

# Guidance

## The public interest test: section 21

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## Overview

1. This is part of a series of Guidances issued by the Information Commissioner's Office (ICO), which provide details on specific areas of the Public Access to Information (PATI) Act 2010. The Guidances aim to help public authorities fully understand their obligations under the PATI Act and to promote good practice.
2. The ICO Guidances provide our *general* recommended approach on the application of the relevant PATI Act provisions and the matters we will take into account when exercising functions and powers under the PATI Act.
3. Please remember that all requests for records under the PATI Act must be considered on a case-by-case basis. Similarly, the Information Commissioner's decisions on applications for review are based on the specific circumstances and merits of each application.
4. The ICO will revise our Guidances on an annual basis, or sooner if needed, when the Information Commissioner and the Courts issue new decisions and when new legislative changes take effect.
5. This particular Guidance provides an overview of how public authorities should apply the 'public interest test' contained in section 21 of the PATI Act and interpret the 'public interest'.
6. When a public authority decides that a record falls within a 'qualified' exemption, it must apply the public interest test to determine whether the record must still be disclosed.
7. The test requires public authorities to balance whether the public interest in favour of disclosing an exempt record outweighs the public interest against disclosing the record.
8. The public authority can only refuse access to the record when the public interest against disclosing the record outweighs the public interest in favour of disclosing the record. If the public interest in favour of disclosing the record is equal to or greater than the public interest against disclosing the record, then the record must be disclosed.
9. Public authorities must keep in mind that the PATI Act requires a public authority to provide access to a record unless there is a valid reason not to.

## Public interest test: What does the law say?

10. The PATI Act states in section 21:

### Public Interest Test

21 For the purposes of this Part [Part 4 Exempt Records], the test of whether disclosure by a public authority of a record or the existence of a record is in the public interest is whether the public interest would, on balance, be better served by disclosure rather than non-disclosure.

11. The Public Access to Information (PATI) Regulations 2014 further explain:

### Interpretation

2 In these Regulations—

\* \* \*

“public interest” means but is not limited to things that may or tend to—

- (a) promote greater understanding of the process or decisions of public authorities;
- (b) provide reasons for decisions taken by Government;
- (c) promote accountability of and within the Government;
- (d) promoted accountability for the public expenditure or the more effective use of public funds;
- (e) facilitate public participation in decision making by the Government;
- (f) improve the quality of services provided by the Government and the responsiveness of the Government to the needs of the public or of any section of the public;
- (g) deter or reveal wrong-doing or maladministration;
- (h) reveal information relating to the health and safety of the public, or the quality of the environment or heritage sites, or measures to protect any of those matters; or
- (i) reveal untrue, incomplete or misleading information or acts of a public authority.

## Background to the public interest test

12. Section 12(1) of the PATI Act sets out clearly that:

*...every person who is Bermudian or a resident of Bermuda has a right to and shall, on request, be given access to any record that is held by a public authority, other than an exempt record.*

13. As section 12(1) states, the default rule under the PATI Act is that Bermudians and residents of Bermuda are granted a right to access any record held by a public authority.

14. This general right of access is limited, however, by exemptions from disclosure listed in Part 4 of the PATI Act.

15. Exemptions are either ‘absolute’ or ‘qualified’ exemptions.

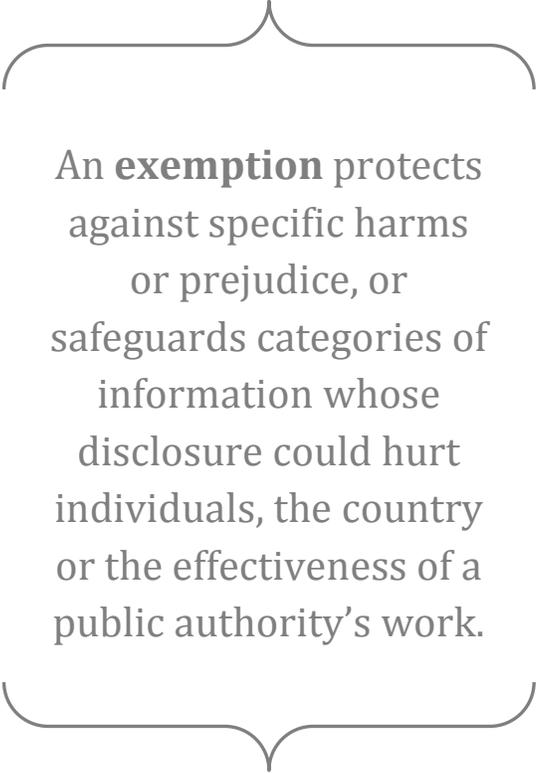
16. When an ‘absolute’ exemption applies to a record, a public authority may refuse to disclose the record without needing to consider the public interest. See the ICO Guidance on each of the absolute exemptions to understand how to apply them in practice.

17. The absolute exemptions under the PATI Act are:

- s.26A, Information received in confidence—international tax agreements
- s.27, Cabinet documents
- s.36, Contempt of court and parliamentary privilege
- s.37, Disclosure prohibited by other legislation

18. When a ‘qualified’ exemption applies to a record, the public authority must then apply the public interest test. This 6-part test, outlined below, requires public authorities to balance whether the public interest is in favour of or against disclosing a requested record.

19. The outcome of this test will determine whether the public authority must disclose the record or whether it can legitimately refuse the request.



An **exemption** protects against specific harms or prejudice, or safeguards categories of information whose disclosure could hurt individuals, the country or the effectiveness of a public authority’s work.

20. Most exemptions in Part 4 of the PATI Act are qualified exemptions and require consideration of the public interest.

21. The following exemptions under Part 4, are all qualified exemptions:

- s.22, Health or safety of an individual
- s.23, Personal information
- s.25, Commercial information
- s.26, Information received in confidence
- s.28, Ministerial responsibility
- s.29, Deliberations of public authorities
- s.30, Operations of public authorities
- s.31, Financial and economic interests
- s.32, National security, defence, and international relations
- s.33, Governor's responsibilities and communications with the United Kingdom
- s.34, Law enforcement
- s.35, Legal professional privilege

22. This means that in most cases, even when a record falls within one of the above exemptions, the public authority should still release the record unless the public interest against disclosure outweighs the public interest in favour of disclosure. Further, when the competing public interests are evenly balanced, the public authority should disclose the record. For a depiction of this, see Illustration 1: Outcome of Public Interest Test, on the next page.

## Illustration 1: Outcome of Public Interest Test

Arguments against disclosure outweigh those in favour



Arguments in favour of disclosure outweigh those against



Arguments are evenly balanced



## The ‘public interest’

23. To carry out the public interest test, it is necessary to understand generally what the ‘public interest’ means in the context of the PATI Act.
24. The PATI Act does not define ‘public interest’. PATI regulation 2, though, provides some guidance. Regulation 2 identifies things (listed above) that may be considered as part of the public interest. The items listed in regulation 2 are not a comprehensive list of what is part of the public interest, but provide examples of the types of things that would be appropriate to balance.
25. When deciding whether additional interests should be considered as part of the public interest, think about how the public interest has been defined more generally. It has been described as, “something which is of serious concern and benefit to the public” and not merely something of individual interest. The public interest means the public good.
26. The public interest is not necessarily the same as what interests the public. The fact that a topic is discussed in the media or social media does not automatically mean that there is a public interest in disclosing a record about it. A topic may be interesting to satisfy a curiosity or to provide amusement, but not have any impact upon the public good.
27. The public interest can cover a wide range of values and principles relating to the public good, or what is in the best interest of society. The public interest can take many forms. For example, there is a public interest in:
  - transparency and accountability;
  - promoting public understanding;
  - safeguarding the democratic process;
  - good decision making by public bodies;
  - upholding standards of integrity;
  - ensuring justice and fair treatment;
  - securing the best use of public resources and funds;
  - ensuring fair commercial competition;
  - ensuring that any public authority with regulatory responsibilities is adequately discharging its functions;
  - ensuring fairness in relation to applications or complaints; and
  - contributing to a debate on a matter of public interest.

28. Like regulation 2, these additional interests are not an exhaustive list, but also help to show the types of issues that public authorities may consider. Depending upon the circumstances of the specific request, a number of interests may apply.
29. The 'public' in the context of the 'public interest' may be the wider general public or it may also be a relatively smaller segment of the public, such as a particular community, parish, neighborhood, or interest group.
30. Note that disclosure of records under the PATI Act is, in effect, to the world at large and not merely to the individual requester. So the requester's private interests are not the same as the public interest. Disclosure may be beneficial to the requester's private interests but may not necessarily serve a wider public interest.

## Applying the public interest test

31. Applying the public interest test requires six broad steps, set out below (with a helpful flowchart provided in the Annex to this Guidance):
  - i. The public authority initially determines that a qualified exemption applies.
  - ii. Then, the public authority must apply the public interest test. The public authority should identify the public interest arguments in favour of disclosing the record.
  - iii. The public authority should next identify the public interest arguments against disclosure.
  - iv. The public authority must make sure to exclude any irrelevant factors.
  - v. Using its list of public interest arguments, the public authority must decide the relative weight of each interest. Some interests will be much more important than others, and should be given more weight in the decision process.
  - vi. Finally, the public authority conducts a balancing test of these arguments to decide where the public interest lies.

### **Step 1: Identify whether the record falls within a qualified exemption**

32. The first step is to determine whether the record actually falls within the qualified exemption. The ICO is producing full Guidances on all of the exemptions (see the 'More Information' section, at the end of this Guidance).

**Note:**

If none of the exemptions apply, the public authority must provide access to the requested record.

If an 'absolute' exemption is relevant, the public authority should follow the advice given in the ICO Guidance on how to apply the specific absolute exemption.

33. If the relevant test or tests for the exemption are met, then the record is an exempt record. However, that is only the first part of the process.
34. The public authority must then apply the public interest test to determine whether, considering all of the relevant circumstances of the case, the public interest in favor of disclosure outweighs the public interest against disclosure. Access to the record can only be denied if the public interest against disclosure outweighs the public interest in favour of it.

## **Step 2: Identify the arguments in support of disclosure**

35. Public interest arguments in favour of disclosure may cover a broad range of topics. Public authorities will typically need to consider some of the following arguments within the specific context of the requested record(s).

### **General public interest in disclosure**

36. There is a general public interest in promoting transparency, accountability, public understanding, and involvement in the democratic process. The PATI Act is a means of helping to meet that public interest, so this must always be given some weight in the public interest test.

### **Public interest in the issue**

37. In addition to the general public interest in transparency and accountability, and any public interest arising generally from the issue concerned, there may be a specific public interest in disclosing the information in the record in question. This will depend upon the specific circumstances of the request.

### **Suspicion of wrongdoing**

38. Another example of a potential public interest in transparency is a suspicion of wrongdoing on the part of the public authority, where the record requested may shed light on this. For this to be considered as a factor in the public interest test, disclosure must serve the wider

public interest rather than the private interest of the requester and the suspicion of wrongdoing must amount to more than a mere allegation. There must be a plausible basis for the suspicion, even if it is not actually proven.

39. Several sources may suggest whether a plausible basis exists:

- The facts may suggest that the basis for the public authority's actions is unclear or open to question.
- If there has been an independent investigation, for example, by an Ombudsman or auditors, the outcome of this may indicate whether or not there is any substance in an allegation of wrongdoing.
- The content of the record is important in making this assessment. It may refute the suspicion, in which case there may be some public interest in disclosing the record to clear up misconceptions; or, it may indicate that the suspicion is justified (a 'smoking gun'), in which case there is an even stronger public interest in disclosure.
- Evidence of public concern about the issue could also be a factor for disclosure.
- If there is evidence of public concern but those concerns do not have an objective basis, there can still be a public interest argument for disclosure if this would show that the concerns are unjustified and would help restore confidence in the public authority.

**Note:**

The Information Commissioner cannot assess whether there has been maladministration or other wrongdoing. In dealing with an application for review, we would consider the types of evidence listed above to assess whether the suspicion of wrongdoing creates a public interest in disclosure, not to decide whether there has been any wrongdoing.

**Presenting a 'full picture'**

40. Even if wrongdoing is not an issue, there is a public interest in fully understanding the reasons for public authorities' decisions, to remove any suspicion of manipulating the facts, or 'spin'.

41. For example, this could be a public interest argument for disclosing advice given to decision makers. The fact that the advice and the reasons for the decision may be complex does not lessen the public interest in disclosing it and may strengthen it.
42. Similarly, the information in the record does not have to give a consistent or coherent picture for disclosure to help public understanding; there is always an argument for presenting the full picture and allowing people to reach their own view.
43. There is also a public interest in the public knowing that an important decision has been based on limited information, if that is the case.
44. If information that is already in the public domain (rather than the requested information) is misleading or misrepresents the true position, or does not reveal the full picture, this may increase the public interest in disclosure.

#### **Other public interest arguments in favor of disclosure**

45. Consider the various lists of possible public interests in the PATI Regulations and this Guidance. Although the requester does not have to, he or she may have also identified some public interests at stake.
46. Decide whether any of them are triggered by the requested record. If so, those public interests should be identified and included in the balancing process.

### **Step 3: Identify the arguments against disclosure**

47. The valid public interest arguments against disclosure are more narrowly defined. This is because the public interest arguments against disclosure must relate specifically to the relevant exemption and the requested records.

#### **Arguments must be relevant to the specific exemption**

48. The PATI Act provides a right to access records held by public authorities. The exemptions from that right are listed in Part 4 of the Act and aim to protect particular, specified interests. The public interest arguments against disclosing a record must relate specifically to that exemption.
49. Arguments that relate to other exemptions are irrelevant. If, for example, a public authority wishes to rely on section 34(1)(a) relating to the prevention, detection or investigation of crime, the public interest arguments put forward against disclosure must relate specifically to the need to avoid harming crime prevention, detection or investigation, and not, for example, to avoid endangering health and safety, which is addressed in section 22.

50. Remember that even though the public authority has already determined that the exemption applies, the public interest test requires a balancing of the interests.

**Example:**

The public authority may argue that a record cannot be disclosed under section 34(1) because it will reveal the specific technology used for conducting surveillance to detect criminal activity. This argument must be balanced against concerns, for example, that the surveillance technology exceeded the public authority's lawful power or was used contrary to legal requirements, or that an elected official had publicly promised not to adopt that technique. Thus, falling within a specific exemption does not automatically mean that a public authority can refuse to disclose a record.

**Arguments must be specific to the requested record**

51. A public authority may have a general policy that it does not intend to disclose a specific type or class of records. Many public authorities, for example, stated in their 2015 Information Statements that certain classes or types of records were exempt under qualified exemptions.
52. However, this general policy must not prevent the public authority from considering the balance of public interest in the individual circumstances of each request and specific record. The public authority must be willing to consider whether the circumstances in a particular request justify departure from its general policy.

**Step 4: Ensure no irrelevant arguments are considered**

53. There are a number of arguments which may be put forward in the public interest test that are widely considered unlikely to be relevant.

**Identity of the requester**

54. The requester's identity or his or her motives in seeking the record are not relevant to the public interest test. Public access to information laws, like the PATI Act, are often considered to be 'applicant and motive' blind because the disclosure under the PATI Act is in effect a disclosure to the world. The public interest issues that arise when a qualified exemption is applicable are about the effect of making the record public, not the effect of giving it to a particular requester. This does not mean that the requester's public interest arguments should not be considered.

### **Information may be misunderstood**

55. Information in requested records may be technical or complex. This is not usually an argument that justifies the exemption. The obvious solution is for the authority to publish an explanation of the information, rather than refuse to disclose the record.
56. The public authority may be concerned that the record would be misleading, perhaps because it consists of notes reflecting only part of a discussion or because it may be inaccurate or out of date. The PATI Act provides a right to records held by a public authority; it does not require the information in the record to be complete, accurate, or up to date.

### **Other means of scrutiny**

57. It may be argued that the existence of other means of scrutiny or regulation of the relevant public concern weakens the public interest in disclosure. This argument suggests that there is no need for the public to scrutinise the requested information through the PATI Act because it can be adequately considered by another body as part of their scrutiny or regulatory function.
58. The fact that other means of scrutiny are available and could be used does not itself weaken the public interest in disclosure and we consider this argument to be irrelevant in the public interest test.
59. However, the use of other means of scrutiny may help to satisfy the public interest that would otherwise be furthered by disclosure. If, for example, a report providing the conclusions of other means of scrutiny is publicly available, this may lessen the public interest in disclosing the information in the record requested under the PATI Act. Furthermore, if the other investigation is ongoing, the public interest may be better served by allowing the investigation to continue without interference, rather than disclosing information prematurely.
60. The questions to consider are: (a) how far the other means of scrutiny go to meet the specific public interest in transparency in any particular case and (b) what information is available to the public by these other means?

### **Embarrassment of Government, civil service or other public authority officers or staff**

61. Potential embarrassment of Government, civil service, other public authorities, or their individual officers or staff is not a valid public interest argument against disclosure. At times, the disclosure of records will lead to discomfort or embarrassment. This part of accountability in a democratic and open society.

### **The seniority of persons involved in the subject matter**

62. Frequently, the requested record(s) will involve senior individuals in Government, the civil service or other public authorities. The fact that an individual holds a high position is not, itself, sufficient to weigh against disclosure. The public authority must assess the consequence or benefits from disclosure of the particular record(s).

### **Possible loss of confidence in Government, the civil service or other public authority**

63. Relatedly, the possible loss of confidence in Government, the civil service or other public authority is not a valid public interest argument against disclosure. This may occur, for example, when a requested record reveals poor decision making or poor management of public funds. The PATI Act seeks to increase transparency and accountability under these circumstances and that, at times, may lead to a loss of confidence from the public that requires an improvement in the public authority to restore.

### **Step 5: Attach weight (importance) to the arguments**

64. Once the public authority has identified the relevant public interest arguments in favour of and against disclosure, it must then decide if some interests should be given more weight (importance) than others.

65. In weighing the arguments for and against disclosure of a document, it is not sufficient simply to list the arguments. The public authority must explain the relevance of the arguments and the relative importance given to those arguments in its decision.



**Weighing** is a process that identifies some interests as more important than others because of their nature, risk of happening, or the severity of the harm involved.



66. Certain factors can add weight to the arguments on either side and these will help decide where the balance of public interest lies. These factors include the following:

### **Likelihood of harm**

67. A key factor is the public authority's assessment of the likelihood of harm or prejudice. For example, some exemptions require the public authority to determine whether disclosure 'would' or 'would be likely to' cause the harm described in the exemption. 'Would' means more probable than not (a more than 50% chance). 'Would be likely' means that there must be a real and significant chance of the harm occurring, even though the probability may be less than 50%.
68. 'Would' is a higher standard to meet than 'would be likely to'. So, if the public authority can establish that harm would happen, the argument against disclosure carries greater weight than if it had only established that harm would be likely to happen. This does not mean that when the harm 'would' happen, the public interest will always be against disclosure—there may be equally weighty arguments in favour of disclosure—but it does make it more likely that the balance of public interest will be against disclosure.
69. Applications may also arise in which the Information Commissioner does not accept that, on the basis of the evidence shown, the authority has established that the harm would happen. In these instances, the Information Commissioner instead proceeds on the basis of 'would be likely to'.

### **Severity of harm**

70. The severity of the harm that may happen also affects the relative importance of the public interest argument. The severity of the harm refers to the impact of the harm when it happens and not about how frequently the harm may happen. Harm may still happen, even if its impact would not be severe. However, if the harm has a particularly severe impact on individuals, the public authority, or other public interest, then this will carry considerable weight in the public interest test. This would be relevant if, for example, there is any risk of causing physical or mental harm to an individual.
71. The severity of the harm and the likelihood of it occurring, considered together, indicate the impact of the harm, and this in turn will affect the weight, or importance, attached to the arguments against disclosure.

### **Age of the information in the record**

72. Generally speaking, the public interest against disclosure will diminish over time, as the issues in the record become less relevant and sensitive, and the likelihood or severity of the

harm lessens. However, this is not necessarily true in every case. For example, an investigation may be closed for a very long time and it may be argued that the weight of public interest in favour of disclosure has increased, but if the investigation is re-opened, the weight of the public interest argument against disclosure may be restored. So, the weight of the arguments on either side can depend on the age of the information and the timing of the request.

73. The PATI Act also acknowledges the effect of the passage of time—under section 40 some exemptions cease to apply altogether to a record 30 years after the record’s creation. Note, however, that if a record is old, but 30 years has not yet passed, this does not automatically mean that there is a stronger argument for disclosure simply because the record is nearing the point at which the exemption no longer applies.

### **The specific information and the public interest in disclosure**

74. In assessing the weight of arguments for disclosure, it is important to consider how far disclosing the requested information would further the public interest. The information may be relevant to a subject of public interest, but it may not greatly add to public understanding—in such cases the public interest against disclosure may outweigh that in favour of disclosure. On the other hand, disclosure may help inform that debate, and if so, the public interest in favour of disclosure is strengthened. The weight of the argument for disclosure will depend on the content of the information and the nature of the public interest identified.

### **Information already in the public domain**

75. It may be necessary to consider whether similar information is already available in the public domain, and what effect this has on the public interest test. If similar information is already available and the requested record would not significantly add to it, the public interest arguments about furthering debate and increasing accountability may carry little weight. If the requested record contains new material that would help inform public debate, then the weight of the specific public interest argument could still be strong. Moreover, there is always some weight in the general argument for transparency and having the ‘full picture’.
76. The factors discussed above will help in assigning relative weight to the public interest arguments on each side but they are not intended to be a complete list. Other factors may also be relevant, depending on the circumstances of the case.

## **Step 6: Balance the public interest arguments**

### **The balancing exercise**

77. The public authority must identify and set out the competing public interest arguments for and against disclosure. Having identified the public interest arguments on both sides, and assigned them a relative weight, the public authority must then balance the arguments to determine where the public interest lies.
78. This is not an exact process, but the public authority should try to approach it as objectively as possible. It should recognise that arguments can be made on both sides. It may be helpful for the public authority to create a list showing the arguments it is considering on both sides.
79. If the Information Commissioner is deciding the application, we will consider these arguments, or consider other public interest arguments that the authority did not include, and may reach a different conclusion. An example of balancing the public interest test in practice can be found at Illustration 2, at the end of this section.

### **The impact of timing upon the balancing process**

80. Note that the need to consider the public interest in all the circumstances of a case means that the factors weighing in favour of and against disclosure, or their relative weight in the balancing exercise, may well change over time. It is important that the balancing exercise takes into account the circumstances at the time of the request for the record (or, where relevant, at the review stage). Just as the application of an exemption may change with the passage of time, the balance of the public interest will also shift with the passage of time, often in favour of disclosing the record.
81. Theoretically, a public authority might withhold information when the balance of the public interest test at the time it received the request was against disclosure, even if this shifted during consideration of application for an internal review. If such a situation arose, however, the requester could simply submit a new request and receive the record. It would be in the public authority's interests to avoid damage to its reputation by not seeking to rely on this technicality at the review stage to deny the request. Rather, the public authority should strive to fulfill the mandate of the PATI Act to promote transparency in a timely manner.
82. Following this principle, when addressing an application for review of a decision to withhold a requested record, the Information Commissioner will consider the circumstances at the time of the request or within the time for the public authority's compliance. There may be rare cases where events after the time for compliance change the balance of the public

interest test, and the Information Commissioner may take this into account when appropriate.

### **Information Officers consulting with others about the public interest**

83. The PATI Act gives the Information Officer the responsibility and authority to perform the public interest test and make the initial decision on the request. The Information Officer is in the best position to determine what, if any, assistance he or she needs to make an informed decision.
84. With the majority of requests, the Information Officer will be fully capable of making the public interest determination without influence or input from others within the public authority.
85. With other requests, the Information Officer may want *information* from others, including directors or other individuals with more seniority within the public authority. Once the Information Officer gets the additional information, he or she is able to complete the public interest test and reach a decision. It is the responsibility of the Information Officer to collect all of the needed information and then make an independent decision that fairly balances the public interests.
86. Finally, in some instances, the Information Officer may decide that to make the best decision possible, he or she needs the head of the public authority to provide both *information* as well as *advice* about how to balance the public interests.
87. The public authority's internal review of the Information Officer's decision would normally be conducted by the head of the public authority. The head of the public authority would usually, therefore, not be involved in the initial decision on the request. One of the overarching purposes of the PATI Act, though, is to improve decision making by public authorities. If the Information Officer needs to consult with the head of the public authority, or others, on the public interest to reach an appropriate decision, this should occur.
88. However, this decision making process must be transparent to both the requester and the Information Commissioner. In the rare situations where the head of the authority is involved in reaching the initial decision on the request to the point that the decision is considered made by the head of the authority—rather than the Information Officer—the requester must be informed of this in the decision.
89. To determine whether the decision is 'made by the head of the authority,' the public authority should consider whether the head of the authority would be able to fairly provide an internal review that newly considers the initial decision with 'fresh eyes'. If this is not

possible, then when notifying the requester of the right to a review, as required by section 14(2)(b), the public authority must explain to the requester that because of the nature of the considerations for the public interest test in the particular case, the head of the authority made the initial decision. As a result, any request for an internal review would be referred directly to the Information Commissioner under section 44 and proceed as an independent review by the Information Commissioner.

90. Ultimately, decisions about how to conduct the public interest test and who to consult rests solely with the Information Officer.
91. It is important when the Information Officer is seeking advice or input to remember that section 12 requires him or her to protect the requester's confidentiality. The name of the requester should not be shared with anyone unless the name is necessary to locate responsive records and assistance is needed for the search. Anyone assisting with that search, the public interest test, or otherwise involved in handling a PATI request is under the same statutory obligation to safeguard the requester's confidentiality as the Information Officer.

## Illustration 2: The public interest test in practice

A useful example of the public interest test is a Decision Notice by the UK Information Commissioner (Ref FS50264783, 10 January 2011) under the UK Freedom of Information Act.

It involved a request to the Department of Education for an assessment report by the Prime Minister’s Delivery Unit (PMDU). The Department relied on the PMDU report to expand a new model for secondary education. The report included information and advice from stakeholders about the model. The Department withheld part of the report under an exemption for records whose disclosure ‘would be likely to’ inhibit the free and frank provision of advice and exchange of views for purposes of deliberations.

This is a qualified exemption, so the question was whether the public interest against disclosure outweighed the public interest in favour of disclosure. The UK Information Commissioner compared the public interest arguments on both sides, as follows:

Public interest arguments against disclosure	Public interest arguments in favour of disclosure
The PMDU considered their assessments to be confidential advice to Ministers	The failure to release the report raised public suspicion; more public information might remove the suspicion of ‘spin’
Participants were told they could give their views confidentially, so disclosure would be likely to inhibit the ability to get similar advice or exchange of views in the future	Current speculation about what the report says shows significant public interest in understanding the ‘full picture’ of the report’s content
PMDU depends on participants being frank; if the stakeholders felt their findings and advice would be made public, it would result in less frank reporting, conclusions, and advice in future assessments	There is a strong specific need to better understand how this educational reform was assessed, in addition to the general public interests in transparency and a better understanding of government decision making

The UK Information Commissioner’s decision depended on balancing the relative weight, or importance, of the arguments on each side, not the quantity of those arguments.

He found that the interests in favour of disclosure were ‘significant’ in light of the extensive public attention, debate, and questions about this major educational reform.

On the other side, he found that the arguments against disclosure were weak. The severity of the harm to confidentiality or to future open and frank discussions was limited because the final report kept comments anonymous. The record’s age also made the harm minimal because the report’s recommendations and plans were to have been finished before the request was made.

On balance, the Information Commissioner decided that the public interest favoured disclosure of the assessment report and ordered its release.

## Notifying a requester of a decision to refuse access to a record

92. When the public authority decides that the public interest lies in maintaining the exemption and that it is refusing the request in whole or in part, the public authority must immediately give notice in writing of the decision to the requester, as well as to any relevant third party, as required by section 14(2) of the PATI Act. The public authority must give this notice no later than six weeks after receipt (or deemed receipt) of the request.
93. Importantly, section 14(2) makes clear that when a public authority is refusing the request on public interest grounds, the notice of the decision must state why the authority believes that, in all of the relevant circumstances of the case, the public interest against disclosure outweighs the public interest in favour of disclosure of the record. The reasons must include the public authority's findings on any material issues and the details about which interests were taken into consideration in balancing the public interest.
94. It is not enough for the public authority to quote the statutory language and say in its decision that the public interest lies in maintaining the exemption. The public authority must set out the competing public interest arguments and then explain why it has concluded that the public interest against disclosure outweighs the public interest in favour of disclosure.
95. Without this information, a requester cannot make an informed decision about whether to seek an internal review of the decision or whether to seek a review by the Information Commissioner. Public authorities may also find it difficult to justify their decisions on the public interest if an application for review is subsequently made to the Information Commissioner.
96. The Information Commissioner expects that public authorities using qualified exemptions to refuse a request will provide clear, logical, and credible reasons as to why the disclosure of the record would not be in the public interest.

## More information

97. This Guidance has been developed based upon the PATI Act and current PATI Regulations, understood in the context of best practices and guidances from other Commonwealth countries with access to public information laws.
98. We do not have any decisions yet from the Information Commissioner or Bermuda Courts to draw upon. So our Guidances may use examples of legal judgments from the UK or

other Commonwealth countries. These examples are for illustration only and are not binding on Bermuda's Courts or public authorities.

99. If you would like to read more about 'public interest' cases in the UK and other jurisdictions please see the list of examples of cases on our website, [www.ico.bm](http://www.ico.bm). Again, these cases are not binding, but they may help you to understand how others have worked through these issues.
100. The Information Commissioner's Guidances and additional resources are available on our website, [www.ico.bm](http://www.ico.bm). If you do not have access to the internet, hardcopies of our Guidances, decisions, and resources are available on request by contacting our office.
101. If you need any more information about this Guidance or have an inquiry about any other general aspect of the PATI Act, or public access to information, please contact us:

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# Annex 1: Applying the public interest test flowchart

