FOI Exemptions: Health and Safety and Statutory Bans on Disclosure

Section 38 of the Freedom of Information Act 2000 protects people from harm. It is qualified. Section 44 recognises that other laws, and the courts, can bar disclosure. It is absolute. Together they come up often in the NHS, local government, housing and the justice sector.

AT A GLANCE

	Section 38	Section 44
Subject	Endangering the physical or mental health, or the safety, of any individual	Prohibitions on disclosure
FOISA equivalent	Section 39 for health, safety and the environment	Section 26
Environmental information	Regulation 12(5)(a) for public safety	Regulation 5(6) removes legal bars on disclosure. See the note below
Type	**Qualified. Prejudice based**	**Absolute. Section 2(3) lists it**
Main test	Would disclosure, or would it be likely to, endanger health or safety	Is disclosure prohibited by an enactment, incompatible with an assimilated obligation, or a contempt of court
Neither confirm nor deny	Section 38(2)	Section 44(2)

1. What does section 38 protect?

Section 38(1) exempts information if disclosure under the Act would, or would be likely to, endanger the physical or mental health of any individual, or the safety of any individual. The person at risk can be anyone, including a member of the public, a member of staff or the requester.

Endangerment is a higher threshold than annoyance or distress. You need to show a real link between disclosure and the risk. Consider the following.

- **Whose health or safety is at risk, and how.** Be specific. A threat of violence to a named officer is different from a general worry about reaction.
- **How likely it is.** The risk must be real, not speculative. A previous incident, a credible threat or a known vulnerability supports the case.

- **Mental health.** The exemption covers it, but it needs real evidence, for example medical advice that disclosure would damage a person's mental health.

Section 38 is qualified, so you must weigh the public interest. Factors for disclosure include openness about public safety and accountability. Factors for withholding include the protection of life and wellbeing. Where the risk is serious, the balance usually favours withholding.

2. What does section 44 cover?

Section 44(1) exempts information if disclosure by the authority, other than under the Act, falls into one of three categories.

- **Prohibited by or under any enactment.** A statute, or secondary legislation, forbids the disclosure.
- **Incompatible with an assimilated obligation.** The legislation uses the term assimilated obligation, which replaced the earlier wording referring to EU obligations.
- **A contempt of court.** Disclosure would constitute or be punishable as a contempt of court.

Section 44 is absolute. There is no public interest test, and no harm test either. If a statutory bar applies, the information is exempt.

The work is in identifying the bar. Your own sector may have specific confidentiality provisions, for example in legislation about health records, adoption, social care or child protection. Check that the provision actually prohibits disclosure by your authority to the public. A power to withhold, or a duty of confidence at common law, is not a statutory bar. For common law confidence, consider section 41.

Where a statutory bar contains a gateway or exception that would permit disclosure, you must consider whether it applies. A prohibition with a gateway that allows disclosure for the purpose of the request is not a bar for that request.

Section 44(2) removes the duty to confirm or deny where confirming would itself fall within one of the categories.

3. A note on environmental information

The Environmental Information Regulations 2004 work differently. Regulation 5(6) says any enactment or rule of law that would prevent disclosure under the Regulations does not apply. In other words, a statutory bar that would support section 44 does not by itself justify refusing environmental information, and you must use an exception in regulation 12 and weigh the public interest.

WORKED EXAMPLE (ILLUSTRATIVE)

A county council receives two requests in one week.

- **Request one.** A requester asks for the home addresses and shift patterns of social workers involved in a child protection case, after posting threats online. The council has evidence of the threats. It applies section 38(1), concludes that disclosure would be likely to endanger the safety of staff, weighs the public interest and withholds. It records the evidence of the risk and the reasoning.
- **Request two.** A requester asks for the records of a named adoption. The council identifies a statutory prohibition on disclosing information about adoptions to the public. It applies section 44(1)(a), names the enactment in its refusal notice and records the provision relied on.

Both case records note the section, the evidence and the reasoning.

4. Recording protective decisions: spreadsheet or structured case workflow

Task	Spreadsheet and email	Structured case workflow
Recording evidence of risk	Held in a separate file or email	Notes kept in the case, with the exemption and reason in the audit log
Protecting names and addresses	Manual redaction, hard to evidence	Redaction tool with exemption reasons recorded
Handling sensitive responses	Email attachments	Secure, time bound download portal with email code verification
Evidence at internal review	Reconstructed	Timeline and audit log attached to the case

Frequently asked questions

Does section 38 protect staff from embarrassment?

No. It requires endangerment to health or safety, not embarrassment.

Do we need to show a risk to a named individual for section 38?

You need to show a risk to an individual or individuals, which can be identified or a class. Be as specific as the evidence allows.

Does a confidentiality clause in a contract create a section 44 bar?

No. A contractual duty is not a prohibition by or under an enactment. Consider section 41 instead.

Is section 44 subject to the public interest test?

No. It is absolute.

THE PITFALL

Treating a contract clause or a duty of confidence as a statutory bar.

THE REMEDY

Identify the enactment, assimilated obligation or court order, and name it in the refusal notice.

KEY TAKEAWAYS

- Section 38 is qualified and needs real evidence of endangerment.
- Section 44 is absolute and needs an actual statutory or court based bar.
- Name the specific enactment in your refusal notice for section 44.
- A contractual or common law duty of confidence is not a section 44 bar.
- Environmental information is treated differently under regulation 5(6) and regulation 12.

Conclusion: prioritise real evidence of risk, the right enactment and a clear notice

For section 38, gather the evidence of risk before you decide. For section 44, find the specific bar, and name it in the refusal notice.

HOW PROVEPRIVACY HELPS

ProvePrivacy DSAR & FOI (Lite) records the exemption you rely on, whether section 38 or section 44, and the reasons in the audit log. The redaction tool protects names and addresses across large sets of documents. Disclosure goes through a secure portal that asks the recipient to prove control of the mailbox with a one time code before any file is shown, and access closes once delivery is confirmed.

Where this fits in the FOI process

Both exemptions are applied at the decision stage. For section 44, identify the statutory bar early, because it often settles the request. See our FOI process hub for the whole journey.

SCOTLAND AND ENVIRONMENTAL INFORMATION

In Scotland, section 39 of the Freedom of Information (Scotland) Act 2002 covers health, safety and the environment, and section 26 covers prohibitions on disclosure. Under the Environmental Information Regulations 2004, public safety is covered by regulation 12(5)(a), subject to the public interest test, and regulation 5(6) overrides legal bars on disclosure. See our guides on EIR exceptions and on FOISA and the EIRs in Scotland.

Related guides

- DSAR Exemptions: Health and Social Care
- FOI Exemptions: Personal Information
- FOI Exemptions: Investigations, Crime and Law Enforcement

Sources

- Freedom of Information Act 2000, sections 2, 38 and 44 (legislation.gov.uk)
- Environmental Information Regulations 2004, regulations 5 and 12
- Freedom of Information (Scotland) Act 2002, sections 26 and 39
- ICO guidance: Health and safety (section 38), and Prohibitions on disclosure (section 44)

Talk to someone who has handled FOI

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