

# Information in the public domain

## Freedom of Information Act Environmental Information Regulations

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## Introduction

1. The Freedom of Information Act 2000 (FOIA) and Environmental Information Regulations 2004 (EIR) give rights of public access to information held by public authorities.
2. An overview of the main provisions of FOIA and the EIR can be found in [The Guide to Freedom of Information](#) and [The Guide to the Environmental Information Regulations](#).
3. This is part of a series of guidance, which goes into more detail than the Guides, to help public authorities to fully understand their obligations and promote good practice.
4. This guidance sets out the issues to consider if the requested information, or some related information, is already in the public domain. It is not intended to dictate the outcome in any particular case, but should help public authorities to identify the relevant arguments and think through the issues.

## Overview

- Information is only in the public domain if it is realistically accessible to a member of the general public at the time of the request. It must be available in practice, not just in theory.
- There is no simple rule about the effect of information in the public domain. It is not automatically an argument either for or against disclosure. It may be relevant to either or both sides of the argument, and its nature and effect will depend on the exact content and context of the information.
- In general, if the requested information itself is already in the public domain, it will be difficult to justify withholding it. Disclosure is unlikely to cause additional harm, and there will always be some residual public interest in disclosure.
- However, care should always be taken to consider whether the disclosure might actually reveal anything new. For example, the information could be more detailed, could corroborate a previously unreliable source or leak, or could put the information in a new context.
- Relevant arguments about other related information in the public domain might include arguments about mosaic harm, similar

effect, not adding to public debate, or a suspicion of misrepresentation or wrongdoing.

## General principles

5. There is no simple rule about the effect of information in the public domain. In essence, the correct approach will always be to look at the effect the disclosure would have in light of the information already in the public domain. This will vary from case to case, depending on the exact content and context of the information.
6. Relevant information in the public domain might include the requested information itself, or some other information on the same subject, or similar information on a similar subject. Each will have a different effect.
7. A public authority might consider that the existence of relevant information in the public domain means the information should not or need not be disclosed. On the other hand a requester could argue that this means it can and should be disclosed.
8. The fact that relevant information can be found in the public domain does not automatically support either side. Public authorities should always consider the quality and content of the information in the public domain and compare it carefully with the withheld information to determine its relevance in the particular circumstances of the case.
9. This guidance considers generally applicable issues raised by information in the public domain: in other words, how it may affect the engagement of any prejudice-based exemption or exception, and how it may affect the public interest test.
10. However, public authorities should also be aware that information in the public domain may have a more specific effect on the engagement of some class-based exemptions. In particular, it is likely to be relevant when considering the following issues:
  - information reasonably accessible to the applicant (section 21)
  - personal data and fairness (section 40 or regulation 13)
  - confidentiality (section 41, regulations 12(5)(d) or (e))

- legal professional privilege (section 42 or regulation 12(5)(b))
11. See [our guidance](#) on those specific exemptions or exceptions for more information.

## ‘In the public domain’

### **Introduction**

12. Before considering the effect of any information already in the public domain, the first step is to decide whether that information was actually ‘in the public domain’ at the time of the request. This is a question of degree, and will depend on the circumstances.
13. For these purposes, information is in the public domain if it is realistically accessible to a member of the general public at the time of the request.
14. If a member of the public could not actually get hold of the information at the time of the request, the Commissioner does not consider that it is in the public domain for these purposes, and this guidance is not directly relevant.
15. Previous disclosures, especially to a limited audience, do not necessarily mean that information enters (or remains in) the public domain. However, this does not mean that all arguments about previous or partial disclosures falling short of the public domain should be dismissed out of hand. There may be similar issues to consider even if they do not directly relate to information currently in the public domain. For example:
  - Previous publication may indicate that no harm is likely, even if the information is in practice no longer available. In such cases the focus is likely to be whether there has been any change in circumstances since the previous disclosure that would now justify withholding the information, despite the fact it was previously considered appropriate for release. Similarly, previous publication to a limited group of people (eg in a particular geographic location only) may indicate that no harm is likely from wider disclosure to the general public.
  - If some related information is known to only a limited number of people, it will not be in the public domain, but

there may still be "[mosaic](#)" arguments that disclosure of the new information would be harmful because those people would be likely to combine it with the new disclosure.

- For the purposes of the exemptions and exceptions dealing with confidentiality or legal professional privilege, confidentiality will be permanently lost if the information has at any time entered the public domain, even if it does not remain there at the time of the request. See [our guidance](#) on the individual exemptions and exceptions for more information.

### **Realistically accessible**

16. Information will only be in the public domain for these purposes if it is realistically accessible to the public. The question is not whether it is theoretically in the public domain, but whether it is actually available in practice.
17. This mirrors the approach used by the courts in relation to considering whether to restrain further publication of potentially private information by the press.
18. In that context, the courts have found that information which can be easily found using a simple internet search is in the public domain:

#### **Example**

In [Mosley v News Group Newspapers Ltd \[2008\] EWHC 687 \(QB\)](#), the High Court considered whether video footage of Max Mosley posted on various websites was in the public domain. The court found that it was: "*Anyone wishing to access the footage can easily do so*".

The court summarised the correct approach: "*the extent to which material is truly 'in the public domain' will ultimately depend on the particular facts before the Court. In [Attorney General v Greater Manchester Newspapers \[2001\] All ER \(D\) 32 \(Dec\)](#) the test was applied as to whether certain information was 'realistically' accessible to members of the public or only 'in theory'.*"

19. However, information will not be in the public domain if it would require unrealistic persistence or specialised knowledge to find it, even if it is theoretically available somewhere in a

library or on the internet. In practice a normal member of the public would still not be able to find that information:

**Example**

In [Attorney General v Greater Manchester Newspapers \[2001\] EWHC QB 451](#), the High Court considered whether the whereabouts of the boys convicted of killing Jamie Bulger was in the public domain. This information could be inferred from statistics available in public libraries and on a government website. However, the information was not in the public domain as it was not accessible in practice:

*"I do not consider that such information is realistically accessible to the wider public by being on a library shelf, no doubt, under a specialised heading. I would doubt that members of the public, who were not interested in the specialised information would know that such a book existed or that it was placed on a library shelf. Second, the information published on the website of a Government Department would require some degree of background knowledge and persistence for it to become available to a member of the public and would not be widely recognised as available..."*

*"I have come to the conclusion that accessibility to the general public of Government statistical information is, in the present context, theoretical and therefore not generally accessible to the public. This information was not public knowledge. In my judgement therefore the information available in this particular form on the internet or in the publication did not amount to that information having already been placed in the public domain."*

**To a member of the general public**

20. Information must be available to a member of the general public. This means a hypothetical average member of the general public who is interested enough to conduct some searches for the information, but does not possess any specialised knowledge or research skills (see [Attorney General v Greater Manchester Newspapers](#) above).
21. Information disclosed only to a limited audience will not generally be in the public domain, as it is unlikely to be available to a member of the general public:

**Example**

In [Craven v Information Commissioner \(EA/2008/0002, 13 May 2008\)](#), the requester argued that a draft report into the mis-selling of financial products should be released, particularly as the report had already been leaked to various parties and subsequently quoted in parliamentary committees, news reports, and High Court proceedings.

However, the Information Tribunal drew a distinction between this limited leak and the question of whether the information was in the public domain. It focused on the information actually available to the general public from the published committee report and the published court judgment.

At para 32 it concluded: *"We are satisfied that there were some elements of information in the draft which were not readily available to the public, and which were therefore the proper subject of a FOIA request. We will call these the "unrevealed" elements of information, notwithstanding that certain journalists and MPs, and even Mr Craven himself, may have seen them, since they are not readily available to the applicant as a member of the public via the proceedings of the Treasury and Civil Service Committee or the judgment of [the court]."*

**Example**

In [S v Information Commissioner and GRO \(EA/2006/0030, 9 May 2007\)](#) the Information Tribunal said (at para 42): *"Whether information is in the public domain is a matter of degree and whilst it is acknowledged that the disputed information may be known to the Appellant and her family and parts of it are likely to be known to other individuals, it is not information that has been widely disseminated and publicized to the general public."*

22. In particular, information is not necessarily in the public domain just because it is known to the requester. The question is still whether a hypothetical interested member of the public could access the information.

### **Example**

This approach was confirmed in [Williams v Information Commissioner and Cardiff & Vale NHS Trust \(EA/2008/0042, 22 September 2008\)](#), at paragraph 33: "*this was ... information [the applicant] had received outside of FOIA. As such it was not information that was publically available. The Tribunal reminded itself that disclosure under FOIA was disclosure to the world such that it had to consider the application of section 43(2) regardless of what information Mr Williams already privately had.*"

23. And on the other hand, information may be in the public domain even if the requester could not access it because of their personal circumstances (for example, because they have no access to the internet). Availability to the individual requester is irrelevant. The question is whether it is available to a hypothetical member of the public. This question of public availability should not be confused with reasonable accessibility to the individual applicant under section 21.

### **At the time of the request**

24. To be in the public domain, information must be available at the time of the request. This is consistent with the general rule that public authorities should consider the circumstances as they exist at the time of the request, and was approved by the Information Tribunal in [S v Information Commissioner and GRO \(EA/2006/0030, 9 May 2007\)](#) (see paragraph 40).
25. Even if information has entered the public domain some time before the date of the request, this does not mean it remains there indefinitely. Even if the information was at one time considered a matter of public record (eg by being revealed in open court) or was otherwise previously published or disseminated (eg in response to an earlier FOI request), this does not mean it is still available in practice at the time of the request.
26. For example, information disclosed in court may briefly enter the public domain in theory, but its availability in practice is likely to be short-lived unless it passes into other more permanently available sources (eg online newspaper reports).



### **Example**

In [Armstrong v Information Commissioner and HMRC \(EA/2008/0026, 14 October 2008\)](#) the Information Tribunal confirmed this approach:

*"We also consider that even if the disputed information had entered the public domain by virtue of having been referred to during the Siddiqui trial in 2001, it does not necessarily follow that it remains in the public domain. We agree with the observation of the Commissioner in the Decision Notice that knowledge obtained in the course of criminal trials is likely to be restricted to a limited number of people and such knowledge is relatively short-lived."*

27. If a member of the public can no longer access the information at the time of the request, the FOI or EIR disclosure would, in practice, be revealing 'new' information over and above what is currently public knowledge.

### **Previous FOI or EIR disclosures**

28. Theoretically, any disclosure under FOIA or the EIR is said to be a disclosure into the public domain. This was confirmed by the High Court in [OGC v Information Commissioner \[2008\] EWHC 737 \(Admin\)](#):

*"Disclosure under FOIA is always to the person making the request under section 1. However, once such a request has been complied with by disclosure to the applicant, the information is in the public domain. It ceases to be protected by any confidentiality it had prior to disclosure. This underlines the need for exemptions from disclosure." (para 72)*

29. However, this is in the context of considering the effect of disclosure and whether exemptions or exceptions apply. The question in this context is whether the information can in theory be disclosed to the general public, not just to the individual requester. This should not be confused with the question of whether particular information is actually available in the public domain. The Commissioner does not interpret the High Court in [OGC](#) as laying down a general principle that all information disclosed under FOIA or the EIR always enters (or remains in) the public domain in practice.

30. In short, a previous FOI or EIR disclosure to a particular requester does not mean that the information will actually enter or remain in the public domain. At a later date, the relevant question is still whether a member of the public could in practice realistically access that information.
31. Information disclosed under FOIA or the EIR is only likely to enter or remain in the public domain for these purposes if it is reproduced in publicly available sources – eg online disclosure logs, press releases, newspapers, or online FOI forums such as [www.whatdotheyknow.com](http://www.whatdotheyknow.com).
32. Nonetheless, even if the information is not actually in the public domain, the fact that it was previously considered appropriate for disclosure may still be relevant. It is likely to be a strong indication that there is no justification for withholding the information and it should be disclosed again. In such cases the focus is likely to be on whether there has been any change in circumstances which could now justify withholding the information despite the previous disclosure. Previous disclosures may also be relevant to [‘mosaic harm’ arguments](#).

### **Charges for information**

33. Information available for a fee may still be considered available to the public:

#### **Example**

In [S v Information Commissioner and GRO \(EA/2006/0030, 9 May 2007\)](#), the Information Tribunal decided that the information on a death certificate was in the public domain despite the payment of a fee: *"the Tribunal is satisfied that the public record is the entry created in the Death Register. Only the specific information required to be put on the death certificate is accessible to the public. This is apparent from the fact that a copy is available following the payment of a fee by any member of the public."*

34. However, this is likely to be a matter of degree. In some circumstances a particularly prohibitive charge may act as a barrier as it would effectively mean that the information is not realistically available to a member of the general public.

## **Fragmented or buried information**

35. Information can be in the public domain even if it would have to be collated from multiple sources, or if it is buried within a much larger collection of information, as long as an interested member of the public could realistically access it without specialist skills or knowledge. This will depend on the facts of the case and the public authority must make a judgement in all the circumstances.
36. However, even if we accept the information is all in the public domain, disclosure in a ready-collated and more easily understandable form could increase the risk of prejudice and/or increase the public interest benefits from disclosure. See the section below on [the requested information is in the public domain](#).

## **Potential public domain sources**

37. Although this is not an exhaustive list, examples of potential sources of information in public domain include:
  - websites
  - social networking sites
  - press releases
  - newspapers
  - magazines
  - books
  - government publications
  - Hansard
  - court judgments
  - TV or radio programmes
  - companies house records
  - birth/marriage/death certificates
38. However, in each case it will still be necessary to consider whether the information could in fact be realistically accessed by a member of the general public at the time of the request.

## **The requested information is in the public domain**

### **Introduction**

39. Even if the information itself is already in the public domain, this is not decisive and is not an automatic argument either for or against disclosure.

### **Example**

In [Armstrong v Information Commissioner and HMRC \(EA/2008/0026, 14 October 2008\)](#), the Information Tribunal said: *"Even if the information had previously entered the public domain, that is not in itself conclusive of whether the public interest weighs in favour of disclosure, it is merely one consideration to be weighed in the public interest balance."*

40. A public authority might want to consider the section 21 exemption (information accessible to the applicant by other means) under FOIA. See [our guidance](#) on section 21 for more information. However, note that this exemption will not always apply, and there is no equivalent EIR exception.
41. In most cases, the fact that the information is already available will reduce the likelihood and severity of any prejudice, the public interest in maintaining an exemption, and also the public interest in disclosure. However, the precise effect should always be considered on the facts of each case.
42. However, there will still always be some weight to general transparency and full picture arguments in favour of disclosure. Therefore, as a general rule, there is likely to be little justification for withholding the information.
43. Nonetheless, any arguments that disclosure would still be harmful because it would draw more attention to a sensitive issue or reopen a debate at a particularly sensitive time should be considered.
44. Care should also always be taken to consider whether the FOI disclosure might actually reveal anything new. For example, the withheld information could be more detailed than the information in the public domain, could corroborate a previously unreliable source or leak, or could confirm that the public authority did not have any additional information.

### **Effect of a new disclosure**

45. It is likely to be rare that a public authority wishes to withhold information if it is all already in the public domain. Even if the information appears to be the same as that already in the public domain, the request and the exact content of the withheld information might mean that disclosing it in the context of the request would in fact reveal something new.

46. In particular, public authorities might want to consider whether the withheld information is more detailed than what is already in the public domain.

**Example**

In [\*S v Information Commissioner and GRO \(EA/2006/0030, 9 May 2007\)\*](#), the Information Tribunal considered the content of a letter about the death of the requester's brother. The requester already knew the relevant facts about the brother's death. However, the letter revealed more information than this: *"every witness to an event will have an individual perspective and that personal recollections of events vary. Therefore, whilst it may be that the facts within the disputed letter are known to the Appellant the way in which they have been recalled (emphasis given, facts dwelt upon or left out) adds a personal element to the information that comes from its provision by the Informant."*

The letter therefore contained new information, over and above what was already known to the requester. (Note that this was not in fact a case about information in the public domain, but the Commissioner considers the same reasoning can apply.)

**Example**

In [\*Craven v Information Commissioner \(EA/2008/0002, 13 May 2008\)\*](#) parts of the requested report on the selling of home income plans had been leaked and referred to in a High Court case. The Information Tribunal compared the withheld information with the content of the High Court judgment to see how much of the information was in fact new. It concluded that there was *"a significant quantity of material in the draft report which was not contained in the judgment."*

47. Disclosure could also corroborate a previously unreliable source or leak, give previously unknown context for the information, or establish that no further information exists on a topic.

**Example**

In [\*PETA v Information Commissioner and University of Oxford \(EA/2009/0076, 13 April 2010\)\*](#) the request was for details from a licence to conduct experiments on a macaque monkey

named Felix, including references to other scientists' work that had been used to support the application. The university argued that releasing the names of anyone associated with the application, however tangentially, would put them at risk from animal rights activists and thus endanger their health and safety under section 38.

The details of the scientists' works were in the public domain and their identities and association with this area of science could be found by searching the internet. However, the Information Rights Tribunal found that the context of the request would reveal something new: "*The new piece of information provided by way of disclosure of these references in this context was the link to Felix; namely that the work done by these co-authors had been used to support the application to experiment upon Felix. Consequently there was now a direct link between the authors and the experimentation upon Felix.*"

48. If disclosing the withheld information would reveal anything new, public authorities should take care to fully consider the effect of disclosing that new information. See the section below on [some related information is in the public domain](#) in such cases.

### **Engaging or maintaining an exemption**

49. Disclosure of information which is already in the public domain is generally unlikely to cause any additional prejudice. It will therefore be difficult to engage a prejudice-based exemption (although class-based exemptions may still be engaged). And even if an exemption is engaged, the public interest in maintaining the exemption is likely to be limited.
50. However, there may still be some circumstances where the disclosure would, or would be likely to, result in additional prejudice. For example:
- The timing or context of the disclosure: a disclosure may reopen or draw attention to a particular issue at a particularly sensitive time. For example, safe space or chilling effect arguments about prejudice to internal thinking can be time-sensitive.
  - The ease with which the information can be found and used: information may technically be in the public domain even if

it is hidden or buried within a mass of other material or would take some time and effort to find and collate (see the section above on [fragmented or buried information](#)). In some cases, disclosure of that information in a more organised or easily usable form may draw more attention to it or increase the risk of misuse.

### **Example**

The Information Rights Tribunal took both arguments into account in [PETA v Information Commissioner and University of Oxford \(EA/2009/0076, 13 April 2010\)](#).

The Tribunal accepted that the scientists referred to in the licence application may already have been at risk from animal activists as their names were in the public domain. However, releasing their names during the specific campaign over experiments on Felix was likely to cause additional danger: *"disclosure in this atmosphere both raised their profile, placed them in a new context... and consequently put them into a context of a suggested target. To use a colloquialism this was placing them in the cross hairs."*

The Tribunal also considered that, although the information was already published, it was not easy to find and collate: *"It would require additional work and expense to collate the list and there is a safety in numbers in that the list of possible targets using the 'google search method' would be overwhelming and consequently meaningless."* This meant that disclosure was likely to increase the risk that these particular individuals would be targeted, which was enough to show additional harm.

### **Public interest in disclosure**

51. On the other hand, disclosure of information which is already in the public domain will not reveal anything new to further public understanding. This will mean that the public interest in disclosure is limited.
52. However, there will always still be some general residual public interest in disclosure, as some weight should always be accorded to general transparency and the full picture argument (ie full disclosure to allay any suspicion of spin).

## Balance of the public interest

53. In most cases, even if an exemption can be engaged, the public interest in maintaining it is likely to be weak (unless disclosure would cause additional prejudice: see [engaging or maintaining an exemption](#) above). On the other hand, as there is always some (limited) weight to be accorded to general transparency and full picture arguments, the balance of the public interest test is likely to favour disclosure.
54. In [OGC v Information Commissioner \[2008\] EWHC 737 \(Admin\)](#), the High Court implied that, once the information was in the public domain, there was no need to consider the public interest balance, as the information was no longer protected:

*"if the information is not already in the public domain the authority will have to weigh up the public interest in disclosure against the public interest in maintaining the exemption."*  
(paragraph 78)

55. However, these comments were made in the context of a general introduction to the public interest test. The actual impact of information in the public domain was not a live issue in that case. The Commissioner does not interpret the decision as laying down a strict principle that, if the information is in the public domain, exemptions can never apply.
56. The Commissioner interprets the court's comments as simply acknowledging that, once information is in the public domain, there is likely to be little justification for withholding the information in most cases.

## Some related information is in the public domain

### Introduction

57. 'Related information' might be some other information on the same subject, or similar information on a similar subject.
58. The fact that some related information is already in the public domain is not decisive and is not an automatic argument either for or against disclosure. However, it might still be a relevant factor. Depending on the circumstances it could affect either or both sides of the argument in a variety of ways.



59. The High Court has confirmed that related information in the public domain is likely to be relevant:

**Example**

In [ECGD v Friends of the Earth \[2008\] EWHC 638 \(Admin\)](#) at para 43, the High Court found that the existence of related information in the public domain was a relevant factor:

*"the Tribunal concluded that the fact that information about the Sakhalin II project was in the public domain, and extensively so, was an irrelevant factor. Its conclusion is unimpeachable if I had in mind only the narrow questions of public interest to which I have already referred; that is to say, whether ECGD had been properly advised and whether the government department giving the advice had properly fulfilled its statutory duty. But if the Tribunal is to be taken as saying that the fact that information of the kind requested is generally in the public domain is an irrelevant factor, then its views were mistaken."*

**Example**

In [FSA v Information Commissioner \[2009\] EWHC 1548 \(Admin\)](#), the High Court considered the effect of disclosure in the context of the application of a statutory bar. The court overturned the Information Tribunal and decided that it was necessary to consider the relevance of related information already in the public domain: *"the substance or effect of any disclosure must necessarily and in the nature of things be affected by the **context** of the disclosure."*

60. Depending on the facts of the case, related information in the public domain could either increase or reduce the likelihood and severity of prejudice, the public interest in maintaining an exemption, and the public interest in disclosure. The Commissioner's approach to common arguments is set out below, but the precise effect will always need be considered on the facts of each case.
61. Possible arguments include:
- 'Mosaic' arguments, if the requested information can be combined with existing information in the public domain to

cause some harm. See the section below on [mosaic arguments](#) for more information.

- If information of a similar nature is already in the public domain, evidence that it was (or was not) harmful may indicate that this disclosure would (or would not) be similarly harmful. See the section below on [similar effect arguments](#) for more information.
- If the requested information would not add much to what is already in the public domain this may reduce the likelihood and severity of prejudice from disclosure, the public interest in maintaining the exemption or exception, and the public interest in disclosure. However, there will always still be some public interest in disclosure of the full picture. See the sections below on [no additional harm](#) and [not adding to public debate](#) for more information.
- If there are independent grounds for believing that the existing public information misrepresents the true position, or it reveals evidence of wrongdoing, this may increase the public interest in disclosure. See the section below on [suspicion of misrepresentation or wrongdoing](#) for more information.

### **Engaging or maintaining an exemption**

62. These arguments are about the harm likely to be caused by disclosure. As such they may affect both whether a prejudice-based exemption is engaged, and how much weight should be accorded to the public interest in maintaining any qualified exemption.

#### **(a) Mosaic arguments**

63. Even if the requested information is not likely to be harmful on its own, it may be harmful when combined with other information already in the public domain. This is sometimes referred to as a 'mosaic' or 'jigsaw' effect. Public authorities are entitled to look at the effect of the disclosure in the context of existing information already in the public domain.
64. However, general arguments will not carry much weight. It will be necessary to point to specific information already in the public domain, explain why it is likely that they will be combined, and explain how additional prejudice is likely to result from the combination.

65. This does not mean that mosaic arguments are only relevant if information is in the public domain. Mosaic arguments may also be relevant in other situations, for example if the requested information can be combined with information known only to a limited group of people, as long as disclosure would mean that prejudice is likely.

### **(b) Similar effect arguments**

66. If a public authority can provide evidence that disclosure of similar or related information has been harmful in the past, this is likely to strengthen arguments about the likelihood and severity of prejudice (and the public interest in maintaining an exemption). On the other hand, an absence of such evidence may support an argument that no harm is likely.
67. However, this relies on establishing that the disclosure will have a similar effect. Care should always be taken to consider differences in the content of the information and the context and timing of disclosure before drawing any such parallels.

#### **Example**

In [Williams v Information Commissioner and Cardiff & Vale NHS Trust \(EA/2008/0042, 22 September 2008\)](#), the Information Tribunal considered whether releasing the names of unsuccessful bidders for a hospital site (in conjunction with comments on their suitability and financial health) would prejudice those bidders' commercial interests. The requester argued that the name of the successful bidder had been released and that this indicated the name of the unsuccessful bidders could also be released. The Tribunal rejected this argument, as the context of the information was different:

*"The Tribunal was not persuaded that simply because the name of the successful bidder had been revealed in the particular documents that the remaining redacted names could also be revealed without prejudice. It was of the view that a successful bidder would expect a greater degree of public scrutiny and accountability in relation to its dealings with the Trust. Any prejudice moreover would be offset against the fact that the company had been successful in securing the agreement."*

### (c) No additional harm

68. If some information on a subject is already in the public domain, this may mean that the effect of disclosing additional details is more limited and would not cause much additional harm. Even if there is sufficient prejudice to engage an exemption, the public interest in maintaining the exemption may therefore be limited.
69. The Tribunal has accepted this argument in a number of cases:

#### **Example**

In [FCO v Information Commissioner \(EA/2007/0047, 22 January 2008\)](#) the request was for an early draft of the Iraq dossier. The Information Tribunal considered chilling effect arguments, but concluded that any additional harm would be limited given the information already in the public domain:

*"We agree that the additional effect of disclosure over what had already taken place is significantly less than if the requested information were the first information on the drafting process to be put into the public domain."*

At para 28 they continued: *"We conclude that the 'chilling effect' would have been quite limited, given that the Hutton Report had not only put into the public domain a great deal of information on the subject but had also provided a detailed description of the circumstances in which the Dossier had been prepared, so that the public was in a good position to place the Williams draft into its correct context."*

#### **Example**

Similarly, in [Cabinet Office & Lamb v Information Commissioner \(EA/2008/0024 and 0029, 27 January 2009\)](#), when considering the effect of disclosing the Cabinet minutes at which the Attorney-General's legal advice on Iraq was discussed, the Information Tribunal said: *"On the particular facts of this case the importance of maintaining the convention [of collective responsibility] is diluted by the extent to which some of the information had already been disclosed, through formal and informal channels"*.

70. However, the effect of disclosing additional information should always be fully considered on the facts of each case. In some cases additional information may be likely to cause more harm.

**Example**

In [Craven v Information Commissioner \(EA/2008/0002, 13 May 2008\)](#) the Information Tribunal considered a draft regulator's report on the mis-selling of financial products. Some, but not all, of the report had been leaked, and some information was available in a High Court judgment on the issue.

However, the tribunal accepted that some additional harm would still be caused to the interests of a firm criticised in the report (at para 44): "*The opinions are critical of WBBS and are expressed in strong terms. Despite the severe damage already done to the reputation of WBBS by the [High Court judgment], we are unable to take the view that WBBS has no reputation at all to protect or that it cannot be damaged any further. Disclosure of the unrevealed opinions would in our judgment be damaging to the commercial interests of WBBS.*"

**Public interest in disclosure**

**(a) Not adding to public debate**

71. As the tribunal said in its remitted decision in [OGC v Information Commissioner \(EA/2006/0068 and 0080, 19 February 2009\)](#):

*"the disputed information must be carefully examined to see whether it would have 'materially added' to any debate".*

72. If disclosure would not reveal much more than what is already in the public domain and would not significantly add to public understanding, this will mean that the public interest in disclosure is limited.

**Example**

In [DCMS v Information Commissioner \(EA/2007/0090, 29 July 2008\)](#), the Information Tribunal concluded that disclosure of information about listed sporting events and television rights

would not have materially added to the information already available and would not therefore increase accountability. The Tribunal went on to say:

*"It may certainly be said that the disclosure of any information may facilitate, to some degree, public debate. But for the point to bear any material weight it must draw some relevance from the facts of the case under consideration."*

73. In other words, the specific public interest in furthering debate on the issue in question will not carry any weight, as the information would not actually further that public interest. However, this does not mean there is no public interest in disclosure. Arguments that the public interest is 'already met' by existing information cannot be fully accepted.
74. This is because there will always be some residual public interest in disclosure, as some weight should always be accorded to general transparency and the full picture argument (to protect from suspicions of spin). The Tribunal in [Baker v DCLG \(EA/2006/0043, 1 June 2007\)](#) explained this as follows:

*"It seems to us ... that one reason for having a freedom of information regime is to protect Ministers and their advisers from suspicion or innuendo to the effect that the public is not given a complete and accurate explanation of decisions; the outcome is in some way 'spun' (to adopt the term whose very invention illustrates this tendency towards cynicism and mistrust). Disclosure of internal communications is not therefore predicated by a need to bring to light any wrongdoing of this kind. Rather, by making the whole picture available, it should enable the public to satisfy itself that it need have no concerns on the point."* (para 24)

75. In other words, generalised transparency or full picture arguments will carry some (albeit more limited) weight in every case and should always be factored into the public interest balance.
76. Of course, if disclosure **would** actually reveal some new details which would further inform public debate on an issue, there will be specific public interest in furthering public knowledge on the particular issue as well as the general public interest in transparency and the full picture.

**Example**

In [FCO v Information Commissioner \(EA/2007/0047, 22 January 2008\)](#) the Information Tribunal considered whether an early draft version of the Iraq dossier should be disclosed. It considered the argument *"that much of the information on the Dossier is already in the public domain and that, as the Hutton Report was issued at the end of a detailed investigation into the drafting process, the public interest in the issue has been served either in full or at least to a degree that reduces significantly the public interest in seeing an additional document which was not central to the process by which the Dossier was developed."*

But the Tribunal did not accept this approach on the facts of the case, and concluded: *"We do not accept that we should, in effect, treat the Hutton Report as the final word on the subject... we believe that the Williams draft might be capable of adding to the public's understanding of the issues in question."*

**(b) Suspicion of misrepresentation or wrongdoing**

77. In some circumstances, related information in the public domain may actually increase the public interest in disclosure – eg if there is independent reason to believe that existing information provides an unbalanced view of events. This may be true even if the new information wouldn't actually reveal anything further, as it could still allay the suspicions of spin or wrongdoing.

**Example**

In [FCO v Information Commissioner \(EA/2007/0092, 29 April 2008\)](#), the Information Tribunal considered what public interest factors in favour of disclosure might outweigh legal professional privilege, and considered: *"the most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received"*.



**Example**

In [Galloway / Central and North West London NHS Foundation Trust \(EA/2008/0036, 20 March 2009\)](#) the Information Tribunal considered the disclosure of staff witness statements prepared for the Trust's investigation into an incident involving a patient. A final 'SUI report' had already been published. Although on the facts the Tribunal found that the public interest favoured withholding the statements, it also said:

*"We are of the view that if an SUI report were clearly unsatisfactory, and either the statements would assist in getting to the truth of the matter, or the report materially fails to summarise the statements correctly, this could indicate the public interest in ensuring the Trust performs its functions properly outweighs the public interest in withholding the statements."*

78. However, for this factor to carry any material additional weight in favour of disclosure (ie over and above the general full picture argument and arguments about adding to the debate), the Commissioner considers that there must be some particular reason to believe that the existing information misrepresents the true position, and that the arguments should be supported by cogent evidence.
79. The public interest in disclosure may also be increased if information already in the public domain contains reasonable grounds for a suspicion of wrongdoing or poor performance.

**Example**

In [Cabinet Office & Lamb v Information Commissioner \(EA/2008/0024 and 0029, 27 January 2009\)](#), the Information Tribunal took into account published criticisms of the decision-making process when finding in favour of disclosure: *"the public interest factors in favour of disclosure are, in the view of the majority, very compelling. The decision to commit the nation's armed forces to the invasion of another country is momentous in its own right and...its seriousness is increased by the criticisms that have been made (particularly in the Butler report) of the general decision making processes in the Cabinet at the time."*



80. How much weight is accorded to such arguments is likely to depend on the severity of the suspected wrongdoing and the reliability of the source. A complainant should not be able to increase the public interest in favour of disclosure simply by publishing unfounded allegations of wrongdoing.
81. Note that arguments about misrepresentation or wrongdoing should not be applied to any information reflecting proceedings in parliament (eg Hansard, select committee reports). This is because parliamentary privilege prevents anyone else from considering, questioning or relying upon the accuracy or reliability of such information.

### Other systems of access, scrutiny or regulation

82. Similar arguments sometimes arise where there is already a body or system set up to investigate, regulate or otherwise scrutinise the issue underlying the request. For example, if an independent regulatory body is responsible for investigating an issue, a public authority might argue that this meets any public interest in scrutinising or debating the issue, and FOI disclosure is not required.
83. The Commissioner considers that the mere existence of other bodies or systems for scrutinising or debating an issue is irrelevant. FOIA and the EIR exist as an additional rather than alternative means of promoting public debate and transparency.

#### **Example**

In [\*Department of Health v Information Commissioner \(EA/2008/0018, 18 November 2008\)\*](#), the request was for a copy of a contract to provide electronic recruitment services. The Department of Health argued that the public interest in disclosure was reduced because there were already systems in place to ensure proper accountability and scrutiny: all procurement decisions were reported to the Treasury and examined by the OGC and the Public Accounts Committee.

However, the Tribunal commented that: "*there is considerable weight in the Commissioner's arguments that there is very little material in the public domain and as such is insufficient to inform public debate. That there is internal scrutiny whilst important does not meet the argument that the public have no opportunity to participate in this scrutiny*" (para 72).

84. However, if a regulatory body has actually investigated and published a report or other relevant information on its findings, and this is realistically accessible to a member of the public, this might be relevant as it will mean that relevant information on the issue is already in the public domain. Public authorities should consider the content of the information that has been published, and follow the approach set out in this guidance as for any other information in the public domain.

### **Example**

In [\*FCO v Information Commissioner \(EA/2007/0047, 22 January 2008\)\*](#) the Information Tribunal considered whether an early draft version of the Iraq dossier should be disclosed. The Hutton Inquiry had been set up to examine the death of Dr David Kelly in this context and had published a report containing a significant amount of information about the Iraq dossier and the drafting process. The FCO argued that the scrutiny of the Hutton Inquiry and the publication of its report met (or at least reduced) the public interest in disclosure.

The Tribunal did not agree. It found that the Hutton Inquiry was not the only or final means of scrutinising the issue, and although a lot of information had been published the requested draft could still add something:

*“We do not accept that we should, in effect, treat the Hutton Report as the final word on the subject... First, the Hutton report does not expressly state that the Williams draft is an irrelevance... Secondly, the issue which we are required to consider, namely whether the FCO ought to have disclosed the Williams draft, is different from those that the Hutton Report addressed. Thirdly... information has been placed before us, which was not before Lord Hutton, which may lead to questions as to whether the Williams draft in fact played a greater part in influencing the drafting of the Dossier than has previously been supposed” (paragraph 28).*

## **Other considerations**

85. If the requested information itself is already in the public domain, public authorities might want to consider the exemption at section 21 of FOIA (information reasonably accessible to the applicant by other means). However, note

that this exemption will not necessarily apply in every case, and there is no equivalent exception under the EIR.

86. Information in the public domain may also affect the following concepts relevant to specific exemptions and exceptions:
- personal data and fairness (section 40, regulation 13)
  - confidentiality (section 41, regulations 12(5)(d) and (e))
  - legal professional privilege (section 42, regulation 12(5)(b))
87. Additional guidance is available on [our guidance pages](#) if you need further information on the public interest test, specific FOIA exemptions, or specific EIR exceptions.

## More information

88. 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.
89. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
90. If you need any more information about this or any other aspect of freedom of information, please [contact us](#): see our website [www.ico.org.uk](http://www.ico.org.uk).