

Freedom of Information Act Awareness Guidance No. 17

Law Enforcement

The right under the Freedom of Information Act 2000 (the Act) to request information held by public authorities (known as the **right to know**) comes into force from January 2005. The **Awareness Guidance** published by the Information Commissioner aims to assist public authorities and their staff in thinking about some of the issues resulting from the implementation of the Act. The guidance introduces key concepts and exemptions in the Act, and summarises the types of approach that may be taken in practice.

This guidance considers section 31 of the Act, which relates to the exemption covering information held for the purpose of law enforcement and various sorts of regulatory activity.

The Commissioner also intends to publish the more detailed advice being prepared for ICO case workers later in 2004. Further advice, particularly for central government, will be available from the Department for Constitutional Affairs which is committed to preparing advice on the key exemptions for Whitehall Departments. The Association of Chief Police Officers has also prepared advice on this and other aspects of the Act for its members.

A) What does the Act say?

a) General

In broad terms, section 31 of the Act creates an exemption from the right to know if the release of information “would or would be likely to prejudice” the purpose of law enforcement, taxation, and various types of regulatory activity as defined in the section. The meaning of the phrase “would or would be likely to prejudice” is considered in sub-section d) below.

The exemption is a so-called “qualified” exemption. This means that even if information which has been requested by an applicant is exempt under this section of the Act it is necessary to consider whether disclosure should be made in the public interest. This issue is considered in Section C.

Compared to many of the other exemptions in the Act, s.31 may appear complicated. This is because rather than providing a general definition of “law enforcement”, the section provides a detailed list of the purposes for which information may be held that are covered by the exemption. The scope of the exemption is considered in Section B below.

b) Relation to section 30 (“Investigations”)

Superficially there are areas of overlap between sections 30 and 31. The former provides an exemption in relation to investigations and proceedings brought by public authorities. (See Awareness Guidance 16 for further detail.) However, section 31 makes clear that in cases where section 30 might also apply it is neither necessary, nor permissible to make use of section 31.

In other words, in areas such as policing or investigations carried out by, say local authority trading standards or environmental health departments, s.30 covers particular investigations, whereas s.31 covers investigative procedures.

At the same time, as will become clear from the discussion of the scope of s.31 below, the law enforcement exemption is much wider and includes crime prevention, taxation and other regulatory matters.

c) The duty to confirm or deny

The **right to know** places two related duties on public authorities:

- the duty to confirm or deny that the information requested is held and, if it is,
- the duty to communicate the information to the applicant.

Both duties must be considered separately, although clearly if it is decided that there is no duty to confirm or deny the holding of information there will be no obligation to provide the information to the applicant.

Public authorities are often likely to refuse to confirm or deny the holding of information for the purposes of investigations, whether or not any particular investigations are in fact underway, since even that limited disclosure of investigation might assist those who are or could be under investigation. It is less likely that a public authority could legitimately refuse to confirm the holding of information as to investigative procedures since that information would in any case be likely to become public knowledge when cases are brought to court or regulatory action is taken against organisations and individuals.

However, it may be legitimate to refuse to confirm or deny the holding of information about, say the development of a tax assessment or collection strategies or about steps taken to recover charity property (matters covered by the exemption) if disclosure would facilitate tax evasion or make the recovery of charity property more difficult.

d) The Test of Prejudice

Section 31 is subject to the prejudice test which means that a public authority cannot withhold information unless its disclosure would, or would be likely to, prejudice any of the purposes listed in the exemption. The Information Commissioner’s interpretation of ‘likely to prejudice’ is that there should be evidence of a significant risk of prejudice to the subject of the exemption. The degree of risk must be such

that there 'may very well' be prejudice to those interests. Whether prejudice exists is to be decided on a case by case basis.

Further guidance on the prejudice test is given in Awareness Guidance No 20.

B) The Scope of the Exemption

Section 31 is in effect divided into two 'parts'. The first contains a list of stand-alone purposes. Information held for any of these purposes may be exempt, subject to the Test of Prejudice (above) and the public interest test discussed in Section C (below).

The second is a list of "qualified" purposes.

a) The stand-alone purposes

The stand-alone purposes (found in section 31(1)(a)-(f)) consist of the following:

- Prevention or detection of crime. This includes not only the procedures followed by the police, customs and excise and other investigatory bodies, but also the crime prevention measures taken by public authorities in general. Information as to the physical security of buildings, or the security of IT systems would, for instance be covered.
- Apprehension or prosecution of offenders.
- Administration of justice. A variety of matters may be covered by this provision including the appointment of magistrates and judges and the development of sentencing policies. The courts themselves are not public authorities for the purpose of the Act. Section 32 provides an absolute exemption for information held in court records. Further information is available in Awareness Guidance 9.
- The assessment and collection of taxes or any duty or imposition of a similar nature. The wording of this provision is deliberately wide and will include not only income and company tax, VAT and National Insurance contributions but also local charges and levies such as the Council Tax.
- Immigration controls. These include not only information about the physical security of entry points to the UK but also information about the issuing and approval of Visas, work permits etc and the processing of asylum applications.
- Security and good order of prisons and other institutions. This includes both external security and internal disciplinary matters.

b) The "qualified" purposes

The 'second' set of so-called "qualified" purposes are listed in section 31.1(g)-(i) of the Act as follows:

- the exercising of public authorities functions for various specified purposes.

- civil proceedings brought by or on behalf of a public authority, arising out of investigations conducted for various specified purposes.
- inquiries held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 arising from out of investigations conducted for various specified purposes.

These broad purposes are then “qualified” by a further list of specified purposes which is set out in s.31(2) of the Act. Thus, information whose disclosure might cause harm to the exercise of the functions of a public authority will only fall within this part of the exemption if the function is carried out for a purpose such as “ascertaining whether any person has failed to comply with the law,” i.e. a purpose appearing on the list in subsection (2).

This list is as follows:

- the purpose of ascertaining whether any person has failed to comply with the law;
- the purpose of ascertaining whether any person is responsible for conduct which is improper;
- the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;
- 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;
- the purpose of ascertaining the cause of an accident;
- the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration;
- the purpose of protecting the property of charities from loss or misapplication;
- the purpose of recovering the property of charities;
- the purpose of securing the health, safety and welfare of persons at work, and
- 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.

In all cases, it should be noted, public authorities will be performing functions with a clear basis in law. The Commissioner would expect that public authorities relying upon the provisions of this exemption are able to explain the legal basis of their functions both to applicants requesting information and to himself.

C) The Public Interest Test

Section 31 is a qualified exemption. This means that even if the information requested is exempt, the public authority must decide whether the public interest in maintaining the exemption outweighs the public interest in its disclosure.

Although the Act does not list the factors that would favour disclosure, the Information Commissioner has suggested that among the factors that would weigh in favour of disclosure are:

- Furthering the understanding and participation in the public debate of issues of the day.
- Promoting accountability and transparency by public authorities for decisions taken by them.
- Promoting accountability and transparency in the spending of public money.
- Allowing individuals, companies and other bodies to understand decisions made by public authorities affecting their lives.
- Bringing to light information affecting public health and safety.

General advice on the public interest test is given in Awareness Guidance 3. Applying the public interest test means weighing the harm that is identified in a particular exemption against the wider public interest that may be served by disclosure. The test must be applied on a case by case basis and it is only possible, therefore, to give a general indication of the approach to be taken.

An example might be of a request for information about aspects of the work of the Immigration and Nationality Department (IND) at the Home Office. The operation of immigration controls is covered by the exemption and it is not difficult to imagine that there would be many disclosures of information which would prejudice the work of the IND and would facilitate the evasion of immigration controls.

The public interest test will therefore involve the weighing of the clear public interest of the state in being able to prevent illegal immigration, illegal working and overstaying against the public interest in ensuring that the system is operated fairly and that applications for visas and asylum status are properly handled. Although it is easy to see that there will be many instances where the disclosure of operational or tactical information would assist those seeking to circumvent immigration controls, there will be other cases in which the disclosure of information will be necessary in order to guarantee public confidence in the system.

D) Key Issues for Implementation

- Section 17 of the Act requires public authorities to explain their reasons for refusing a request for information. The Commissioner strongly recommends that those authorities who are likely to wish to give a non-committal response, neither confirming nor denying that they hold the information requested, prepare a statement of policies about disclosure which can then be provided to applicants without the risk of implying comment upon particular requests. It may be helpful to develop standard approaches across sectors, so that, for instance, all police

forces, all environmental health departments or all social services departments give standard messages to applicants.

- The application of the public interest test in relation to this exemption is likely to involve a number of considerations including human rights issues (right to a fair trial etc) and an assessment of the impact of disclosure upon the success of particular investigations and, more generally upon investigative procedures. Public authorities are strongly advised to put procedures in place for identifying the difficult cases and for taking appropriate legal advice.
- The Information Commissioner's casework guidance on s.31 is due to be published on the ICO website and will also be available upon request in hard copy form. It is likely that public authorities will find it helpful to read this advice in conjunction with advice on s.30 ("Investigations"). Advice will also be available in due course from the Department of Constitutional Affairs website.