

Please read the Introduction – See [Introduction](#).

Section 35: Information Obtained in Confidence

Section	Information Required
35(2)	<p>Section 35(2) states that the exemption at 35(1) does not apply to certain records prepared by a member of staff of an FOI body or a service provider. Please therefore answer these questions related to section 35(2).</p> <ul style="list-style-type: none"> • Was the record prepared by a head, director or member of staff of an FOI body or a service provider in the course of the performance of his/her functions? <p>If the answer to the Question above is No – please proceed to the relevant Question below relating to the paragraph of section 35(1) being relied on in this case.</p> <p>If the answer to the Question above is Yes –</p> <ul style="list-style-type: none"> • Show (having regard to the relevant questions at section 35(1)(b) below) that disclosure of the information contained in the record would constitute a breach of a duty of confidence that is provided for by: <ul style="list-style-type: none"> ○ an agreement or ○ statute or ○ otherwise by law <p>AND</p> <ul style="list-style-type: none"> • Identify the person to whom the duty of confidence is owed and show that such person is not : <ul style="list-style-type: none"> ○ an FOI body, head or director or member of staff of an FOI body or ○ a service provider as defined in section 2 <p>Please now proceed to the relevant Question below relating to the paragraph of section 35(1) being relied on in this case.</p>
35(1)(a)	<ul style="list-style-type: none"> • Show <u>all</u> of the following – <ul style="list-style-type: none"> ○ that the information contained in the record was given to an FOI body in confidence, and ○ that it was given on the understanding that it would be treated by the FOI body as confidential, and ○ that the disclosure of the information would be likely to prejudice the giving to the FOI body of further similar information from the same person or other persons, and ○ that it is of importance to the body that such further similar information should continue to be given to it. • What public interest factors in favour of release of the record and what public interest factors against release of the record were considered? • Explain why you concluded that, on balance, the public interest would not be better served by granting this request.

35(1)(b)	<ul style="list-style-type: none"> • Clarify whether, in your view, disclosure of the information contained in the record would constitute a breach of a duty of confidence provided for by: <ul style="list-style-type: none"> ○ a provision of an agreement or ○ a provision of an enactment or ○ otherwise by law. • If the duty of confidence concerned is provided for by a provision of an agreement, <ul style="list-style-type: none"> ○ provide details of the agreement and the particular provision concerned and furnish a copy of the agreement or other relevant supporting information as appropriate and ○ explain how disclosure of the information would constitute a breach of that duty of confidence. • If the duty of confidence concerned is provided for by a provision of an enactment, <ul style="list-style-type: none"> ○ identify the legislation and the particular provision concerned ○ confirm that it is not a provision specified in column (3) in Part 1 or 2 of Schedule 3 of the FOI Act and ○ explain how disclosure of the information would constitute a breach of that duty of confidence. • If the duty of confidence concerned is provided for otherwise by law, please note that the Commissioner accepts that an equitable duty of confidence is comprehended by this provision and that the necessary elements required to establish a breach of an equitable duty of confidence in most cases are: <ul style="list-style-type: none"> a) the information has the necessary quality of confidence, b) it was imparted in circumstances imposing a duty of confidence and c) disclosure would be an unauthorised use of that information to the detriment of the party communicating it. <ul style="list-style-type: none"> ○ Show that each of the elements at a), b) and c) above are met
35(4)	<p><u>To be asked only where section 35(4) has been relied on</u></p> <ul style="list-style-type: none"> • Please show that the request relates to a record to which subsection (1) applies • Show that subsections (2) and (3) do not apply to the record, or would not, if the record existed, apply • Explain clearly how disclosure of the existence or non-existence of the record (as opposed to disclosure of the actual contents of the record) would have an effect specified in subsection (1).