

Staff training

Making the connection between learning and work

FOI advanced training workbook on sections 30 and 31



ico.

Information Commissioner's Office

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Chapter 1. Objectives and introduction

1.1 Objectives

When you have completed this workbook you should be able to:

- Understand the relationship between sections 30 and 31
- Describe the types of investigations and proceedings covered by section 30(1) and understand that for section 30(2) to apply the information must relate to confidential sources
- Explain the sort of factors that should be considered when applying the public interest test to section 30
- Identify the range of law enforcement areas covered by section 31(1)
- Explain what is meant by the exercise of functions for the purposes listed in section 31(2)
- Explain the level of prejudice required to engage section 31
- Identify the type of factors to be considered when applying the public interest test to section 31
- Explain how/when the requirement to confirm or deny is disapplied

1.2 Introduction

There is a close link between these two exemptions and for this reason they are covered together. Section 30 is concerned with particular investigations and prosecutions conducted by public authorities, such as a murder investigation by the police, and also the obtaining of information from confidential sources (for example, police informants), whereas section 31 is concerned more generally with crime prevention, law enforcement and investigatory functions.

Each exemption will be analysed in detail separately, and, by way of assistance and practical application, reference will be made to real cases and hypothetical examples. Practical exercises will be included and other useful resources will be linked to where appropriate. Points of particular relevance to different parts of the office are set out in labelled boxes, for example case officer tips.

1.3 Relationship between section 30 and 31

The two exemptions may complement each other but the exemptions from the duty to communicate information do not overlap despite the fact that they protect similar or related interests. This is because section 31(1) explicitly states that it can only be applied to information that is not exempt under section 30. For example, section 30 can protect information held by the police for the purpose of a criminal investigation they are conducting, and section 31 can be used to withhold information which could prejudice the detection of crime. So, on the face of it, details of forensic evidence collected at a crime scene could be withheld under either exemption. However in practice, because section 31 cannot be applied to information exempt under section 30. Therefore where the public authority has a duty to investigate (in this case the police) only section 30 would be available.

Section 30 is subject to the public interest test and so information exempt under section 30 could be disclosed in the public interest. But, even where section 30 cannot be maintained in the public interest, this still doesn't mean that a public authority can apply section 31 to the information. This is because the exemption provided by section 30 is still engaged even if the public interest favours disclosure.

However, where a public authority is not confident that one of the two exemptions applies, it can cite the other exemption as a back-up. That is, it may withhold information under section 30 but also explain that should the Commissioner find that section 30 is not engaged, it believes the information would be exempt under section 31.

There is another direct link between the exemptions, as section 30(2)(a)(iii) makes specific reference to the purposes listed in section 31(2). This will be discussed later in the workbook when section 30(2) is considered in more detail.

Read:

- **FOI and EIR Foundation Training Workbook section 6.1**

Chapter 2. Section 30

2.1 The main focus of the workbook will be on section 30(1)-(3), as subsections (4)-(6) simply provide certain definitions for the main provisions of the section.

Section 30(1)-(3) is reproduced in full as follows:

30(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—

(i) whether a person should be charged with an offence, or

(ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct.

(2) Information held by a public authority is exempt information if—

(a) it was obtained or recorded by the authority for the purposes of its functions relating to—

(i) investigations falling within subsection (1)(a) or (b),

(ii) criminal proceedings which the authority has power to conduct,

(iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the

purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or

(iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and

(b) it relates to the obtaining of information from confidential sources.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2).

2.2 Section 30 is a qualified, class-based exemption

This means that there is no prejudice test. If the information meets any of the definitions in subsections (1) or (2), the exemption is engaged. Once engaged, as section 30 is a qualified exemption, it will then be necessary to consider the public interest test (see later in Chapter 2.5).

Read:

- **The Prejudice Test paragraph 6**
- **Foundation workbook 6.1.2**

Section 30 introduces two closely related qualified exemptions at subsections (1) and (2). In general they focus on the purposes for which information was obtained, recorded or held.

The language used in these two subsections is very precise and includes several key terms. It is important to understand these terms, and as we work through each subsection we will consider the meaning of the following:

"At any time" (s30(1))

"Duty" (to investigate) (s30(1)(a))

"Power" (s30(1)(b) and (c))

"With a view to" (s30(1)(a))
"Any investigation" (s30(1)(a) and (b))
"In the circumstances may lead to" (s30(1)(b))
"Relating to"/"relates to" (s30(2)(a) and (b))

2.3 Section 30(1)

In general terms this subsection is about the need to protect the effective investigation and prosecution of crime, and covers information held for the purposes of certain investigations and proceedings conducted by public authorities.

Information held at any time

The exemption applies to information that "has **at any time** been held for the purposes of" the investigations and criminal proceedings set out in subsections (a) to (c). Therefore, information held for both on-going and closed investigations is covered, regardless of whether it was obtained for other purposes or also used for any other purposes.

Exercise (1)

You will be aware that there are various stages to the investigation and prosecution of a crime. The following is a 'timeline' regarding a hypothetical investigation:

January 2011 - Police commence an investigation of an armed raid on a newsagent's premises. CCTV footage together with other information concerning the incident is collected as evidence by the police.

March 2011 - Suspects are identified and arrested and weapons are confiscated. The police discover that one of the confiscated guns has been used in a number of other crimes.

October 2011 - Criminal proceedings are instituted and convictions are secured.

January 2012 - The police use this crime as a case study to be included in a confidential report to the Home Secretary on the increasing use of guns in the area.

- 1. If in January 2012 a request was made to the police for the CCTV footage (i.e. three months after the convictions), would this information still be exempt?**
- 2. Would the case study be exempt if a request was received by the police in March 2012 for the information contained in the confidential report to the Home Office?**

[N.B. The answers are provided overleaf.]

Exercise (1) – answers:

1. **Even though the request for the CCTV footage is made after convictions have been secured, this information is still exempt under section 30(1)(a) because it had been held for the purposes of a police investigation in the past.**
2. **Much will depend on the nature of the information in the case study. To the extent that it contains details of the actual crime that were held for the initial investigation, the exemption at section 30(1) will still apply. However, if there is any additional information in the case study that was not held as part of the investigation that commenced in January 2011, this will not be exempt under section 30(1). For example, the case study may include information relating to general police policies and procedures that were not held for the specific investigation.**

For information to be exempt under section 30(1), information must have been held at any time for at least one of the **specific** investigations or proceedings referred to and not simply for the general purposes of investigating and prosecuting. For example, evidence collected at a crime scene would be held for a specific investigation, whereas a manual explaining the procedures for labelling and storing such evidence would not.

Case officer tip:

It's possible that, for example, a copy of the procedures for collecting evidence from a crime scene is placed in the investigation file of a specific burglary. The Commissioner would accept that in this context that copy of the procedures is held for the purpose of the investigation and could be exempt under section 30(1)(a) if a request was made for that crime file.

However, if a request was made (with no reference to a particular investigation) for the procedures for collecting evidence in isolation, or a request was made for all procedures and policies adopted by the police when investigating a crime, it could not be withheld under section 30(1)(a) on the basis that a copy of it had been attached to a specific crime file.

If its disclosure would prejudice the detection of crime it could be withheld under section 31.

This approach may not be consistent with our normal approach that the Act provides a right to information, not documents, but it does have practical benefits in terms of both case work and the protection it affords investigations.

We will now look in more detail at the types of investigations and proceedings that are covered by the various subsections of section 30(1).

Duties and powers

Section 30(1) describes different duties and powers that the public authority must have.

A “duty” must relate to a legal duty to investigate; in other words, the public authority has a legal obligation to investigate.

By contrast, a “power” to investigate or to conduct proceedings refers to circumstances where a public authority uses its discretion whether or not to exercise the authority that is vested in it.

2.3.1 Section 30(1)(a)

30(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—

- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—**
 - (i) whether a person should be charged with an offence, or**
 - (ii) whether a person charged with an offence is guilty of it,**

This subsection relates to circumstances where something has happened which triggers the **duty** to investigate whether an offence has been committed. It will apply where there is the potential for that investigation to lead to someone being charged with that

offence, or, where someone has already been charged, to investigations to gather evidence to determine their guilt. In broad terms, the exemption covers criminal investigations, but, as will be explained shortly, this is not always a very helpful term.

The key phrases here are "duty to investigate", "with a view to". Authorities who have the legal "duty" to conduct such an investigation will often be police forces. However it will also apply to some investigations carried out by organisations such as the UK Border Agency.

Section 30(1)(a)(i), which covers the period of an investigation leading up to the decision whether or not to bring charges, is the more frequently used exemption of the two.

Section 30(1)(a)(ii) covers the 'post-charge' period, but is still concerned with the investigatory process and would cover, for example, situations where the Crown Prosecution Service asks the investigating body (such as a police force) to provide further information before a case comes to trial.

Case officer tip:

To rely on section 30(1) a public authority must have the powers and duties described in section 30(1). These will usually be set out in statute. Case officers should ask the public authority to demonstrate how the powers or duty arises. Where section 30(1)(a) is cited the public authority also needs to indicate the offence or offences likely to be relevant in the circumstances of the particular case.

Read: Caseworker advice note 'Evidence required to engage section 30(1)(a)' CWAN011

Case officer tip:

For investigations relating to individuals, experience has shown that police forces and the ICO will often apply the exemption at section 40 rather than section 30. Clearly, for such an approach to be acceptable, it must either be a breach of the data protection principles to confirm or deny or (if only the section 1(1)(b) right to have information communicated is relevant, then all the withheld information must be personal data.

Although the investigation must be instigated with a view to ascertaining "whether a person should be charged with an offence", it is not necessary that the investigation does ultimately lead to a charge or proceedings. For example, an investigation may conclude that no offence was committed, fail to identify a suspect or to obtain sufficient evidence to charge the suspect.

2.3.2 Section 30(1)(b)

30(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct,

This differs from section 30(1)(a) in that the investigating authority must **also** have the power to conduct the criminal proceedings. The emphasis also differs as there does not have to be a "**duty**" to conduct the investigation.

"Any investigation" / "in the circumstances may lead to":

The provision refers to "any investigation" so it's possible that the focus of the investigation is not initially on a criminal offence. However, at some stage in the investigation it must become apparent that there is a possibility that a criminal offence has been committed which the public authority has the power prosecute - i.e. that there are "**circumstances** [that] may lead to a decision ... to institute criminal proceedings".

It is possible to imagine different scenarios where this sub-section could apply.

Example

The Information Commissioner's investigations into section 55 (DPA) and 77(FOIA) offences provides a useful illustration of how this subsection applies. The Commissioner

undertakes investigations and also has the power to institute and conduct proceedings. It is an offence under section 77 of FOIA to destroy information to avoid disclosing it in response to a subject access request under the Data Protection Act (as well as in response to a section 1 request under FOIA). It may be that what at first appeared to be a run of the mill Request for Assessment unearths such an offence. Alternatively, a whistle blower within a public authority may inform the Commissioner that the authority has destroyed information to avoid complying with a request, in which case the investigation would commence as one focussing on a possible criminal offence.

It is important to emphasise that, in the Commissioner's view, 'in the circumstances' means that there must be a plausible reason to suspect that an offence may have been committed. So, for example, he would not accept that any section 42 Request for Assessment could be withheld under this subsection simply because there is a chance that an offence may be uncovered at some point. There would need to be something about the circumstances at the time of the request to suggest that this is likely to be the case.

Other regulators, such as the Health and Safety Executive, the Environment Agency and DEFRA, are also likely to have the necessary powers of investigation and prosecution.

It's important to establish whether the public authority has the power to institute and conduct criminal proceedings. For example, although the police carry out investigations they do not have any power to **conduct** criminal proceedings and so cannot apply this part of the exemption to information they hold.

Case officer tips:

Criminal proceedings can be instituted when an individual is charged with an offence. Although the CPS are usually responsible for deciding whether to charge someone, the police can make the decision themselves, where for example despite the CPS believing there is insufficient evidence to charge a suspect the police are concerned that releasing him would put others at risk. Therefore the police can institute criminal proceedings. However the police are not responsible for **conducting** criminal proceedings.

Again requests for information relating to individuals are likely to be dealt with under section 40 rather than section 30.

For other examples of public authorities that have the power to conduct criminal proceedings, read:

- Paragraphs 16-20 and 32 of decision notice [FS50375720](#) for an understanding of how the Food Standards Agency has the necessary powers to be able to rely on section 30(1)(b).
- Paragraphs 58-63 of decision notice [FS50260346](#) for an analysis as to why the Foreign and Commonwealth Office was unable rely on section 30(1)(b).

2.3.3 Section 30(1)(c)

30(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—

.....

- (c) any criminal proceedings which the authority has power to conduct.**

The key difference here is that there is no reference to investigations. In order to be able to claim this exemption, the public authority must have the power to conduct criminal proceedings. There is a close link to section 30(1)(b) in that it can apply to the same public authorities, but (c) applies solely to information held as part of the post-investigative stage once a decision has been made to prosecute. Importantly, it will also apply to public authorities who are solely prosecuting authorities. This will often be the Crown Prosecution Service (the CPS). Note that section 30(1)(c) still protects information even if the CPS decides not to pursue a prosecution.

Section 30(1)(a)-(c) :

- (1)(a) – the PA must have a duty to investigate
- (1)(b) – the PA must have the necessary investigatory role **but also** the power to conduct proceedings
- (1)(c) – the PA is only required to have the power to conduct criminal proceedings

2.3.4 Historical records

Note that section 63(1) says that the exemption at section 30(1) cannot apply to information contained in historical records. See [FS50373733](#). However, such information can be exempt under section 31.

For an explanation of historical records see the [FOI Guide](#) – Is there anything else we need to know about exemptions?

2.4 Section 30(2)

- 30(2) Information held by a public authority is exempt information if—**
- (a) it was obtained or recorded by the authority for the purposes of its functions relating to—**
 - (i) investigations falling within subsection (1)(a) or (b),**
 - (ii) criminal proceedings which the authority has power to conduct,**
 - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or**
 - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and**
 - (b) it relates to the obtaining of information from confidential sources.**

The key element of this exemption is subsection (b); to be exempt information must relate to the obtaining of information from confidential sources. Both (a) and (b) must be met as they are linked by the word "and". The intention of this exemption is principally to give protection to the identities of confidential sources and the processes by which those sources provide information to public authorities.

2.4.1 Section 30(2)(a)

Unlike section 30(1) there is no requirement for the information to relate to a particular investigation. Instead, it applies to information that was obtained or recorded by the authority for the purposes of its functions **relating to** the listed investigations and proceedings. Therefore, it could relate to a specific investigation or prosecution, but it could also relate to policies and procedures which govern how such investigations and prosecutions are carried out. This could include details of payments made to informants and the administrative procedures relating to the management of informants.

Note:

The phrase "relating to" can be interpreted relatively widely in the same way as it is for section 35 – **Read** Government policy (section 35)

The relevant investigations and proceedings include those falling within section 30(1), but also investigations conducted for any of the purposes specified in section 31(2) as well as civil proceedings arising out of both criminal and non-criminal investigations. Reference is also made to HM prerogative, but there will be very few cases where this crops up as an issue.

Read:

Further detail on the purposes specified in section 31(2) is provided in our guidance Law enforcement (section 31). This should be referred to when considering the application of section 30(2)(a)(iii) and (iv). See also Chapter 3.4 of this workbook.

These are complex provisions, and the public authority should make clear which subsection is being relied on and how the information relates to the relevant function.

Example

FS50123912 provides a straightforward example of where both elements of section 30(2) were satisfied.

Northumbria Police was the public authority. As a police

force it has a duty to investigate crimes, and in certain circumstances it uses information provided by confidential sources to assist with these investigations. The information requested was the total amount of money spent on, together with the number of, informants over the previous five years. In this way, the requirements of both section 30(2)(a) and (b) were met:

- Information was obtained or recorded by the public authority for the purposes of functions relating to investigations, and so section 30(2)(a)(i) was engaged.
- The information requested clearly related to the obtaining of information from confidential sources which satisfied the requirements of section 30(2)(b).

2.4.2 Section 30(2)(b)

Crucially, if information falls within section 30(2)(a) it is only exempt if it also relates to the obtaining of information from confidential sources.

Case officer tip:

This key point is often misunderstood by public authorities, and it is very important to understand that the application of subsection 30(2) depends on whether or not the information relates to the obtaining of information from confidential sources. Consequently, it can be simpler to check whether the information does in fact relate to confidential sources, as if it doesn't, you won't need to consider the complex provisions of section 30(2)(a).

As with section 30(2)(a), the phrase “**relates to**” is present, and once again this can be interpreted in accordance with the Government policy (section 35) guidance. Although this may appear to offer a lot of leeway, as the exemption is qualified, the consideration of the public interest arguments should ensure that the necessary scrutiny is given.

Read:

ICO guidance Investigations and proceedings (section 30) which includes examples of the circumstances and the type

of information where section 30(2)(b) may apply. The Ministry of Justice guidance Section 30: Investigations and proceedings conducted by public authorities is also a useful resource.

Marriott v IC and the Metropolitan Police (EA/2010/0183, 6 October 2011 - see the IT summary) provides an example of section 30(2)(b) being engaged via section 30(2)(a)(i). The summary also comments that the specific information that relates to confidential sources should be separated out.

It is important to understand that section 30(2)(b) relates to the confidentiality of the **source**, not the confidential nature of the information. The requested information may or may not be confidential in nature, but the exemption will be engaged **only if** it relates to the obtaining of information from confidential sources (i.e. where it is necessary to protect the identity of the source).

The Commissioner accepts that police officers and others working for public authorities undercover will constitute confidential sources. See the Investigations and proceedings (section 30) guidance for more information.

2.4.3 Historical records

Unlike section 30(1), the exemption at section 30(2) can apply to historical records. For example in Tribunal case *The Metropolitan Police v IC* (EA/2008/0078, 30 March 2009 – see the IT summary) (FS50106800) the requested information was over 100 hundred years old but section 30(2) could still apply.

Exercise (2)

- 1. Section 30(2) applies to the general process by which information is obtained from confidential sources. Does it also apply to the actual information supplied by the source?**
- 2. Read the external guidance and the Tribunal cases/decision notices referred to above and provide 3 examples of the sorts of information likely to be covered by section 30(2).**
- 3. Also, having read the guidance referred to above, explain how the term 'confidential' in the context of**

section 30(2)(b) differs from its meaning in section 41?

See overleaf for suggested answers.

Exercise (2) - suggested answers

1. It applies to both aspects. Although the exemption itself says that information is exempt if it "relates to the **obtaining** of information from confidential sources", this will include the actual information that was obtained. Note, however, that there is no requirement for the information itself to be confidential in nature.
2. Diarised appointments to meet an unnamed informer; details of surveillance and investigative techniques and procedures used to manage external sources; an indication that certain information had been obtained from a confidential source.
3. In this context it is the relationship with the source that is confidential, as opposed to the information itself. There is no need to satisfy all the tests relating to confidential information as required by section 41. As long as it relates to the obtaining of information from a source whose identity needs to be protected, the exemption is engaged.

2.5 Section 30 and the public interest test

Section 30 is a qualified exemption. So, if information is exempt in accordance with subsections (1) or (2), it will be necessary to go on to consider the public interest test in order to determine whether or not the information should be disclosed.

Read:

- FOI Foundation Workbook – Chapter 7 – the public interest test.
- The public interest test – guidance
- Investigations and proceedings (section 30)

2.5.1 Section 30(1)

There is now a significant body of precedent in the area of public interest considerations for section 30(1), some of which is reflected in our external guidance. The following is a summary of the main factors that should be taken into account when considering the application of section 30(1):

Firstly, it has been accepted that the general public interest served by section 30(1) – i.e. the key public interest factors in maintaining the exemption – is **the effective investigation and prosecution of crime**. This, in turn, requires:

- Maintaining the independence of the judicial and prosecution process;
- Preservation of the criminal court as the sole forum for determining guilt;
- The protection of witnesses and informers to ensure people are not deterred from making statements or reports;
- Allowing the investigating body space to determine the course of an investigation.

So, if disclosure of information would prejudice the effective investigation and prosecution of crime, or interfere with one of the requirements listed in the bullet points, there would be a strong public interest in maintaining the exemption. Note that whilst there is no prejudice test when engaging the exemption, in considering the public interest test it is necessary to look at the harm to the effective investigation or prosecution of crime that disclosure would cause.

Secondly, there are a range of factors that can influence the extent to which disclosure of information will harm the effective investigation and prosecution of crime. These are the factors that will come into play when the public interest test is carried out in individual cases, and can serve to either support the exemption or the disclosure of the information. They are as follows:

- Timing of disclosure (i.e. the stage reached in the investigation).
- Whether, and the extent to which, the information is already in the public domain.
- The significance of the information.
- The age of the information.
- Impact on future investigations/future flow of information.

Further detail on these factors, together with casework examples, is provided in the external guidance on section 30.

The following example discusses some of these factors and provides the opportunity to consider their application in real cases.

Example

FS50373733 concerned a request for information to the Police Service of Northern Ireland for case papers relating to an investigation into an unsolved double murder from 1975. Although a relatively short decision notice, it provides a good example of the case-specific factors considered when determining the extent of harm and therefore the weight to attribute to arguments in favour of maintaining the exemption.

- **Timing of the disclosure – although not a ‘live’ case in the conventional sense, it was under active review by the Historical Enquiries Team (a unit set up by the police authority to review more than 3,000 unsolved murders). There was the possibility that charges could be brought in the future and that disclosure could prejudice this. There is considerable public interest in maintaining the exemption when a police investigation is still open.**
- **Content of the withheld information and the impact on future investigations/future supply of information – the requested information included evidential items such as investigation reports, forensic information and photographs in addition to witness statements and correspondence between family members of the deceased. A threat would be posed to witnesses if their statements were released or if they were identified. This threat is likely to be heightened in the context of Northern Ireland. Witnesses to future crimes could also be inhibited from co-operating with the law enforcement authorities.**
- **The age of the information – despite the long passage of time since the crime was committed, the case was under active review and it was still possible that charges could be brought and some, if not all, of the evidence used.**

The public interest arguments in favour of disclosure that had most validity in this case were considered to be:

- **Adding to the public's knowledge of how the police investigate such cases.**
- **Providing the public with the ability to evaluate the effectiveness of the public authority's investigation (including value for money) and an understanding of why evidential difficulties means that on occasions charges are not brought.**
- **Disclosure could encourage others to report criminal offences in the knowledge that a proper investigation will be done.**

However, despite the age of the information, the public interest in disclosure was significantly outweighed by that in maintaining the exemption.

You may wish to read the decision notice to see, in detail, how the public interest test was carried out.

Note paragraphs 18 and 19 provide a summary of public interest arguments in favour of both disclosing the information and maintaining the exemption which are likely to be relevant in cases involving police investigations.

2.5.2 Section 30(2)

The public interest test in section 30(2) cases is likely to be similar to section 30(1). However, there will usually be a different emphasis to reflect the fact that section 30(2) is not restricted to specific investigations and prosecutions (see 2.4 above).

Given that the exemption relates to confidential sources there will often be strong public interest arguments for maintaining the exemption. However, it should never be elevated to the status of an absolute exemption and the public interest test should always be undertaken on the circumstances of each case. (see IT summary on case EA/2008/0078). This is well illustrated in the following example:

Example

As previously mentioned, FS50123912 concerned a request to Northumbria Police for the amount spent by the force on informants for each of the previous five years, together with the number of registered informants. Much of the case related to the identifiability of informers. If identification was a realistic possibility, this would be likely to affect the authority's ability to obtain information from confidential sources.

Read the decision notice and then consider the analysis of the public interest arguments below.

As is often the case with such requests, the public authority's argument was that as the information related to confidential sources, the consequence of disclosure would be to restrict the future flow of information to the police. However, despite strong public interest in the police being able to recruit and manage their confidential sources to assist their investigatory functions, the content of the requested information must be taken into account. In this case the request was for highly aggregated information and, significantly, previous disclosure of similar information had not resulted in any of the adverse effect/prejudice that the authority was arguing would result.

The public authority's main public interest argument did not have any significant weight. The Commissioner was not convinced that the disclosure would have any serious effect on the future flow of information from confidential sources.

The Commissioner went onto consider the public interest in disclosure (see paragraphs 62-63). Relevant arguments were:

- The use of confidential sources by the police is a controversial area and there is legitimate public interest in obtaining information about it.**
- Even the aggregated information that was requested would represent a significant increase in transparency.**
- Public interest in allocation of resources for the purpose of investigating crime, which, for example, when combined with other information such as crime**

statistics may enhance debate on the effectiveness of the use of confidential sources by the police.

The Commissioner's decision was that the public interest arguments in maintaining the exemption did not outweigh the public interest in disclosure.

Example

The following example illustrates how case specific factors are relevant to the public interest test:

The case considered by the Tribunal in *Marriott v Information Commissioner and the MPS* (EA/2010/0183, 6 October 2011) concerned a request to the Metropolitan Police for full unredacted versions of Special Branch ledgers and a register dating from 1888-1912. Some of the entries recorded payments to police informants and others related to activities of police informants.

Two main public interest factors of relevance were age of the information and information in the public domain. Read the Tribunal decision to see how they were applied to the particular circumstances of the case.

Age of the information

Some of the information included names (or pseudonyms) of individuals who acted as police informers in relation to the threat from Irish nationalist extremists. It was suggested that, especially in the context of sectarian politics in the north of Ireland, co-operation with the authorities was offered by individuals on the basis that their identity would never be revealed as, in such a context, the risk of serious retribution against the families of such individuals can extend beyond a single generation (or at least living descendants would be stigmatised). In addition, there was a chance that disclosure would deter individuals from becoming informants through fear of future exposure. This represented the public interest in maintaining the exemption. It was suggested that the weight attached to the age of such information diminishes very slowly and was still sufficient enough to tip the balance in favour of withholding the information.

Public domain

Some information had previously been disclosed to researchers but as the volume of information requested under FOIA was much larger, disclosure of that would have a greater effect *in this case*.

The Tribunal also distinguished between unauthorised and inadvertent disclosures on the one hand (which appeared to have happened in this case) and a formal disclosure in response to a FOI request on the other. The fact that some information was already in the public domain did not reduce the weight of arguments for maintaining the exemption in this case, but each such case has to be considered on the facts. For the avoidance of doubt, if previous disclosures can be characterised as having been made in error, this does not mean that in response to a subsequent request the public authority is obliged to repeat the mistake.

2.6 Neither confirm nor deny

30. (3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2).

Read:

- When to refuse to confirm or deny information is held
- FOI Foundation Workbook section 6.3 'Exclusions from the duty to confirm or deny'

Section 1(1)(a) imposes a duty on public authorities to confirm or deny whether information requested is held. Section 30(3) provides public authorities with an exclusion from this duty in respect of information that falls within the class definitions at section 30(1) and (2).

You will note from the wording of this section that, if the requested information is exempt under section 30(1) or (2), the public authority is automatically excluded from the duty to confirm or deny. However, as section 30 is a qualified exemption, the authority

must carry out a public interest test. This means that the exclusion from the duty to confirm or deny will only be upheld where the public interest in maintaining the exclusion outweighs the public interest in disclosing whether the authority holds the information. Therefore, in practice, unless confirming or denying the information is held would damage the efficient investigation and detection of crime, the exclusion would not be upheld.

The following provides an example of a case in which section 30(3) was engaged and the public interest favoured maintaining the exemption.

Example

FS50212581 concerned a request for information to the Medicines and Healthcare Products Regulatory Agency which asked the public authority to confirm whether it had issued a caution under the Medicines Act 1968 to a named clinic in relation to the illegal supply of prescription medicines to the general public, together with the date of issue of any such caution.

It was established that information of this nature would be held for the purpose of an investigation to establish whether offences under the Medicines Act had been committed. Such information would be captured by section 30(1)(b) as such an investigation could have lead to a decision to institute criminal proceedings. Therefore, section 30(3) was engaged.

The Commissioner considered the public interest arguments and upheld the authority's refusal to confirm or deny.

One of the main arguments in favour of confirming or denying whether information was held was that it would add to the public's knowledge of the enforcement of the subject legislation.

The main arguments in favour of neither confirming nor denying that the information was held centred on the harmful effect this would have on the public authority's ability to carry out its enforcement activities under the legislation. As the request was related to a named company, and confirming or denying could reveal that the company had been issued with a caution, a likely consequence of disclosure would be, for example, that companies and individuals would be much less willing to co-operate in

future investigations, especially as consent is required before a caution can be issued.

The example demonstrates how the wording of the request has a crucial impact on the harm that confirmation or denial would cause, which in turn impacts on the public interest arguments. Had the request been worded in a general manner, such as asking for information on the number of cautions issued in a certain period together with the subject matter of those cautions, it is likely that the authority would have been required to confirm or deny whether such information was held. Had the request referred to a specific type of breach, but without naming a company, the decision on whether the authority should confirm or deny would probably have depended on whether this would have led to the identification of those companies. It can be seen that the way a request for information is worded will have a major impact on whether confirming or denying it is held would cause any harm.

Case officer tip:

Difficulties can arise for public authorities with refusal notices where section 30(3) has been applied. This has been considered in both the external guidance and the Foundation Workbook and it is recommended that those resources are consulted.

Chapter 3. Section 31

3.1 This section is reproduced in full as follows:

31(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- a) the prevention or detection of crime,**
- b) the apprehension or prosecution of offenders,**
- c) the administration of justice,**
- d) the assessment or collection of any tax or duty or of any imposition of a similar nature,**
- e) the operation of immigration controls,**
- f) the maintenance of security and good order in prisons and in other institutions where persons are lawfully detained,**
- g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),**
- h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or**
- i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.**

(2) The purposes referred to in subsection (1)(g) to (i) are—

- a) the purpose of ascertaining whether any person has failed to comply with the law,**
- b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,**
- c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,**
- d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,**
- e) the purpose of ascertaining the cause of an accident,**
- f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,**
- g) the purpose of protecting the property of charities from loss or misapplication,**
- h) the purpose of recovering the property of charities,**
- i) the purpose of securing the health, safety and welfare of persons at work, and**
- j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.**

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

3.2 Nature and structure of the exemption

With reference to the relationship with section 30 (see section 1.3 above), a public authority can only consider section 31 if the information is not exempt under section 30.

Section 31 is a qualified, prejudice-based exemption. This means that if disclosure of the information would prejudice one of the law enforcement activities listed in the exemption, the information is exempt for the purposes of section 31. It would then be necessary to go on to consider the public interest test.

Read:

- **External guidance on the prejudice test**
- **Foundation Workbook section 3.2**

Unlike section 30, which can only be claimed by those public authorities who have the requisite powers and/or duties to investigate and prosecute as described in the section, section 31 can be claimed by any public authority. Engagement depends on the disclosure of the requested information prejudicing a wide range of law enforcement matters. As a prejudice-based exemption, the public authority has to show that there is a causal link between the disclosure and prejudice to one of the specified matters set out in section 31. However, the public authority does not need to have a particular role in that area of law enforcement. For example, an NHS trust would be able to claim section 31 if it received a request for information about its building security systems, if the disclosure would increase the risk of burglary.

As with section 30, the exemption contains undefined terminology relating to a wide range of law enforcement activities. The structure of section 31 is relatively complex, although it can be split into two, as follows:

- Section 31(1)(a)-(f) comprises a list of broad law enforcement activities, which may overlap.
- Section 31(1)(g)-(i) and section 31(2) must be read together and relate to specific law enforcement purposes.

3.3 Section 31(1)(a)-(f)

3.3.1 Section 31(1)(a) - prevention or detection of crime

The exemption is engaged if disclosure of information would, or would be likely to, prejudice the prevention and detection of crime.

Section 31(1)(a) will cover all aspects of the prevention and detection of crime, and, although this will often relate to public authorities with law enforcement responsibilities, it will also apply to disclosures by other public authorities which could increase the chances of crime being committed.

The following are general examples of circumstances where section 31(1)(a) may apply:

- Intelligence about the risk of potential criminal activities, eg on hooligan gangs involved in violence at football matches.
- Information relating to planned police operations and/or to police strategies and tactics concerning crime prevention policing demonstrations.
- Information whose disclosure would facilitate the commission of an offence, eg security arrangements, alarm codes.

Although the police clearly play an important role in crime prevention and detection, they are not the only public authorities who have such a role. For example, HMRC and the Health and Safety Executive have their own responsibilities in this context. Moreover, we have seen several examples where public authorities who have no primary role in crime prevention and detection use this exemption in order to prevent disclosure of information that would frustrate another public authority's attempts to prevent or detect crime.

Example

FS50145474 concerned a request to the Office of the Surveillance Commissioner for its report relating to HM Prison Service. The report included information regarding the use of covert human intelligence sources (informants) in prisons and other covert activity. Its disclosure would prejudice the ability of the Prison Services to prevent or detect crime in prisons. The Commissioner accepted that section 31(1)(a) was engaged.

3.3.2 Section 31(1)(b) – apprehension and prosecution of offenders

The exemption is engaged here if disclosure of information would, or would be likely to, prejudice the apprehension or prosecution of offenders.

Section 31(1)(b) will cover all stages of the apprehension process and the subsequent prosecution of criminal activity, including all stages of prosecution. This subsection is most likely to be used by those public authorities who have the necessary statutory role in the apprehension or prosecution of offenders.

FS50172691 is an example which shows the close overlap between section 31(1)(a) and (b). The applicant requested detailed information relating to specified speed cameras, including the periods during which the cameras are active together with the number of notices of intended prosecution issued and the number of actual prosecutions. Paragraph 29 of the decision notice refers to the inter-relationship between section 31(1)(a) and (b) and how they both apply in this case.

Section 31(1)(b) could also be used to protect information held by a public authority that doesn't have a law enforcement role. For example, a hospital worker is suspected of committing an offence and the hospital provides the police with documents relevant to their investigation. The hospital could apply s31(1)(b) to withhold any copies of the information. The police, of course, could rely on section 30(1)(a).

3.3.3 Section 31(1)(c) - administration of justice

Under this subsection information is exempt if its disclosure would, or would be likely to, prejudice the administration of justice.

In broad terms it covers information that, if disclosed, would prejudice a fair trial, where proceedings have been or may be instituted.

There is potential for it to overlap with section 30(1)(b). For example the disclosure of information relating to a police investigation may both frustrate that investigation and make it difficult to secure a conviction if the disclosure also interfered with a defendant's right to a fair trial. This is illustrated by the example

below where information withheld under section 31(1)(c) could also have been withheld under 31(1)(b).

Example

FS50209828 concerned a request to the Northern Ireland Office for information relating to a specific murder investigation. Much of the information was forensic evidence held by an executive agency of the department and paragraphs 32-33 indicate the decision by the Commissioner to accept that this exemption was engaged.

N.B. Had the request been made to the police or the prosecuting authority, the exemption at section 30(1) would have been used.

It should also be noted that the administration of justice is not limited to the administration of justice through the courts, but will also cover other judicial bodies such as tribunals and inquiries.

There are also many different aspects to the administration of justice which could be prejudiced by disclosure of information, such as the operation of the judicial appointments system, the enforcement of sentences and the execution of judgments and orders in civil cases.

3.3.4 Section 31(1)(d) – assessment and collection of taxes

Under this subsection information is exempt if its disclosure would, or would be likely to, prejudice "the assessment or collection of any tax or duty or of any imposition of a similar nature."

Once again this is a very wide description. For example, in addition to national taxation such as income and corporation tax, VAT, National Insurance contributions it will also cover local taxation such as Council Tax. The fact that the words "duty" and "imposition" are used in addition to "tax" indicates the wide application of this exemption.

The exemption would be engaged, for example, if the disclosure would lead to steps being taken to evade payment of tax.

Example

FS50342294 concerned a request to HMRC for information relating to inheritance tax. Some of the information was withheld on the basis of section 31(1)(d) as disclosure could lead to people taking

measures to avoid the payment of this tax. Paragraphs 14-17 explain the acceptance of this by the Commissioner.

3.3.5 Section 31(1)(e) - immigration control

Under this sub-section information is exempt if its disclosure would, or would be likely to, prejudice "the operation of the immigration controls."

As well as information relating to the physical immigration controls at points of entry into the United Kingdom, this subsection will also apply to arrangements made in connection with entry into, and stay in, the United Kingdom. For example, information relating to the issuing and approval of visas and work permits, asylum applications as well as the investigation of offences relating to immigration.

Examples

Read the following decision notices for examples of cases where section 31(1)(e) was considered:

1. **FS50286261** - a request for information relating to a flight that was chartered for the deportation of failed asylum seekers. This case is interesting as, although it was correct to consider the request under this subsection, it was decided that the prejudice test was not met.
2. **FS50172159** - the requested information was correctly considered under section 31(1)(e) as it concerned a review of security surrounding the use of photographic evidence in connection with identity verification of people taking the citizenship test. However, the prejudice test was not met, and so the exemption was not engaged.

3.3.6 Section 31(1)(f) - security of prisons

Under this subsection information is exempt if its disclosure would, or would be likely to, prejudice "the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained."

Institutions to which this subsection applies will, in addition to prisons, include Youth Offenders Institutions, Secure Hospitals, Secure Training Centres, Local Authority Secure Units and

Immigration Detention and Removal Centres. The terms "security and good order" refers to external and internal security matters relating to these institutions as well as internal disciplinary matters, and in general the maintenance of safe and orderly regimes. It is therefore necessary to consider both whether the institution in question is one in which persons are lawfully detained and whether disclosing the requested information would prejudice the maintenance of security and good order in that institution.

The following two decision notices illustrate the application of this subsection:

Examples

Read the following two decision notices for examples of cases where section 31(1)(f) was considered:

1. FS50173181 (Youth Justice Board) - a request for a copy of the manual detailing the physical restraint methods that may be used on young people held in the custody of Secure Training Centres. Consideration was given as to whether disclosure would undermine security within the institution. (note: this case will be discussed later in section 5.5 on the public interest test).
2. FS50383346 (Ministry of Justice) - the request was for floor plans of HMP Belmarsh. The decision notice considered the likely effect on safety and security at the prison as a result of disclosure of the requested information.

3.4 Section 31(1)(g)-(i)

These three sub-sections differ from the above as they can only be applied if they directly relate to the list of specific "purposes" provided in section 31(2). The purposes are as follows:

- a) ascertaining whether any person has failed to comply with the law,
- b) ascertaining whether any person is responsible for any conduct which is improper,
- c) ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- d) ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any

profession or other activity which he is, or seeks to become, authorised to carry on,

- e) ascertaining the cause of an accident,
- f) protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- g) protecting the property of charities from loss or misapplication,
- h) recovering the property of charities,
- i) securing the health, safety and welfare of persons at work, and
- j) protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

Again, subsections (g)-(i) can be claimed by any public authority. Their engagement depends on the disclosure of the requested information prejudicing the processes referred to in section 31(1)(g), (h) or (i).

Note:

Cases involving section 31(1)(h) and (i) are rare; indeed, to date they have not featured in our casework. However, section 31(1)(g) is used relatively frequently, as can be seen from analysis of our decision notices on the ICO website.

The subsections are considered individually as follows:

3.4.1 Section 31(1)(g)

Under this subsection information is exempt if its disclosure would, or would be likely to, prejudice "the exercise by any public authority of its functions for any of the purposes specified in sub-section (2)."

In essence, section 31(1)(g) seeks to protect the conduct of investigations and proceedings which may result in prosecution or regulatory action.

It is important to remember that prejudice must be to the function of a public authority. In most cases the public authority receiving the request will have the necessary function, but this isn't a pre-requisite and it could be a different public authority whose functions would be prejudiced.

For example:

- Public authority A has a function listed in section 31(2).
- Public authority B receives a request for information.
- Disclosing that information would prejudice A's ability to perform that function.
- Therefore, public authority B can apply section 31(1)(g) to withhold the information.

Read:

Read sections 31(1)(g) and 31(2)(a)-(e) of the Law Enforcement guidance before considering the examples below. Note the way in which the Commissioner interprets the term 'ascertaining' in these exemptions.

In essence, the function must be entrusted to the individual public authority which exercises the function, be derived from statute or imposed by the Crown, and be designed to fulfil one of the listed purposes in sub-section (2).

Examples

As indicated above, this subsection is considered relatively frequently in decision notices. To give a flavour of how it has been applied, the following are examples of cases where section 31(1)(g) was engaged by virtue of purposes in section 31(2):

1. FS50382936 (British Waterways):

The public authority had a statutory *function* in respect of the navigation of inland waterways, which included the issuing and policing of mooring licences. The authority argued that disclosure would prejudice the policing of those licences, i.e. the *purpose* of ascertaining whether any person had failed to comply with the law (s31(2)(a))

2. FS50368075 (Queen's University, Belfast):

The request was made to the University, who argued that disclosure would prejudice the statutory *function* of the Police Service of Northern Ireland to carry out investigations for the *purpose* of ascertaining compliance with the law (s31(2)(a)).

3. FS50382270 (Charity Commission):

In this case the Charity Commission had the statutory *function* to determine whether organisations are entitled to be registered as charities, and it was argued that disclosure would prejudice the *purpose* of ascertaining whether regulatory action is necessary (s31(2)c)).

4. FS50309983 (VOSA):

Here the public authority had a statutory *function* regarding the enforcement of, and compliance with, road traffic legislation. It was argued that disclosure would prejudice this function for the *purpose* of investigative and regulatory activities in relation to the legislation (s31(2)(a)-(d)).

5. FS50184898 is a long decision notice concerning a request to the Charity Commission in which several exemptions are considered. The basis for the authority's claim that the purposes at section 31(2)(f)-(h) were engaged appears in paragraphs 70-77.

Case officer tip:

When considering this particular subsection the temptation may be to go straight to subsection (2) and see if any of the purposes are relevant to the requested information. However, the first step must be to establish that the public authority, whose functions would allegedly be prejudiced by disclosure, actually has the requisite statutory functions to which the listed purposes relate.

So for example in the British Waterways case listed above, the requested information was gathered by the public authority's enforcement teams when checking whether boaters were complying with the terms and conditions of the licences it issued. It was first established that British Waterways had functions relating to the issuing and policing of mooring licenses. These functions were conferred on it by the Transport Act and British Waterways Act.

3.4.2 Section 31(1)(h)

Under this sub-section information is exempt if its disclosure would, or would be likely to, prejudice any civil proceedings which are brought by or on behalf of a public authority for any of the purposes specified in sub-section (2). To qualify, the proceedings must arise out of statutory investigations or investigations carried out under Royal Prerogative.

This provision is seldom used and therefore will not be looked at in any more detail.

3.4.3 Section 31(1)(i)

This sub-section is very similar in structure to s31(1)(h), but here the prejudice is only in relation to one specific area, namely an inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976.

To date this sub-section has not featured in any casework handled by this office and so no practical knowledge of its operation has been generated. This is likely to be because the Act is specific to Scotland, although there may be circumstances where it will apply to UK government departments that operate in Scotland.

3.5 The prejudice test

Central to this exemption is the test of prejudice. The exemption is only engaged if disclosure of information would, or would be likely to, prejudice one of the law enforcement activities and functions listed in section 31(1).

Note:

The way to approach the prejudice test is set out in our external guidance on ['The prejudice test'](#) and is also referenced in the Foundation Workbook at section 3.2.2.

Having read these consider the cases referred to in section 3.3, in particular FS50145474 (page 31), FS50209828 (page 32) and FS50383346 (page 34), to see how the principles have been applied in practice with real requests.

In essence, the test comprises a three step approach: first, the prejudice claimed should be to the interest stated in the exemption; second, the public authority has to provide evidence that there is a causal relationship between the potential disclosure and the prejudice, and that the prejudice is real, actual or of substance; third, what is the likelihood of occurrence of the prejudice? As regards the third step, it should be noted that, as with other prejudice based exemptions, information is exempt if disclosure would, or would be likely to, cause prejudice. It is therefore important to understand which 'likelihood' of prejudice is being claimed in each case as this is carried over into the public interest test.

Also read the external guidance on 'The impact of disclosure on the voluntary supply of information' as this will be relevant to some section 31 cases.

Exercise (3)

The ICO has certain law enforcement functions and could use section 31 in certain circumstances.

Read our external guidance on section 31, the prejudice test and the impact of disclosure on the voluntary supply of information and then consider how the ICO would respond to a request for the information contained in its enforcement referral log.

This document is used by the Enforcement Team to record relevant examples of non-compliance with FOIA and EIR with a view, ultimately, to considering whether action should be taken. It is available on Meridio at 5.04.01.02 in the folder 'Enforcement log – FOI enforcement casework monitoring'. Other documents are available on the Enforcement team's ICON pages which outline the ICO's approach to FOI enforcement. In broad terms, referrals are made via casework and when public authorities are identified for possible action, dialogue is entered into in order to seek resolution, with formal enforcement action being a last resort.

In particular you should consider which sub-sections of section 31 are likely to apply, and, having identified the relevant function and law enforcement purpose in section 31(2), go on to consider the effect disclosing the information

would have on that function.

Compare your answer with FS50271526 which considered an actual request for this information. (See next page for a summary of which purposes were applicable and the resultant prejudice test in that decision notice.)

Exercise (3) – summary from FS50271526 (see previous page)

Functions/purposes:

By virtue of FOIA and the EIR the Information Commissioner exercises a number of specific statutory functions for the purpose of:

- ascertaining whether a public authority has failed to comply with the provisions of FOIA and the EIR, and/or
- ascertaining whether circumstances exist, or may arise, which would justify regulatory action in pursuance of FOIA and the EIR.

The Commissioner was therefore claiming section 31(1)(g) and 31(2)(a) and (c). In this case it is clear that the Commissioner has functions that are designed to fulfil two of the purposes listed in section 31(2).

Prejudice test:

- disclosure of information in the Enforcement Referral Log relating to its regulatory work on live enforcement cases would have a negative impact on its regulatory functions, and for all cases (whether live or not) would have a negative impact on its open dialogue with public authorities.
- Causal relationship between disclosure and prejudice was established on the basis that disclosure would undermine the trust and confidence of the public authorities it regulates and so have an adverse effect on the informal exchange of information that was considered necessary for effective regulation.
- Sufficient evidence was provided to indicate that disclosure would be likely to prejudice the Commissioner's regulatory functions under section 31(1)(g) for the purposes in section 31(2)(a) and (c).

3.5.1 The 'mosaic' argument:

Another aspect relating to the prejudice test under section 31 which crops up from time to time is the so-called 'mosaic' or 'jigsaw' argument. This is where prejudice may be caused either by the combining of the requested information with information already in the public domain (or known to a limited number of people) or

where disclosure could lead to the same type of information being disclosed in the future (i.e. which could then be collated, combined or analysed, thereby causing prejudice). This is sometimes referred to as the 'precedent effect'.

Example

Such an argument was accepted by the Commissioner in FS50122063 in a case concerning a request to HMRC for details of the quantity of drugs seized in Devon and Cornwall for the years 2001-2005. The public authority argued that if it disclosed the information it would not be able to resist future requests for the same information for other parts of the country. This would allow a matrix of the authority's results and deployment strategies for drug seizures for all UK counties which could then be used by criminals to circumvent frontier controls. The decision was that the necessary likelihood of prejudice was established and that the authority was correct in withholding the information under section 31(a) as the availability of the UK-wide information would, or would be likely to, prejudice the prevention and detection of the crime of smuggling.

It is relatively common for the mosaic argument to be deployed by law enforcement public authorities in the context of section 31. However, we would require a convincing case to be made before accepting the mosaic/precedent argument.

Read:

- **The policy line LTT234 on the mosaic argument and its application in FS50122063 to gain an understanding of how the prejudice test can be applied in specific circumstances.**
- **Guidance on Information in the public domain**

3.6 The public interest test

As with section 30, section 31 is a qualified exemption. This means that, once the requisite likelihood of prejudice has been established then it is necessary to apply the public interest test in order to establish whether or not the information should be disclosed.

Read:

- **Public interest test section of the Law Enforcement guidance**

- The Public Interest Test .
- **Foundation workbook on the PIT (Chapter 4).**

There is a significant amount of case precedent where the Commissioner and the Tribunal have considered public interest arguments in a range of cases concerning section 31. This is helpful in understanding how relevant arguments are deployed and how balancing the competing public interest factors plays out, but it is important to note that it is the public interest factors as they apply to each individual request that must be considered. It is also important to remember that when considering the public interest in maintaining section 31, a public authority should only take account of the factors relevant to that exemption.

For example, if section 31 has been engaged on the basis that disclosing the codes for alarms at a local authority's sports centre would prejudice the prevention of crime, then the public interest in maintaining section 31 in that case is the public interest in preventing that crime.

The nature, degree and likelihood of the prejudice should be taken into account when considering the balance of the public interest. For example, how likely is it that the sports centre would in fact be broken into if the alarm codes were disclosed and how serious would such a break in be?

Although there will often be strong public interest in protecting the activities listed in section 31, it is important that the exemption is not treated as an absolute one.

When considering the public interest in **disclosing** the information, a public authority can take into account general factors such as the promotion of transparency, accountability, and public debate.

Exercise (4)

FS50210846

Consider the relationship between the level of likelihood of prejudice that was determined in this case and the strength of the public interest arguments.

In 2007 a request was made to the Northern Ireland Office for information relating to the Smithwick Tribunal, which had been established in 2005 by the Irish Parliament in Dublin to

examine the murder of two members of the then Royal Ulster Constabulary in 1989. As the Tribunal was still sitting at the time of the request there were very strong arguments for determining that the administration of justice would be prejudiced by disclosure of the information.

The main factors that led to the conclusion that prejudice would occur were that disclosure would:

- **Prejudice the Tribunal's on-going work.**
- **Undermine free and frank exchange of views between the UK Government and the Tribunal.**
- **Discourage individuals and organisations from assisting the Tribunal.**
- **Undermine the candidness of individuals interviewed by the Tribunal if given advance warning of lines of inquiry.**
- **Prejudice the planned review of the murders by the PSNI.**

Can these same factors be considered in the context of the public interest test?

What is the underlying key factor?

Do you think the level of likelihood of prejudice is an important factor, i.e. that disclosure would prejudice the administration of justice?

Would the fact that information relates to unsolved murders that took place in Northern Ireland have any bearing?

Having given thought to these questions, attempt to set out the public interest arguments for and against disclosure and come to a conclusion.

Also consider why section 30 wasn't appropriate in this case.

Note: a summary of the public interest arguments taken from the decision notice is provided overleaf. (see the DN for more detail)

Exercise (4) - answer (FS50210846):

This is a case where, due to the level of prejudice, the fact that the tribunal was still on-going (the key underlying factor), and that it had been set up to consider the circumstances surrounding a very sensitive case of the murder of two police officers which also had repercussions in the Irish Republic, the public interest in maintaining the exemption was very high.

Nevertheless, it illustrates the fact that even in such cases a full public interest test has to be carried out. It also provides a good example of how the likelihood of prejudice influences the strength of the public interest arguments in maintaining the exemption.

1. Public interest arguments in favour of disclosing the information:
 - Public assurance that justice is done and the considerable public interest in Northern Ireland concerning unsolved murders.
 - The need for the public to have confidence in such inquiries which could be assisted by offering greater transparency.
 - The long delay in the inquiry holding any hearings (at the time of the request no public hearings had been held).
2. Public interest arguments in favour of maintaining the exemption:
 - The nature and likelihood of the prejudice.
 - Substantial harm to the effectiveness of the Tribunal.
 - Not in the public interest to discourage people from assisting the Tribunal.
 - Disclosure would prejudice the PSNI review of the murders.

It can be seen that the same factors that lead to the exemption being engaged are also relevant when engaging the public interest test.

3. Balance of the public interest arguments:
 - The Commissioner recognises there may be situations where disclosure is favoured where section 31(1)(c) is engaged.
 - In view of the subject matter, considerable public interest in ensuring effectiveness of the Tribunal.

- Despite doubts as to whether prosecutions would ever be brought, there is strong public interest in avoiding prejudice to the review of the murders.
- Consequently, the exemption should be maintained.

N.B. The Northern Ireland Office couldn't rely on any of the provisions contained in section 30 because the information was not held for any of the purposes relating to the investigations or proceedings set out in section 30.

Given the nature of some of the law enforcement activities covered by section 31, there will be occasions where the public interest arguments will be similar to those conducted in cases involving section 30.

Examples

FS50073464 concerned a request to South Yorkshire Police for information relating to illegal firearms over a five year period. The information requested had not been held at any time for a specific police investigation and so section 30 could not be applied. However, the public interest factors that favoured maintenance of section 31(1) included the following:

- The possible prejudice to on-going investigations and apprehension of offenders, for example as the information included general information on police tactics in relation to types of investigation.
- Detriment to the full and frank flow of information from informants to the police.
- Sources of information should be protected.

Note again that it was determined that disclosure **would** lead to prejudice to law enforcement activities which meant that this was reflected in the public interest arguments.

FS50209828 concerned a request was made to the Northern Ireland Office for information relating to a murder investigation. The public authority did hold forensic information relating to the investigation, but, as it did not fulfil the criteria under section 30 (because it did not, itself, hold the information for the purposes of an investigation it had the power to conduct), it had to rely on section 31(1)(c). Consequently, some of the public interest factors were of a similar nature to those that would have applied had the request been made to an investigating or prosecuting authority. As with the above case,

the level of prejudice that had been determined in the prejudice test was reflected in the public interest arguments.

Where the public interest in maintaining s30 relates to the importance of preventing crime it should be noted that the impact of crime is not confined to its immediate victims. Account should be taken of any wider repercussions of crime which can reasonably be predicted. This is dealt with in more detail in the external guidance on section 31 – Law Enforcement – (section 31).

Public interest favouring disclosure

Prejudicing matters of law enforcement can have serious implications and there are clear reasons why law enforcement should be effective, efficient, and unhindered by disclosures of information. In practice, this means that where the exemption is engaged – in particular if the higher test of '**would** prejudice' is satisfied – there will need to be a high level of public interest in disclosure in order to equal or outweigh the public interest in maintaining the section 31 exemption.

Note:

One of the examples provided on earlier for engagement of section 31(1)(f) was the Youth Justice Board case FS50173181. This is also a useful example here, as it is a case where the public interest favoured disclosure. The exemption was engaged on the basis that prejudice would be likely. It is therefore an important exercise to study this case and note the respective weights of the public interest arguments. In brief, the arguments are as follows:

Arguments in favour of disclosure:

- Use of physical methods of restraint is the subject of controversy and debate, both in terms of legality and ethics, and that they can result in physical harm.
- Disclosure would add to the information already in the public domain and inform the legal and ethical debate.

Arguments in favour of maintaining the exemption:

- Maintenance of good order and security in such institutions is in the public interest. (inherent public interest in the exemption, especially given the frequency with which physical restraint is used.)
- There is a mechanism for oversight of the use of physical

restraint techniques.

Balance of the public interest arguments:

- The second factor in favour of maintaining the exemption was in fact counter-productive as at the time of the request there seemed to be evidence that there was no central framework for assessing the safety of, and effectiveness of training in, restraint methods.
- The public interest in maintaining security and good order in such institutions was significantly outweighed by the public interest in informing debate about the legal and ethical concerns.

3.7 Neither confirm nor deny

Section 31(3) states the following:

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters in subsection (1)."

Note that the wording is different to section 30(3) and reflects the fact that section 31 is a prejudice-based exemption.

Read:

- External guidance on NCND
- Law enforcement (section 31) guidance – neither confirm nor deny section
- **Foundation Workbook section 3.3 'Exclusions from the duty to confirm or deny'**

Section 1(1)(a) imposes a duty on public authorities to confirm or deny whether information requested is held. This is a separate duty which exists regardless of whether the information is exempt from disclosure.

Section 31(3) provides public authorities with an exclusion from this duty in respect of information whose disclosure would, or would be likely to, prejudice any of the law enforcement activities or functions listed in section 31(1). As with considerations about disclosure, once such prejudice is established it is then necessary to apply the

public interest test. If the public interest in maintaining the exclusion to confirm or deny does not exceed the public interest in confirming or denying, the public authority must say whether or not it holds information within the scope of the request.

The wording of a request is very important in determining whether section 31(3) is engaged. This reflects the prejudice-based nature of the exemption in contrast to section 30(3) which is automatically engaged if the requested information meets one of the class definitions (see Chapter 4). The examples below relate to section 31(3) and give an indication of how the principles of the exclusion from the duty to confirm or deny can apply in practice.

Examples

(1) In [FS50154876](#) the Home Office received a request for information that it held on a named website. The request did not specify the type of information, and so it could objectively be interpreted as being for any information on that website. The broad nature of the request, coupled with the wide range of issues that the Home Office is responsible for, led the Commissioner to find that the Home Office could not rely on the NCND provisions. This was because confirming or denying whether the information was held would not necessarily reveal anything about whether the website was the subject of a criminal investigation.

The situation would be very different if, for example, the Home Office received a far more specific request for information. Consider a request for 'information on any investigation into whether the named website was promoting terrorism'. To confirm or deny whether the requested information was held in this case would clearly indicate whether the website was under investigation. This could prejudice either the prevention and detection of crime, or the apprehension of offenders.

(2) [FS50402011](#) - a request was made to the Home Office for details of any section 5 authority issued to the Association of Chief Police Officers ACPO, the strategic body that leads the development of the police service in England, Wales and Northern Ireland. The requester sought copies of the authority and date issued. (A section 5 authority would allow ACPO to possess, purchase or acquire firearms.)

The public authority contended that confirming or denying would, or would be likely to, prejudice the prevention or detection of crime.

The Commissioner decided that the public authority was correct in adopting its use of section 31(3) and that the public interest favoured maintenance of the exclusion from the duty to confirm or deny.

Refer to the decision notice and note how the prejudice test is conducted followed by consideration of the public interest arguments in this case.

Note:

At first sight, it would seem unusual that the public authority should not confirm that the police hold firearms. However, a convincing argument was put forward that, firstly, the public do not generally recognise a difference between ACPO and individual forces, and, secondly, a consistent approach is necessary when responding to such requests in order to prevent the build-up of a picture of who may be in possession of section 5 authorities and where firearms are located.

This also refers back to the 'mosaic' and 'precedent value' arguments that were discussed earlier in section 5.4 (see page 45), whereby if a disclosure is made in one case this could establish a precedent and allow additional information to be disclosed in subsequent cases which would cause prejudice to the law enforcement exemption.

Although the exemption from the duty to communicate information provided by sections 30(1) and (2), and those provided by sections 31(1) are mutually exclusive, the exemptions from the duty to confirm or deny are not. In other words section 30(3) and 31(3) can be applied to the same information.

3.8 Historical records

Section 63 treats section 31 differently to section 30(1) as information contained in a historical record can still be exempt under section 31.

However under section 63(4), information which is contained in a record that is 100 years old cannot be exempt by virtue of section 31. And under section 63(5), the act of confirming or denying whether a record that is over 100 years old cannot prejudice any of the matters referred to in section 31(1).

Read:

- **Law enforcement (section 31): guidance – neither confirm nor deny section**