

## Freedom of Information Act Awareness Guidance No. 16

### Section 30: Investigations

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 30 of the Act, which relates to the exemption information held for the purpose of investigations or proceedings.

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 the Act says

##### a) General

In broad terms, section 30 creates an exemption for information which is or has been held for the purposes of an investigation or proceedings conducted by a public authority or which was obtained or recorded for the purpose of various investigative functions. The question of what information is covered is considered in further detail in Section B below.

It is a so-called “class based” exemption. This means that unlike the prejudice-based exemptions in the Act (for instance Defence, Commercial interests) it is not necessary to be able to point to some harm or “prejudice” that may arise as a result of disclosure.

Section 30 is, however, a “qualified” exemption. This means that even though information may be exempt because it has been held for the purpose of an investigation, it is necessary to consider whether the wider public interest requires disclosure. This issue is considered further in Section D, below.

##### b) Information held by investigating officers

The duties and obligations created by the Act are generally placed upon public authorities as legal entities and not upon individual officials. In the area of law enforcement and investigation, however, some powers are conferred upon officers and officials rather than the organisations to which they belong. In a policing context,

for instance, it is “constables” rather than police forces who have the powers and duties to conduct investigations. For the purposes of this exemption the information held by individual investigating officers is held by the public authorities to which they belong.

c) The duty to confirm or deny

The **right to know** has two elements: the duty to confirm that information of the sort requested is held and, if so, to communicate that information to an applicant. Both elements must be considered in turn, although if it is concluded that there is an exemption from the duty to confirm or deny holding the information, it would not make sense to then go on to consider whether to provide a copy of the information.

The success of many investigations depends upon ensuring that information as to the targets of investigations, suspicions, evidence gathered, leads pursued and so on are not disclosed prematurely. It is likely, therefore that public authorities will wish to respond to a number of requests for information by giving a non-committal response.

It is not acceptable, however, to provide no response. S.17 of the Act requires public authorities to explain their reasons for refusing a request for information. For more advice on the duty to confirm or deny, see **Awareness Guidance No 21**.

d) In common with a number of other exemptions in the Act, section 30 is time limited. Once a record is 30 years old it becomes a historical record and the investigations exemption no longer applies.

## **B) What information is covered?**

a) Particular investigations

The exemption is divided into two parts. The first covers information which “has at any time been held” by a public authority for any of the purposes listed below. The phrase “has at any time” means that information is exempt if it relates to an ongoing, a closed or an abandoned investigation with the important qualification that the exemption ceases to apply to information which is thirty years old or more (i.e. when it has become “a historical record”).

The information covered by the first part of the exemption will be that held for particular investigations including that held in connection with:

- Criminal investigations which the authority has a duty or power to conduct (e.g. police investigations)
- Prosecutions brought by the authority. (These may be prosecutions brought by the investigating authority or prosecutions brought by another authority such as the CPS. In addition to prosecutions brought in the criminal courts, the exemption also covers courts martial.)

b) Investigatory and other similar functions

Whereas the first part of the exemption is concerned with particular criminal investigations, the second is concerned more broadly with information held in relation to more general investigatory functions which depend upon or relate to the obtaining of information from confidential sources. Information exempted under this part of the section might include, for instance, criminal intelligence gathered from confidential sources which may inform the development of investigations that have not yet been launched. The functions in question are:

- The investigations and criminal proceeding referred to above,
- Other investigations which are listed in s.31(2) of the Act (see Annex 1)
- Civil proceedings brought by or on behalf of a public authority arising from an investigation which the authority has a duty or power to conduct (i.e. where an investigation may lead to civil rather than criminal proceedings, for instance where a social services investigation leads to the obtaining of a child protection order.)

Confidential sources may include witnesses and informants. An important consequence of this provision is to give protection to the identities of confidential sources and the processes by which such sources are recruited whether or not an investigation has been commenced.

### **C) Relation of section 30 to section 31 (“law enforcement”)**

Section 30(1) covers particular criminal investigations and proceedings conducted by public authorities. The purpose of this part of the section is to protect particular investigations and proceedings. The second part of the exemption is broader and provides protection to investigative processes both criminal and civil and to information obtained through confidential sources.

In many cases it may be impossible to draw clear line between the information covered by the two parts of the exemption. For instance, information provided by a confidential source may be held for the purposes of an ongoing investigation and therefore be covered by the first part of the exemption. By definition, it will also be covered by the second part. In practice the effort of attempting to draw clear lines is unlikely to assist public authorities in applying the exemption.

Superficially, there is a similar overlap between s.30 and s.31. Section 30 covers investigations and proceedings. Meanwhile s.31 covers “law enforcement” more generally. Under s.31, for instance, information is exempt if its disclosure might prejudice the prosecution of offenders. Such information might easily also fall under s.30. However, the Act is clear that section 30 takes precedence, however, and a public authority can only rely upon the section 31 exemption if section 30 does not apply.

### **D) The Public Interest Test**

S.30 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, in other words that the

harm that would be likely to be caused to an investigation would be greater than the wider public interest in 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

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 it is only possible, therefore, to give a general indication of the approach to be taken.

A critical issue is likely to be the timing of disclosure. As a general rule, the Commissioner recognises that the public interest in the disclosure of information is likely to be weaker whilst an investigation is being carried out. However once an investigation is completed, the public interest in understanding why an investigation reached a particular conclusion or in seeing that the investigation had been properly carried out is more likely to outweigh the public interest in maintaining the exemption.

By the same token, there is likely to be a weaker public interest in disclosure of information about investigations which have been suspended but which may be reopened, than about those which have been concluded or abandoned.

There is a strong public interest in access to justice and in ensuring that justice is done. There will be occasions when this factor favours disclosure, for instance where there is a well founded suspicion that justice was not done either to the accused or a victim. In some cases this may shift the balance of public interest in favour of the disclosure of information about completed cases or those which have been abandoned with no reasonable prospect of being reopened. There will be other cases, however, where disclosure would be likely to prejudice the right to a fair trial.

Finally it should be noted that the presumption that information relating to ongoing investigations will not be released is not invariable. Much will depend upon the effect of disclosure with a stronger case for maintaining the exemption where the confidentiality of the information is critical to the success of the investigation. In rare cases where a prosecution has collapsed for reasons of procedural failure or dishonesty on the part of the investigating authority, there may be a strong public interest argument in favour of the disclosure of information about other, similar investigations.

## **E) Who is likely to use the exemption**

Some public authorities have the duty or power to investigate complaints, some to bring prosecutions. Some combine both roles. It is not possible to provide a definitive list. However, they may include:

- the police
- the Environment Agency
- local authorities (trading standard, environmental health etc)
- the Crown Prosecution Service
- the Serious Fraud Office
- the General Medical Council
- the Department of Trade and Industry

The Commissioner would expect that public authorities relying upon the exemption are able to explain the legal basis of any investigations or prosecutions which they conduct.

## **F) Further Advice and Key Issues for Implementation**

- S.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, consider preparing a statement of policies about disclosure which can then be provided to applicants without the risk of implying comment on 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 an investigation of prospective prosecution. 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.30 (investigations and proceedings conducted by public authorities) will also be available from the ICO website or requested in hard copy form. It is likely that public authorities will find it helpful to read advice on s.30 in conjunction with advice on s.31 ("enforcement"). Advice is also available from the Department of Constitutional Affairs website ([www.foi.gov.uk](http://www.foi.gov.uk))

**Types of investigation listed in section 31(2) of the Act**

- 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.