 36(2) exempts information if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, do any of the following.

- Prejudice the collective responsibility of Ministers, or the work of the Northern Ireland Executive Committee or the Welsh Cabinet.
- Inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation.
- Otherwise prejudice the effective conduct of public affairs.

For most authorities the second limb is the one in play. The argument is that officials and members will be less candid if they expect their advice to be published.

3. Who is the qualified person?

Section 36(5) sets this out, and it varies by authority. For a government department it is a Minister or the person in charge of the department. For other authorities it can be a Minister of the Crown, or a person authorised by or on behalf of the authority, and authorisations can be general or specific. Check your authority's scheme of authorisation, and make sure the person who gives the opinion is the person named. An opinion given by the wrong person is invalid, and it is one of the most common reasons for section 36 decisions to be overturned.

4. What makes the opinion reasonable?

The qualified person must have the right information in front of them, including the information requested, the arguments for and against the exemption and the specific limb being considered. The opinion must be one that a reasonable person could hold. It does not have to be the best opinion, but it must be substantively justified, not just rubber stamped.

For statistical information, section 36(4) removes the need for the opinion of a qualified person, so the usual requirement does not apply.

Record when the opinion was given, by whom, on what material and for which limb. A section 36 claim without that record is hard to defend.

5. How do you weigh the public interest?

Even after a reasonable opinion, you must still weigh the public interest. The qualified person's opinion goes to whether the exemption is engaged. It does not decide the balance. Arguments for withholding include protecting a safe space for candid advice while a decision

is live. Arguments for disclosure include accountability, transparency about how a decision was reached and the age of the information, since the safe space argument weakens once the decision has been taken.

WORKED EXAMPLE (ILLUSTRATIVE)

A borough council receives a request for the internal emails and draft options papers on a proposed change to waste collection, made while the decision is still before the cabinet.

- **Authority.** The council cannot use section 35, so it considers section 36(2)(b).
- **Qualified person.** The chief executive is authorised in the council's scheme. The monitoring officer prepares a submission with the requested information, the arguments and the relevant limb. The chief executive gives an opinion that disclosure would be likely to inhibit the free and frank exchange of views.
- **Public interest.** The decision is live, which weighs in favour of protecting deliberation. But the council also holds factual background data that was sent to councillors, and that has little protective value. It releases the factual data and withholds the options discussions, with reasons.

The record notes the qualified person, the date, the material they saw and the public interest reasoning.

6. Managing the qualified person process: spreadsheet or structured case workflow

Task	Spreadsheet and email	Structured case workflow
Putting a submission to the qualified person	An email with attachments	Material and notes held in the case, with the decision recorded
Recording who gave the opinion and when	A line in an email chain	Recorded against the case with the exemptions relied on
Public interest delay	Tracked by hand	Public interest delay management for FOIA and FOISA requests
Evidence at internal review	Reconstructed	Timeline and audit log attached to the case

Frequently asked questions

Can a council use section 35?

No. It applies to government departments and the Welsh Government.

Does the qualified person decide the public interest?

No. They give an opinion on whether the prejudice would occur. The authority then weighs the public interest.

Is a blanket claim for all internal emails acceptable?

No. The opinion must relate to the specific information and limb.

Does the safe space argument last forever?

No. It is strongest while a decision is live and weakens afterwards.

THE PITFALL

Taking an opinion from someone who is not the qualified person for your authority.

THE REMEDY

Check your scheme of authorisation, and give the right person the material, the arguments and the limb in writing.

KEY TAKEAWAYS

- Section 35 is only for government departments and the Welsh Government.
- Section 36 needs the reasonable opinion of the right qualified person.
- Give the qualified person the information, the arguments and the limb in writing.
- The opinion engages the exemption but does not settle the public interest.
- Safe space arguments carry most weight while a decision is live.

Conclusion: prioritise the right person, the right material and a recorded decision

Make sure everyone knows who the qualified person is before a request arrives. Then give them what they need in writing, and keep the date and the reasoning on the case.

HOW PROVEPRIVACY HELPS

ProvePrivacy DSAR & FOI (Lite) gives each request a single case with a timeline, so the submission to the qualified person, the response and the date are all visible. Public interest delay management tracks the extra time for qualified exemptions, and the Disclosure tab records the exemption you rely on and your reasons, adding them to the audit log.

Where this fits in the FOI process

Sections 35 and 36 are applied at the decision stage, and section 36 adds a step for the qualified person. See our FOI process hub for the full journey.

SCOTLAND AND ENVIRONMENTAL INFORMATION

In Scotland, sections 29 and 30 of the Freedom of Information (Scotland) Act 2002 cover the formulation of Scottish Administration policy and the effective conduct of public affairs. Section 30 requires substantial prejudice or inhibition, which is a higher threshold than the prejudice test in England, Wales and Northern Ireland. Under the Environmental Information Regulations 2004, internal communications and material in the course of completion are covered by regulation 12(4)(d) and (e), which are subject to the public interest test and a presumption in favour of disclosure. See our guides on EIR exceptions and on FOISA and the EIRs in Scotland.

Related guides

- DSAR Exemptions: Regulatory, Parliamentary and Judiciary
- FOI Exemptions: Investigations, Crime and Law Enforcement
- EIR Exceptions: How They Differ from FOI Exemptions

Sources

- Freedom of Information Act 2000, sections 2, 35 and 36 (legislation.gov.uk)
- Freedom of Information (Scotland) Act 2002, sections 29 and 30
- Environmental Information Regulations 2004, regulation 12(4)
- ICO guidance: Formulation of government policy (section 35), and Prejudice to the effective conduct of public affairs (section 36)
- Scottish Information Commissioner guidance: Policy formulation and effective conduct of public affairs

Talk to someone who has handled FOI

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