

FOISA Guidance

Section 37: Court records, etc.

Exemption Briefing



Contents

Glossary and abbreviations	1
The exemption	3
The exemption: the main points	3
Steps in applying the exemption	3
Why does this exemption exist?	3
Documents lodged with a court, inquiry or arbiter	4
Documents served on, or by, a Scottish public authority	4
Documents created by a court, inquiry or arbiter	5
Is the information solely contained in a relevant document?	5
Do the exemptions apply even when proceedings are at an end?	6
Fatal Accident Inquiries and FOI	6
Appendices	7
Appendix 1: Resources	7
SIC Decisions	7
Other resources	9
Appendix 2	10
Section 37: Court records, etc.....	10
Document control sheet	11

Glossary and abbreviations

Term used	Explanation
SIC/The Commissioner	The Scottish Information Commissioner, staff of SIC (depends on context)
FOISA	Freedom of Information (Scotland) Act 2002
SIC	The Scottish Information Commissioner, staff of SIC (depends on context)
The Section 60 Code	The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 (December 2016 version)
Court	Any "inquiry or tribunal exercising the judicial power of state" (section 37(2) of FOISA). This includes Employment Appeal Tribunals, the Mental Health Tribunal, Justice of the Peace Courts, Sheriff Courts, the High Court of Justiciary, the Court of Session and the UK Supreme Court
Inquiry	Statutory inquiries, i.e. public inquiries established by law. This includes planning inquiries and inquiries, such as the Public Inquiry into Historical Child Abuse in Scotland held under the Inquiries Act 2005.
Arbitration	A dispute resolution process in which, rather than taking their case to court, parties formally agree (via a contract) to accept the decision of a third party (an

	arbitrator). When the parties agree to enter into arbitration proceedings, they accept the arbitrator's decision as final in both fact and law.
Lodge	The formal depositing of documents either with a court or with a person carrying out an inquiry or arbitration.
"Otherwise placed in the custody of"	During the Parliamentary debates on of this exemption, MSPs questioned what this phrase meant. The Justice Minister suggested that documents not lodged with the court but held by it pending an appeal could fall under the term "otherwise placed in the custody of a court". (Section 106 of the Criminal Procedure (Scotland) Act 1995 distinguishes between documents "lodged in connection with the proceedings...kept in the custody of the court", and documents "produced" and kept in the custody of the court.)
Serve	The official delivery of documents relating to a court case (e.g. a summons or a writ).

The exemption

The exemption: the main points

1. Information will be exempt from disclosure under section 37 of the Freedom of Information (Scotland) Act 2002 (FOISA) if it is contained in a document which has been:
 - (i) lodged with a court for the purposes of court proceedings (section 37(1)(a)(i));
 - (ii) served on, or by, a Scottish public authority for the purposes of court proceedings (section 37(1)(a)(ii));
 - (iii) created by a court for the purposes of court proceedings (section 37(1)(a)(iii));
 - (iv) lodged with a person conducting an inquiry or arbitration, for the purposes of that inquiry or arbitration (section 37(1)(b)(i));
 - (v) created by a person conducting an inquiry or arbitration, for the purposes of that inquiry or arbitration (section 37(1)(b)(ii)); AND

in all of these cases, a Scottish public authority holds the information only because it is contained in such a document.

2. The exemptions in section 37 are absolute. This means that the public authority responding to the request doesn't need to go on to apply the public interest test.
3. The exemptions in section 37 don't last forever. In general, they can't be applied to information that is more than 15 years old.

Steps in applying the exemption

4. Once an authority has located the information, it must:
 - (i) Decide, does the exemption apply?
 - (ii) If the exemption does NOT apply, the information cannot be withheld under the exemption (although it might be exempt for other reasons).
 - (iii) If the exemption DOES apply, the information can be withheld.

Why does this exemption exist?

5. Courts are not public authorities for the purposes of FOISA and so are not required to make information available in response to FOISA requests. (While the Scottish Courts and Tribunals Service is covered by FOISA, it is responsible only for providing administrative support – in the form of staff, buildings and technology – to courts and tribunals.)
6. Section 37 of FOISA is designed to ensure that existing procedures governing access to information generated by or used in court (and other legal dispute resolution) proceedings are not overridden by FOISA. The exemption ensures that where authorities hold information *solely* because of their involvement in court proceedings, an inquiry or arbitration, they are not required to disclose the information outwith those proceedings. Broadly speaking, a party to proceedings will have rights to access information under court disclosure rules.

Documents lodged with a court, inquiry or arbiter

7. Information is exempt from disclosure if it is contained in a document –
 - (i) lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter (section 37(1)(a)(i)); or
 - (ii) lodged with, or otherwise placed in the custody of, a person conducting an inquiry or arbitration, for the purposes of that inquiry or arbitration (section 37(1)(b)(i)).
8. “Document” includes electronic documents, recordings, etc. and not just hard copies.
9. A range of documents might be lodged with (or otherwise be placed in the custody of) a court, including:
 - (i) complaints and indictments (documents setting out charges in criminal cases)
 - (ii) written pleadings outlining the arguments to be put before a court
 - (iii) skeleton arguments
 - (iv) affidavits (signed statements taken under oath).
10. In addition to these formal and procedural documents, other documents can be lodged by the parties to a court action in support of their case. Similarly, a wide range of documents might be lodged with or placed in the custody of a person conducting an inquiry or arbitration. This means that the potential scope of section 37 is wide.
11. For the exemptions to apply, the proceedings, inquiry or arbitration must actually have commenced. The exemption won’t apply to documents held in contemplation of court proceedings, etc., which have not commenced. (It is possible that the exemption in section 36(1) will apply in these cases – see **Appendix 1: Resources**.)
12. The Commissioner expects an authority which is claiming that a document has been lodged with or otherwise placed in the custody of a person conducting an inquiry or arbitration to detail the status of the inquiry or arbitration and any terms of reference.
13. See **Appendix 1: Resources** for examples of decisions issued by the Commissioner.
14. Remember that these exemptions will only apply if the public authority holds the information solely because it is contained in a relevant document – see paragraphs 23 to 26 below.

Documents served on, or by, a Scottish public authority

15. Information is exempt from disclosure if it is contained in a document served on, or by, a Scottish public authority for the purposes of proceedings in a case or matter (section 37(1)(a)(ii)).
16. This test will only be relevant when considering documents relating to court proceedings. The Commissioner is likely to expect public authorities to evidence that documents have been served on them when applying this exemption.
17. For the exemptions to apply, the court proceedings must actually have commenced. The exemption won’t, for example, apply to documents which are about to be served, but have not yet been served. (It is possible that the exemption in section 36(1) will apply in these cases – see **Appendix 1: Resources**.)

18. See **Appendix 1: Resources** for examples of decisions issued by the Commissioner.
19. Remember that the exemption will only apply if the public authority holds the information solely because it is contained in a relevant document – see paragraphs 23 to 26 below.

Documents created by a court, inquiry or arbiter

20. Information is exempt from disclosure if it is contained in a document –
 - (i) created by a court or a member of its administrative staff for the purposes of, or in the course of, proceedings in a cause or matter (section 37(1)(a)(iii)); or
 - (ii) created by a person conducting an inquiry or arbitration, for the purposes of that inquiry or arbitration (section 37(1)(b)(ii)).
21. See **Appendix 1: Resources** for examples of decisions issued by the Commissioner.
22. Remember that the exemption will only apply if the public authority holds the information solely because it is contained in a relevant document – see paragraphs 23 to 26 below.

Is the information solely contained in a relevant document?

23. Section 37(1) makes it clear that the exemptions will only apply where a public authority holds the information solely because it is contained in a relevant document.
24. Information held by a public authority only because it is contained in a document which has been served on it by another party is exempt. So too is information held only by virtue of being contained in documents created by a court, or by person carrying out an inquiry or arbitration.
25. When the public authority itself has lodged the document with the court, inquiry or arbiter, establishing whether the information is exempt depends on whether it is held **solely** because it has been lodged with the court, or whether it is held for another business purpose. The two scenarios below help illustrate the distinction.
 - (i) A requester asks for a copy of a contract between an authority and a service provider. The contract is the subject of a legal dispute between the two parties and, as a result, has been lodged with the court by the public authority. The information in the contract **would not** be exempt under section 37: it is held by the public authority independently of the legal action that had led to it forming part of a court process.
 - (ii) A requester asks for a copy of the initial writ that the authority lodged with the court because the contractor has not complied with the contract. The information in the writ **would** be exempt under section 37: it is held by the authority solely for the purpose of lodging it with a court.
26. Sometimes, when determining whether an authority holds information solely because it is contained in a relevant document, it may be necessary to consider the functions and duties of the authority. **Appendix 1: Resources** contains an example of a decision issued by the Commissioner where this was relevant.

Do the exemptions apply even when proceedings are at an end?

27. The short answer is “yes” – although this question was the subject of a Supreme Court judgment, which also looked at the relationship between FOI and the European Convention on Human Rights (the ECHR). The case involved a request by a journalist under the UK Freedom of Information Act 2000 about three inquiries conducted by the Charity Commission into the “Mariam Appeal.” This was a charity appeal launched by George Galloway in connection with sanctions imposed on Iraq following the first Gulf War.
28. The requester argued that allowing the exemption to apply once the Charity Commission’s inquiries were at an end breached his human rights and that the ECHR required, at the very least, that once an inquiry was over, the exemption should no longer be treated as absolute. The Supreme Court disagreed and found that the FOIA exemption, which is written in very similar terms to FOISA’s section 37, continued to apply after the end of an inquiry. See **Appendix 1: Resources** for a link to the judgment.

Fatal Accident Inquiries and FOI

29. Information held by a Scottish public authority for the purposes of an inquiry instituted under the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 is not exempt from disclosure under section 37 (section 37(3)).
30. However, under section 34(2)(a) of FOISA, information is exempt from disclosure if held by a public authority for the purposes of such an inquiry which has not yet concluded. Unlike the exemptions in section 37, the exemptions in section 34 are subject to the public interest test in section 2(1)(b) of FOISA.
31. Further information about fatal accident inquiries and FOISA – including references to decisions issued by the Commissioner – can be found in the Commissioner’s guidance on section 34. See **Appendix 1: Resources** for a link to the guidance.

Appendices

Appendix 1: Resources

SIC Decisions

Reference	Decision number	Authority	Summary
Section 37(1)(a)(i) Paragraph 12 Section 37(1)(a)(iii) Paragraph 21	154/2006	Highland Council	<p>The Council was asked for papers about an appeal to the District Court (which, at that time, was run by the Council). We were satisfied that documents sent to the Clerk of the Court in relation to the appeal were lodged with the court or otherwise placed in its custody.</p> <p>We also accepted that papers, such as the stated case, and notes created by the Clerk and the Justice of the Peace, were created by the court for the purposes of court proceedings. They were therefore exempt from disclosure.</p>
Section 37(1)(a)(ii) Paragraph 18	087/2006	Glasgow City Council	<p>The requester was pursuing a legal action against the Council at the time she made her request. One of the documents she asked for was the initial writ served on the Council. The Commissioner accepted that this was exempt from disclosure.</p>
Section 37(1)(a)(ii) Paragraph 12	001/2007	West Dunbartonshire Council	<p>Falling within the scope of the request was a draft of an initial writ served on a defender to a court action. We accepted that the information was exempt as it was included in the initial writ served by the Council for the purposes of the proceedings.</p>
Section 37(1)(a) Paragraph 12	045/2021	Scottish Courts and Tribunals Service	<p>The record of a hearing of a criminal case was exempt from disclosure, despite the hearing having taken place in open court.</p>
Section 37(2)	046/2012	Standards Commission for	<p>Investigations under the Ethical Standards in Public Life etc. (Scotland)</p>

Reference	Decision number	Authority	Summary
Paragraph 12		Scotland	Act 2000 were inquiries for the purpose of section 37(2) of FOISA.
Section 37(1)(a)(iii) Paragraph 21	012/2015	Scottish Court Service	A report by a sentencing judge to the Parole Board of Scotland was created by a court for the purposes of a cause or matter.
Section 37(1) Paragraph 25	089/2015	Risk Management Authority (the RMA)	Information withheld by the RMA was not solely held for the purpose of court proceedings. The information had been derived from a spreadsheet of statistical data created by the RMA in its own right and for the purpose of its own administrative functions.
Section 37(1) Paragraph 26	116/2008	Glasgow City Council	The Council was asked for its statements of reasons in two cases involving the refusal of a licence for a house in multiple occupation. The Council argued that the information was exempt under section 37(1)(a)(i) of FOISA. By the time the request was made, the statements had been lodged in court for the purposes of an appeal. We did not accept that the Council held the information solely because it was contained in a document which had been lodged in court. The Council had been required to create the information prior to the appeal in response to a request made under the Civic Government (Scotland) Act 1982. Lodging the document with the court did not alter the fact that the Council held it for purposes which were not directly connected to actual court proceedings.

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Other resources

Paragraph	Resource	Link
11, 16	Commissioner's guidance on Section 36: Confidentiality	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section36/Section36.aspx
30	Commissioner's guidance on Section 34: Investigations by Scottish public authorities and proceedings arising out of such investigations	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section34/Section34.aspx
28	Kennedy v The Charity Commission [2014] UKSC 20	Kennedy (Appellant) v The Charity Commission (Respondent) (supremecourt.uk)

Appendix 2

Section 37: Court records, etc.

- (1) Information is exempt information if it is contained in –
 - (a) a document –
 - (i) lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter;
 - (ii) served on, or by, a Scottish public authority for the purposes of such proceedings; or
 - (iii) created by a court or a member of its administrative staff for the purposes of, or in the course of, such proceedings; or
 - (b) a document –
 - (i) lodged with, or otherwise placed in the custody of, a person conducting an inquiry or arbitration, for the purposes of that inquiry or arbitration; or
 - (ii) created by such a person for such purposes,and a Scottish public authority holds the information solely because it is contained in such a document.
- (2) In this section –

“court” includes a tribunal or body exercising the judicial power of the State; and

“inquiry” means an inquiry or hearing held under a provision contained in, or made under, an enactment.
- (3) This section does not apply to information held by a Scottish public authority for the purposes of an inquiry instituted under the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016.

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