

# Section 36 and the ‘qualified person’ — who is it and why does it matter?

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**Paul Gibbons,  
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gives an overview of how  
the section 36 exemption  
operates, and explains  
who is ‘qualified’ to  
give an opinion**

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**I** may be qualified, but I’m not a ‘qualified person’ for the purposes of section 36 of the Freedom of Information Act 2000 (‘FOIA’).

Readers will be familiar with the exemption at section 36 covering prejudice to the conduct of public affairs, which includes the test of a ‘qualified person’. However, confusion around what the term actually means, and what constitutes a ‘qualified person’, persists. Firstly, a refresher on what the section 36 exemption is and when it is relevant.

## Key features of the section 36 exemption

FOI Officers sometimes find themselves in a tricky situation. They are told that the information that has been requested must not be disclosed. They sympathise with the reason, but there is no suitable exemption. The information in question is not that which has been provided in confidence; neither is it commercially sensitive. Nothing fits. What do they do?

Well, this is really what section 36 — the exemption for information which, if disclosed, would cause prejudice to the effective conduct of public affairs — is for. It is the ‘Get Out of Jail Free’ card for public authorities that want to withhold information; the safety net. The exemption is controversial precisely because of its broad nature. It is also subject to important safeguards.

## Information affected

Section 36 captures any information that a public authority needs to withhold, but cannot withhold under any other exemption. Most often, it is policy information not covered by the section 35 ‘policy formulation exemption’ applying to central government departments. As section 35 cannot be used by local authorities, section 36 will often be used instead for similar kinds of information.

## What do FOI Officers need to know about section 36

Government departments cannot use section 36 if section 35 applies to the requested information (section 36(1)(a)).

The exemption applies only if a ‘qualified person’ gives a ‘reasonable opinion’.

The qualified person for each authority is set out either at section 36(5)(a)-(n) FOIA, or is an officer of the public authority designated by a Minister.

FOI Officers may need to search relevant departmental pages, or ask the government department responsible for their sector, to tell them who has been authorised for this purpose. In some cases, the whole public authority has been authorised. In these cases, the primary decision-making body of the organisation should give its opinion.

The most recent guidance from the Information Commissioner (copy available at [www.pdpjournals.com/88184](http://www.pdpjournals.com/88184)) suggests that he interprets ‘reasonable’ to have its ‘plain meaning’. The guidance says: ‘If the opinion is in accordance with reason and not irrational or absurd — in short, if it is an opinion that a reasonable person could hold — then it is reasonable.’

Whilst the Commissioner and Tribunal will mostly be concerned with the reasonableness of the opinion, the process used to reach that opinion may well be a factor in deciding whether that opinion is reasonable. So being able to demonstrate that a clear and logical process is in place for seeking the opinion of the qualified person is essential.

Reasons why an opinion might be found not to be reasonable include:

- inadequate records of the process of seeking the opinion;

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- seeking an opinion later than internal review; and
- if the decision takes into account irrelevant matters.

There needs to be evidence that the qualified person had a full understanding of the information being considered, not necessarily that they have read all of the information concerned.

The opinion should make an indication as to whether disclosure 'would, or would be likely to' cause the prejudice claimed.

The Information Commissioner's guidance suggests that 'would' will only apply where there is more than a 50% chance of the prejudice occurring.

### What prejudice is being considered?

The following are the relevant prejudices for the purposes of the exemption:

- if disclosure would, or would be likely to, prejudice the convention of collective responsibility of Ministers (i.e. Cabinet confidentiality) or the equivalent in the devolved administrations;
- whether disclosure would inhibit the 'free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation'; or
- whether disclosure 'would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.'

Records (i.e. any submission made to the qualified person) must state which of the above reasons applies, and in the case of the latter, explain what prejudice is being claimed.

The Information Commissioner or Tribunal cannot rule against an authority just because they do not agree with the opinion; if the opinion is reasonable and reached through a reasonable process, then the exemption will apply.

Note that a qualified person's opinion is not required if applying section 36 to statistical information (see page 10 of the guidance for examples of where this will apply).

Given the wide scope of section 36, most cases come down to whether the public interest test has been applied correctly. Clearly the Information Commissioner or Tribunals have much more scope for overturning an exemption on these grounds. So public bodies need to take great care in formulating their public interest arguments, and will want to be able to produce strong evidence to support their arguments.

### Who is the 'qualified person'?

How does one 'qualify' for the role? Is there an exam? Do you get letters after your name?

The 'qualified person' is not a fancy name for the organisation's FOI Officer. Neither is it an individual picked at random by the public body to make decisions about what can and can not be released.

The qualified person is someone very specific. The Act itself lists a range of organisations and specifies exactly who the qualified person is. For government departments it is a minister. For the Greater London Authority it is the Mayor of London. In one oddity of the legislation, this means that Boris Johnson can decide whether or not information held by the London Assembly which is supposed to hold him to account should be disclosed.

For many parts of the public sector, the identity of the qualified person is not spelt out in FOIA. Instead, FOIA provides that a government minister should specify who the qualified person is for organisations. In practice, this means that Secretaries of State or their ministers have issued orders declaring who the qualified person is for areas within their brief. For example, David Willetts, the Minister for Higher Education, has issued such an order indicating that Vice-Chancellors, or their equivalent, should fulfil this role in the higher education sector.

In local authorities, the Department for Communities and Local Government has set out that Chief Executives and Monitoring Officers should be the qualified person.

### Practical consequences

It is essential that FOI Officers know who the qualified person is within their organisations. I have borne witness to many occasions where the authority clearly did not understand this, and because of that, their application of the exemption to requested material was found to be invalid.

In the event of an appeal to the Information Commissioner, one of the first things he will check is whether the decision was taken by the right person, and he may ask for evidence that the person concerned is the qualified person for that public body.

Paul Gibbons is speaking on 'To Hold or not to Hold' at the 10th Annual Freedom of Information Conference, taking place in London on 15th and 16th May.

For further information, visit [www.pdpconferences.com](http://www.pdpconferences.com)

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