

Section 31 Investigations and legal proceedings

Introduction

This document is drafted as practical guidance to assist public authorities in applying the section 31 qualified exemption for investigations and legal proceedings. It is not intended to be a comprehensive assessment of the law in this area and a public authority is required to assess each request on the basis of its own individual facts.

Section 31 is a class based qualified exemption and **cannot** be engaged unless the information concerned falls within the class of information described by the exemption.

The first step in applying class based qualified exemptions is to establish whether the information concerned falls within the class of information described by the exemption. If a public authority cannot establish this then it will not be able to rely upon the exemption when answering a freedom of information request. If a public authority is satisfied that the information does fall within this class, it will then have to carry out the public interest test to determine whether the public interest in withholding the information is equal to or greater than the public interest in releasing the information (see part 3 of the Freedom of Information Act 2015 Code of Practice).

Note that the exemption applies to information, not documentation. However, it is possible that information contained in a document created after the conclusion of an investigation or set of proceedings could still attract the exemption e.g. an internal police report on the growth of gun crime over the previous decade may include details of actual offences which may be exempt.¹

A public authority should consider whether other exemptions, in addition to this one, may also apply to the requested information, bearing in mind that other exemptions might be more appropriate (see other exemptions guidance). Different exemptions may apply to different aspects of the requested information, although only one exemption needs to be engaged for information to be withheld.

A public authority may also need to consider whether to neither confirm nor deny that the information is held, if to do so would, in itself, be absolutely exempt or qualified exempt information under this section.²

Purpose of the exemption

- To ensure that the Freedom of Information Act 2015 cannot be used to circumvent the rules of disclosure governing criminal investigations and proceedings.
- To protect and encourage witnesses and informants so that they are not deterred.
- To maintain an independent criminal process and to ensure that the criminal system is the sole forum for deciding criminal guilt.³

¹ ICO guidance – Investigations and proceedings v: 1.0

² s19 of the Act and further guidance on NCND

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Is the exemption engaged?

- The exemption is divided into 2 separate exemptions, one in s31(1) and the other in s31(2). Work through each of these answering the question.
- State which part of the exemption you are relying on.

S31(1) Concerns information held for particular investigations and proceedings which the public authority has the power or duty to conduct.

Assess the Information	
S31(1)(a)	
Does the public authority have a duty or is the public authority obliged to investigate whether someone should be charged with an offence? This usually arises under the law (i.e. a public authority will have no discretion over this).	
What offences are relevant?	
Does the public authority have the power to conduct such investigations and/or institute criminal proceedings?	
Is/has the information, at any time, related to specific investigations or proceedings (answer must be yes)?	
Has the information been held by the public authority, at any time, for the purposes of an investigation that the public authority has a duty to conduct to ascertain if: <ul style="list-style-type: none"> - A person should be charged with an offence or - A person charged with an offence is guilty of it? This is most relevant to the police, other intelligence agencies or others who are able to conduct criminal investigations (s30(1)(a)).	
S30(1)(b)	
Has the information been held by the public authority, at any time, for the purposes of an investigation, conducted by that public authority? In the circumstances may this lead to criminal proceedings being instituted? Primarily relevant if the public authority has regulatory or investigatory functions or conducts investigations with a view to	

³ Digby-Cameron v Information Commissioner and (1) Bedfordshire Police and (2) Hertfordshire Police (EA/2008/0023 and EA/2008/0025, 26 January 2009)
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deciding whether to charge and take proceedings against someone for a criminal offence.	
Has the information been held by the public authority, at any time, for the purposes of any criminal proceedings that the public authority has the power to conduct? (Most applicable to the AGC and other public authorities with prosecution functions rather than investigatory functions).	
Does the information relate to the obtaining of information from confidential sources? For example, whistle blowers or someone that an authority wants to protect. (Note it is not the information that is confidential but the source. Also consider the personal information exemption).	
On the basis of the above, do you think that this exemption is engaged?	

s31(2) Protects information relating to confidential sources

Assess the information	
Does the information relate to the public authorities investigations and confidential sources?	
Is the information obtained or recorded for the purposes of a public authority's functions relating to those investigations or proceedings (i.e. it doesn't have to be obtained or recorded as part of a particular investigation)?	
Does the public authority have the power to conduct such an investigation (implies some form of discretion. Not a statutory duty)?	
Is the information from an inquiry set up by the public authority and which has revealed some sort of illegality but the public authority does not have express power in law to conduct it (answer must be no).	
Was the information obtained or recorded by the public authority for the purposes of its functions relating to any investigations covered by s31(1)?	
Was the information obtained or recorded by the public authority of its functions relating to criminal proceedings that it has the power to conduct?	

<p>Was the information obtained or recorded by the public authority for the purposes of its functions relating to other investigations (not already covered) that are conducted by the public authority by virtue of any other law for one of the following purposes:</p> <ul style="list-style-type: none"> - To ascertain if a person has failed to comply with the law? - To ascertain where a person is responsible for conduct that is improper? - To ascertain whether regulatory action under any law is justified? - To ascertain a person's fitness or competence in relation to the management of corporate bodies or any profession or other activity that the person is or seeks to become authorised to carry out? - To ascertain the cause of an accident? - To protect a charity against misconduct or mismanagement (whether by the trustees or other persons in its administration)? - To protect the property of a charity from loss or mismanagement? - To recover the property of a charity? - To secure the health, safety and welfare of persons at work? - To protect persons, other than persons at work, against risk to health or safety where that risk arises out of, or in connection with, the actions of persons at work. <p>In essence ascertaining whether regulatory action is justified, ascertaining the cause of an accident or protecting the properties of charities.</p>	
<p>Was the information obtained or recorded by the public authority for the purposes of its functions relating to civil proceedings brought by or on behalf of the public authority and which arise out of the above investigations?</p>	
<p>Does the information relate to the obtaining of information from confidential sources i.e. a person who provides information on the basis that they will not be identified as the source of that information?</p>	
<p>Does the information relate to any procedures including administrative processes, relating to confidential sources e.g. protocols for handling such sources or reports on their use? Records of payments made to sources or appointments made with</p>	

sources?	
On the basis of the above, do you think that this exemption is engaged? If so continue and carry out the public interest test.	

Public Interest Test⁴	
Factors in favour of disclosure	Factors in favour of maintaining the exemption
Promotes transparency.	Public confidence requires processes to deliver justice effectively.
The information is already in the public domain.	Disclosure may assist potential criminals and law breakers and this may put others in danger.
A need to put the record straight.	Law enforcement or the prevention of crime could be jeopardised and the integrity and effectiveness of the system undermined.
Justifiable concern about an investigation or prosecution.	Disclosure could be unfair to a suspect against whom there is no real evidence.
The need to have confidence in those bodies tasked with upholding the law by allowing scrutiny of their performance.	Disclosure could affect the willingness of individuals to give evidence.
There is evidence that an investigation or prosecution has not been carried out properly which may be disclosed by the information.	Revealing information from confidential sources in the past may affect future confidential sources coming forward.
The stage the proceedings are at and the age of the information (although this is not critical as investigations may be re-opened in the future).	Whilst investigations and prosecutions are ongoing, public authorities require a safe space in which to operate and premature disclosure would present problems for the judicial process.
	The value of information obtained from confidential sources.
	The outcome of an investigation or proceedings will be at risk.
	The stage the proceedings are at (at a sensitive time).
	The stage that the investigation is at.

The following questions may assist in carrying out the public interest test

⁴ Examples of public interest arguments are listed for illustrative purposes and each request should be looked at on the basis of its own individual facts. Further guidance on carrying out the public interest test can be found in Part 3 of the Freedom of Information Act 2015 Code of Practice.

What stage are the investigation/proceedings at?	
To what extent is any information already in the public domain?	
What is the significance/sensitivity of the information and is there any independent evidence?	
What is the age of the information?	
To what extent will disclosing or withholding information -	
Promote or diminish the chances of a successful prosecution, bringing future charged or making arrests?	
Promote or diminish the chances of a fair trial?	
Be fair to those who have not been prosecuted, in cases where a decision has been taken not to proceed?	
Assist or hamper the gathering of intelligence information from confidential sources such as informants, whistle blowers or calls to Crime Stoppers?	
Further the interests of justice through the participation of victims, witnesses, informants, suspects or offenders in investigations and proceeding – and either protect or endanger them as they do so?	
Assist or impede other ongoing or future proceedings?	
Prevent or facilitate the commission of crime?	
The following factors will not be relevant: Disclosure could be distressing to those involved, their families or suspects (look to other exemptions).	

Further Information

The Information Commissioner has published guidance on the application of this exemption.
https://www.inforights.im/media/1173/exempt31q_investigations-legal-proceedings.pdf