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IMMIGRATION DIRECTORATES' INSTRUCTIONS

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**CHAPTER 25
SECTION 9**

**USE OF EXEMPTIONS RELATING TO INVESTIGATIONS
AND PROCEEDINGS CONDUCTED BY PUBLIC AUTHORITIES
OR FOR LAW ENFORCEMENT ACTIVITIES**

1. INTRODUCTION

The exemptions under sections 30 and 31 of the Freedom of Information Act 2000 (“the Act”) are closely linked. Section 30 applies to information which relates **to investigations and proceeding conducted by public authorities**. It is a qualified exemption and so for it to apply the public interest considerations in not releasing the information requested must outweigh the public interest considerations in favour of disclosing the information.

The section 31 exemption is applicable to information which would or would be likely to **prejudice law enforcement functions**. This includes, most importantly for IND, the operation of the United Kingdom’s system of immigration controls. Like section 30, this is also a qualified exemption which requires an assessment of the public interest. However, for the exemption under section 31 to apply a prejudice test must also be carried out to demonstrate the prejudice that would occur as a result of the disclosure of the information requested. Staff should consult Section 5 of this IDI chapter if they have not had previous experience of applying qualified or prejudice based exemptions

One of the key features of the relationship between the exemptions under section 30 and 31 is that information which falls to be withheld under section 30 **cannot** be exempted under section 31. If it is thought that information held by a Government Department might be exempt under section 31 then a judgement should first be made by staff as to whether or not the information is exempt under section 30. If it appears that it is, section 30, rather than section 31, should be used. This mutual exclusivity is because section 30 is focused in various ways on the **source** of the information and the purpose for which it has been held, while section 31 is an exemption which is focused on the **effects of disclosure on the process**.

One of the most important reasons why a request for information may fall to be considered under section 31 rather than section 30 is because section 30 is limited to information held by IND for its own law enforcement purposes. Section 31, by contrast, will be relevant in cases where IND holds information relevant to its own law enforcement purposes and those of other bodies.

Where IND Directorates are seeking to apply either exemption, these must be authorised at Grade 7/Assistant Director level or above and the IND Central FOI Team must also approve its use.

2. EXEMPTING INFORMATION IN RELATION TO INVESTIGATIONS AND PROCEEDINGS CONDUCTED BY PUBLIC AUTHORITIES

2.1 Background

The exemption under section 30 in relation to investigations and proceedings conducted by public authorities provides for a number of specified conditions under which information can be exempted as follows:

- (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)) 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,
 - (c) it relates to the obtaining of information from confidential sources.

The term ‘**charged**’ referred to in the wording of the exemption under section 30(1) (a) can include:

- the issue of a summons;
- the situation where criminal proceedings are initiated by way of a bill of indictment (“a voluntary bill of indictment”) under the Indictments (Procedure) Rules 1971 (SI 1971 No.2084, as amended);
- where proceedings are instituted by way of a written charge and requisition under section 29 of and Schedule 2 to the Criminal Justice Act 2003; and
- where a “conditional caution” is given under section 22 of the Criminal Justice Act 2003.

2.2 Structure of the exemption

An important difference should be noted by staff between the two key parts of this exemption:

- **section 30(1)** - applies to information which ‘**has at any time been held**’ for the purposes to which it refers. This is a very important feature of this exemption. If information has ever been held for these purposes, it will fall within the terms of the exemption, even if it has ceased to be held for those purposes, and regardless either of the purposes for which it might have been obtained, or of any other purposes for which it might at any time have been held.

- **section 30(2)**- applies to information which **‘was obtained or recorded’** for the purposes to which it refers and relates to **‘the obtaining of information from confidential sources’**. This is a different sort of test, which focuses on the *acquisition* of the information by the Department and also on its content. Information will have been **‘obtained’** if it was acquired by the Department from a source, and **‘recorded’** if it was generated by the Department itself.

There is a clear potential for overlap between the two parts of this exemption. Both will apply in the case of information which has at any time been held for the relevant investigation and prosecution functions in section 30(1), and which was acquired for the purposes of the functions set out in section 30(2), and which relates to the obtaining of information from confidential sources. In practice, it will usually be more straightforward to rely on section 30(1) of the exemption in cases of overlap – but in considering the balance of the public interest for and against disclosure, clearly all the relevant considerations applicable should be considered.

2.3 **Considerations when applying section 30(1)**

The application of section 30(1) should be considered in respect of all of the criminal and certain other statutory investigations and criminal proceedings carried out by IND. The three categories (a-c) covered by section 30(1) are explained in detail here.

Investigations which an authority has a duty to conduct

Section 30(1)(a) clearly applies to criminal investigations conducted by relevant bodies within IND, such as the Immigration Service, which carry out investigations directed towards charging or prosecution decisions.

The investigation must be one conducted with a view to charge or prosecution. There is no specific requirement, however, for the charge/prosecution to which the investigation is directed to be one which IND itself may bring: instead it could be brought by a body such as the Crown Prosecution Service.

Investigations which may lead to criminal proceedings by the authority

Investigations under section 30(1)(b) may fall under the terms of this exemption where:

- an authority within IND has the power to conduct them, and
- in the case in question, this may lead to a decision that an authority within the Home Office will bring criminal proceedings.

This part of the exemption does not require that the only, or even the main or dominant, purpose of the investigation should ultimately be criminal proceedings. This is a particularly important consideration for an authority within IND, such as the Immigration Service, who has regulatory functions and who may conduct investigations with a view to ascertaining whether a person should be charged with a criminal offence or alternatively be dealt with in different ways – such as, for example:

- penalties or sanctions which may be imposed without criminal procedure, or

- administrative removal.

This part of the exemption will also apply where a body, such as the Immigration Service, may also conduct statutory investigations, the results of which may be referred to prosecutors for a decision on whether or not to institute criminal proceedings as well as or instead of being used to launch, for example, administrative removal proceedings.

Criminal proceedings which the authority has a power to conduct

Section 30(1)(c) focuses not on investigations but on criminal court proceedings themselves. It will apply to criminal proceedings conducted by those authorities primarily constituted to do so, such as the Crown Prosecution Service, but also to criminal proceedings conducted by bodies with prosecution functions such as the Immigration Service.

2.4 **Considerations when applying section 30(2)-in relation to confidential sources**

Section 30(2) concerns information with two sets of components. The first set relates to the purposes for which it was acquired (see point 2.5). Crucially, the second set requires that the information must relate to '***the obtaining of information from confidential sources***' and is essential to whether this part of the exemption can or cannot be applied.

Assessing whether information applies to confidential sources

Information may 'relate to' the obtaining of ***information from confidential sources*** in many ways. It may:

- identify those sources,
- describe the process of obtaining the information,
- or indeed itself constitute information obtained from confidential sources.

The information in question need not itself be confidential; it is the relationship with the source which must be confidential.

'Confidential sources' are providers of information operating in a context which is to some degree necessarily covert; they are also characterised by a relationship of confidence, or protection, with the authority (or indeed other body or individual) to which they provide the information. 'Confidential sources' certainly includes informants – that is to say external individuals who covertly provide information under conditions of confidentiality, particularly as to their own identification. But the obtaining of information from confidential sources should be regarded for the purposes of this part of the exemption as limited only to arrangements for acquiring information from **third parties** who have an expectation of confidentiality from the authority to which they give the information.

It is important to note that if the information in question relates to a living, identifiable, individual, it may constitute personal information within the terms of section 40 of the Act and so be liable to the Data Protection Act principles on the processing of personal data. Disclosure of personal information always needs to be considered in that context, whether or not the exemption here will apply under section 30(2). It is also important to note that if the information itself has been obtained from a confidential source, then the exemption under section 41 of the Act relating to confidential information may also be relevant.

The application of this part of the exemption under section 30(2) is therefore most likely to be relevant to information which does not identify individuals and the disclosure of which would not be an actionable breach of confidence. For example it might not be actionable because it was obtained by one Government Department from another. Examples might include:

- a diary which recorded appointments to meet an unnamed informer,
- details of any surveillance and investigative techniques associated with the management of external confidential sources,
- an indication that certain information had been obtained from an unnamed confidential source.

2.5. **Functions of the authority in relation to certain investigations and proceedings**

As well as the limits placed on the application of Section 30(2) by what may or may not constitute a confidential source outlined in Point 2.4, this part of the exemption is also limited by the fact that the information must have been acquired for the purposes of **the functions of the authority** relating to any one of four relevant areas of activity.

The functions of an authority such as IND may be its duties or simply its powers, and for the information to be exempted it must have been acquired for the purposes of IND's own functions rather than those of another authority such as another Government Department.

The four relevant areas of activity which IND must have acquired the information for in order to apply the exemption here are:

(i) Criminal and certain other statutory investigations

These are the identical investigations which are considered above in relation to Section 30(1) (a) and (b).

(ii) Criminal proceedings the authority has power to conduct

Again, this covers the same ground considered above in relation to section 30(1)(c).

(iii) Certain non-criminal investigations. This part of the exemption has three specified elements;

- it relates to investigations;
- they must be either statutory investigations or investigations carried out under prerogative powers; and
- they must be carried out for one of the purposes specified in section 31(2).

Investigations which may fall within the terms of this part of the Act include, for example, investigations which are conducted by IND or the Department and which may lead to a decision to institute criminal proceedings by someone other than the authority (for example the CPS).

The main effect of this provision, however, is likely to be in relation to investigations which have in view outcomes other than formal criminal process.

The investigations must be either statutory or carried out under prerogative powers and will cover a range of law enforcement and regulatory purposes covered in section 31 (2) such as:

- ascertaining whether any person has failed to comply with the law or is responsible for improper conduct;
- ascertaining whether statutory regulatory action might be appropriate;
- ascertaining a person's fitness and competence in relation to certain regulated activities;
- accident investigation;
- the protection of charities; and
- health and safety at work.

(iv) Civil proceedings brought arising out of certain of its investigations

'Civil proceedings' is not specially defined. It certainly includes legal action (other than criminal proceedings) before a court or tribunal. The proceedings must be brought either by IND or the Department, or by another body on behalf of IND or the Department such as the Crown Prosecution Service.

2.6 The public interest balancing test

Section 30 is a qualified exemption and so it is necessary for staff to consider not just whether the requested information falls within scope of the exemption, but also to assess whether or not the public interest in withholding this information outweighs the public interest in disclosing it. The public interest both for and against the disclosure of information falling within the terms of section 30 also needs to be considered in all the relevant circumstances of individual cases.

In balancing public interest considerations when assessing whether to apply this exemption staff will need to consider in particular:

- the potential effects of a disclosure; and
- the nature and seriousness of the matter being pursued.

The provision of information by individuals and organisations remains crucial to the relevant investigation processes carried out by IND for both criminal and non-criminal purposes. In relation to confidential sources, any disclosure of information may have extremely serious consequences in terms of the general willingness of individuals to supply information, and individual cases may involve serious risk of injury or loss of life.

The factors to be taken into account in considering the balance of the public interest will depend upon the circumstances of the particular case. In determining whether the public interest in withholding the information outweighs the public interest in

disclosing the information, one or more of the following factors may be of assistance, namely, the extent to which either disclosing or withholding information would:

- promote or diminish the chances of a successful prosecution, bringing future charges, or making arrests;
- promote or diminish the chances of a fair trial taking place;
- be fair, in cases where decisions have been taken not to proceed, to those who have not been prosecuted;
- assist or hamper the gathering of intelligence information from confidential sources (e.g. informants/whistleblowers/calls to crimestoppers);
- further the interests of justice in the participation of victims, witnesses, informants, suspects or offenders in investigations and proceedings – and either protect or endanger them as they do so;
- assist or impede other on-going or future proceedings
- prevent or facilitate the commission of crime.

This is not an exhaustive list and in some cases none of these factors may be relevant.

2.7 Responding to an applicant

Where staff have decided to apply this exemption and not to communicate the information requested, there will still be another separate public interest assessment to be made. This will involve considering whether confirmation or denial in response to an applicant's request would, in itself, involve supplying information to the applicant to which this exemption applies.

If staff decide that confirming or denying whether the information is held by IND **would not** disclose any of the information being exempted under section 30(1) or 30(2), a reply should be sent to the applicant by IND Directorates adapting the standard template at **Appendix A**. This is entitled: ***'Applying an exemption under section 30 where the duty to communicate has been exempted'***.

Using a neither confirm nor deny answer

If it is decided that confirming or denying whether the information is held in IND in response to an applicant would in itself disclose the information being exempted under section 30(1), or 30(2) then a neither confirm nor deny (NCND) answer can be used in response to the applicant citing section 30 (3) of the Act. But reliance on this exemption from the duty to confirm is also subject to a public interest test assessment and it must be the case that the public interest was in favour of not revealing whether to confirm or deny that the information was held. A standard template for IND Directorates to adapt for their own use when adopting a neither confirm nor deny answer can be found attached at **Appendix A** entitled: ***'Standard template letter for use to an applicant where the duty to confirm has been exempted under section 30 (3) and a neither confirm nor deny response is engaged.'*** .

2.8 Duration of the exemption

Information contained in a historical record (over 31 years old) cannot be exempt by virtue of applying section 30(1) here. But if section 30(2) is being applied then the exemption here is unlimited.

2.9 Relationship with other exemptions

If law enforcement information does not fall within the terms of section 30, it may be necessary to consider the possible application of section 31 (see point 2 for further details)

In relation to live or prospective legal proceedings, the exemptions under the Act relating to court records (section 32), legal professional privilege (section 42) and contempt of court (section 44) may also need to be considered.

In relation to confidential sources, as discussed above, particular attention needs to be paid to the possible applicability of the exemptions under the Act relating to personal information (section 40) and confidential information (section 41) because of the possibility of an authority's incurring legal liability for disclosure. Staff should consult Section 12 of this IDI Chapter for further details on applying both of these exemptions.

3. EXEMPTING INFORMATION IN RELATION TO LAW ENFORCEMENT ACTIVITIES

3.1 Background

The exemption under section 31 of the Freedom of Information Act 2000 ("the Act") covers a very large number of aspects of what may generally be termed **law enforcement activities**. The exemption here is both a prejudice and qualified exemption. For the exemption to apply it requires an assessment of the particular prejudice which a disclosure would have on the law enforcement activity in question, and a public interest balancing test to be carried out which must justify non-disclosure. In common with other prejudice-based exemptions, the nature, degree and likelihood of the prejudice to be caused will need to be taken into account in considering the balance of public interest in disclosure.

This exemption operates around a wide range of law enforcement interests which it breaks down into particular categories which may be prejudiced by disclosure of information. The free-standing categories here under Section 31(1) are as follows

- (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 the immigration controls,
 - (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained.

The majority of IND staff may wish to primarily consider the application of this exemption in respect of the effects of disclosure on the operation of immigration controls under section 31(1)(e). But IND holds a broad range of information and carries out a number of differing core functions, so there is also a significant potential for overlap between the other various categories of law enforcement activities covered by this exemption. Where a disclosure may fall under any of the six categories set out here, careful thought should be given to whether or not another category may also be relevant. By way of an example, staff dealing with Immigration Removal Centre issues may from time to time consider the case for applying the exemption here in relation to both section 31(1)(e) and section 31(1)(f). Where this occurs equal consideration must be given to each category on its own merits.

To help assist staff in IND with the application of this exemption, each category of law enforcement activity covered in section 31 is considered respectively in this guidance, with the exception of sub-clause (d) on the collection of tax. Advice is provided on assessing the likelihood of prejudice in relation to each category and the most likely aspects of the public interest balancing test which staff may need to take into account when making their assessment of whether to apply this exemption.

3.2 **Operation of the immigration controls**

The term "***immigration controls***" is not defined in the FOI Act under section 31(1) (e) but should not be taken to mean simply the physical immigration controls at ports of entry into the United Kingdom. Instead staff should apply the terms to the more general arrangements made in connection with entry into, and stay in, the United Kingdom, including the investigation of offences relating to immigration. These arrangements could be governed by legislation, by policy or by procedure.

Assessing the prejudice of disclosure on the operation of immigration controls

As long as the disclosure of information into the public domain would *cause prejudice* to the operation of our immigration controls the exemption can be considered here; the information does not, although it may well be, need to be specifically about the immigration controls.

Examples of circumstances where disclosure might prejudice the operation of immigration controls include disclosure of:

- Information that there was extensive counterfeiting of travel documents of a particular country, on the basis of which travel documents purportedly issued by that country were to be subjected to particular scrutiny. In this case, the disclosure of the information or the identity of the targeted country might prejudice the operation of the immigration controls because it would alert counterfeiters (and persons making use of their services) to use another country's travel documentation for these purposes instead.
- Information which would reveal an incidence of suspected illegal working which was to be investigated by the immigration service. In this case, the disclosure of the information about the proposed investigation might prejudice the operation of the immigration controls because it would alert the employers and the illegal workers in advance and would enable them to escape investigation.
- Information on proposed changes to visa regimes. The imposition or amendment of visa regimes usually takes place with little or no notice being given to the

public. This is because visa regimes are generally introduced in order to prevent evasion or abuse of immigration controls by nationalities who, over time, have been shown to pose a higher risk of evasion or abuse than other nationalities when seeking to enter the United Kingdom. Therefore the disclosure of information relating to visa regimes could, in some cases, prejudice the operation of immigration controls because it would encourage persons from the countries which are due to be affected to seek to enter the United Kingdom before the changes are introduced, thus avoiding the more stringent regime which has necessarily been developed.

These examples are used for illustrative purposes only to demonstrate where prejudice is likely to occur in IND's business area. Each area of IND is likely to have other examples where prejudice to immigration control will occur through the release of requested information which will be developed as the Act evolves.

The public interest balancing test

Even if the disclosure of a requested piece of information would prejudice the operation of immigration controls, staff are still required to carry out a public interest balancing test and to demonstrate the overall public interest in non-disclosure of the information concerned in order to apply this exemption.

There are a number of public interest considerations which may, in the context of a particular request, favour non-disclosure. When applying the public interest test and assessing the reasons for non-disclosure, staff should always remember the overall point that immigration controls are important in order to regulate entry to and settlement in the United Kingdom, in which there is a strong public interest.

There is also a public interest in ensuring that:

- People are not able to evade or abuse our immigration controls in order to enter the United Kingdom illegally.
- The efficiency and integrity of our immigration controls are not undermined.
- Investigations into suspected immigration offences can be conducted effectively.

However, there are also a number of significant public interest considerations when it comes to the issue of immigration controls which may, in the context of a particular request, favour disclosure. There is a public interest in:

- ensuring that there is public confidence in the operation of our immigration controls by keeping the public informed of policies, developments, proposals for the future, etc, together with explanations of them.
- ensuring that the public have access to correct information – because immigration is an emotive issue set in a complex framework, it is inevitable that there may be inaccurate information about immigration issues circulating in the public domain which ought to be corrected.
- providing information which confirms the performance of immigration control for example in providing statistics on the number of passengers and applications that are handled by IND.

- establishing that the implementation of immigration control is carried out in accordance with the published statements and policies by providing, wherever possible, details of implementation of immigration controls.
- ensuring that those who are subject to immigration controls are aware of those controls and how they operate, as this may discourage such persons from seeking to enter the United Kingdom illegally.

The timing of disclosure may well be relevant when weighing up public interest arguments here as by its very nature the public interest itself is dynamic and subject to change.

The arguments on each side must be weighed up and a decision made. If it is deemed that the arguments balance perfectly, the information should be disclosed.

Potential overlap with other exemptions

In cases where it is considered that this exemption may apply there may be an overlap with some of the other exemptions, in particular:

- Section 31(1)(a) and (b) of this particular exemption which relate to the prevention or detection of crime; apprehension or prosecution of offenders – for example in relation to criminal offences such as people trafficking or illegal working which are designed to reinforce the system of immigration controls. See Point 3.4 for further details.
- The exemption on the formulation of government policy contained in section 35 of the Act – for example in relation to the formulation of immigration policy. See Section 11 of this IDI Chapter for further details.
- The exemption on prejudice to effective conduct of public affairs contained in section 35 of the Act- for example to the extent to which the effective conduct of public affairs relies on the free and frank provision of advice in the context of formulating immigration policy/policy on immigration controls. See Section 11 of this IDI Chapter for further details.
- The exemption on personal data contained in section 41 of the Act – for example in relation to specific immigration cases. See Section 12 of this IDI Chapter for further details.

3.3 The maintenance of security and good order in prisons and other institutions where people are lawfully detained

Under Section 31(1)(f) the exemption may apply where disclosure may prejudice the maintenance of security and good order in prisons and other institutions where people are lawfully detained. The term '**security**' will include all matters related to the secure custody of those detained, the safety of all persons in the institution, and the detection and prevention of activity (including but not limited to criminal activity) not permitted within the institution. The term '**good order**' will include all matters addressing disobedience on the part of individuals or concerted indiscipline by groups of persons in the institution, and promoting a safe and orderly regime.

The exemption is intended to prevent disclosure of information under the Act from prejudicing '**security**' and good order not only in prisons, but '**other institutions**

where persons are lawfully detained. For the purposes of IND staff, this term is likely to be particularly relevant to the operation of Immigration Removal Centres.

Assessing the prejudice of disclosure on the maintenance of security and good order in Immigration Removal Centres

Information might prejudice the maintenance of security and good order in Immigration Removal Centres in two ways:

- Firstly, by in some way causing security to be compromised or good order to break down.
- Secondly, by impairing an institution's ability to restore security or good order.

An example of the first type of prejudice might be prematurely released information about a potentially unpopular policy change either being put in place or being considered. An unwelcome change in the regime of an institution could potentially lead to concerted indiscipline or worse. Hypothetical examples of such information relevant to good order might be information about changes in meal times or visits arrangements.

An example of the first type of disclosure covered by the exemption related to security, might be information detailing the times and routes of detainee escorts. Release of this information might aid an escape attempt, as might detailed information regarding perimeter security systems.

An example of the second type of prejudice might be the disclosure of information about the strategy for dealing with concerted detainee indiscipline or the contingency plans for responding to other types of incident. Releasing such information could compromise the ability of an institution to restore good order.

Conversely, information on physical security at a detention centre which was assessed as having little or no impact on the risk of escape if disclosed might not be considered to prejudice security and should therefore be disclosed.

The public interest balancing test

Even if the disclosure of a requested piece of information would prejudice the maintenance of security and good order in Immigration Removal Centres, staff are still required to carry out a public interest balancing test and to demonstrate the overall public interest in non-disclosure of the information concerned in order to apply this exemption.

There is a public interest in ensuring that there is public confidence in the operation of the immigration detention system, and one way of ensuring this is to keep the public informed of policies, developments, proposals for the future etc, together with explanations of them. The public interest is not served however by releasing information which might aid an unlawful escape or put anybody within an institution at real risk of harm.

Illustrative examples of varying public interest considerations which will need to be weighed in the balance are:

Example 1: A request is received by a detention centre for the contract made with the private company who installed the perimeter fence. Some parts of the contract

will be disclosable in any event, as they do not fall within any exemption. For those parts of the contract that do fall within the exemption here (as being likely to prejudice security etc.), for example, technical information about the strength or depth under the ground of the fence:

- There is a public interest in keeping the public informed about how public money is being spent;
- It is not in the public interest for an authority to release information which might aid an escape;
- It is not in the public interest for an authority to release information which might aid the transmission of contraband into the detention centre

Example 2: A request is received for a report which highlights serious security failings in a immigration detention centre.

- There is a public interest in keeping the public informed if public money has been badly spent;
- There is a public interest in informing the public that they have been put at risk by the actions of a public authority;
- It is not in the public interest for a public authority to release information which would alert detainees to serious security deficiencies.

The timing of disclosure may well be relevant when weighing up public interest arguments. If the request for the perimeter fence contract were to be received the day after the detention centre had been permanently shut down there would be no argument against disclosure. The same considerations will apply here if the request for the report were received long after the security deficiencies had been rectified.

The arguments on each side must be weighed up and a decision made. If it is deemed that the arguments balance perfectly, the information should be disclosed.

3.4 **The prevention or detection of crime and the apprehension or prosecution of offenders**

Section 31(1)(a) is designed to cover all aspects ***of the prevention and detection of crime***. Section 31(1)(b) is intended to cover all stages of the ***apprehension process and the subsequent prosecution of criminal activity***. This includes, for example, making or preparing to make an arrest or an application for an arrest warrant, and all stages of prosecution, including for example making or preparing to make an application for a summons.

Assessing the prejudice of disclosure on prevention or detection of crime and the apprehension or prosecution of offenders

Both of these categories are not restricted to information of any particular description; it turns on consideration of the likely effects of any disclosure. Examples of circumstances in which the prejudicial effects referred to in this part of this exemption are most likely to be relevant could include the following disclosures:

- Intelligence about anticipated criminal activities (disclosure here has a high potential to prejudice the prevention or detection of the crime in question, and the apprehension of the alleged offenders);

- Information relating to planned operations, including specific planned operations, and policies and procedures relating to operational activity;
- Information relating to the identity and role of informers.
- Information relating to strategies and tactics in seeking to prevent crime (the disclosure of such information has a high potential to undermine legitimate police objectives carried out in the public interest);
- Information whose disclosure would facilitate the commission of any offence; and
- Information whose disclosure would prejudice the fair trial of any person against whom proceedings have been or may be instituted.

While the police play the major role in the prevention and detection of crime in the UK, they are not the only public authorities who have such a role. There are a number of other bodies who are responsible for law enforcement in a range of areas including the Immigration Service. The Immigration Service is entitled to rely on this exemption if disclosure would prejudice its ability to prevent and detect immigration related crime.

The public interest balancing test

Where it is clear that prejudice would, or would be likely to, arise in respect of the prevention or detection of crime and the apprehension or prosecution of offenders, staff are still required to carry out a public interest balancing test to demonstrate the overall public interest in non-disclosure of the information concerned in order to apply this exemption.

Maintaining confidence in law enforcement and the criminal justice system is crucial to the public interest. This is a public interest consideration which, depending on circumstances, may weigh both for and against disclosure. Much is done through police/community consultation and the media to keep citizens informed about the ways in which the police carry out their responsibilities. But on occasions, there will be some tension between this emphasis on openness and the need to maintain the confidentiality of specific operations or policies. Similar considerations will apply to other law enforcement bodies.

It is particularly important in this context to be aware that prejudice may arise on an incremental basis, as well as in respect of a single disclosure. For example, disclosure of information on a single specific Immigration Service operation designed to apprehend alleged offenders would be likely to be prejudicial, as would disclosures of more generalised information relating to strategies and tactics where this was considered to undermine legitimate Immigration Service objectives and hamper future operational activity.

In weighing the public interest it will be necessary to consider the public interest that applies to the particular case. Examples of considerations which might be specifically relevant to this part of the exemption include:

- The effects of the action on individuals. For example, it would not be in the public interest to disclose details of a surveillance operation and thus potentially compromise that operation, where the target was a person suspected of people trafficking offences;

- The effects of the action on society. For example, it may not serve the public interest to disclose in advance the arrangements for an operation to combat illegal working
- The effects of the action on the economy. For example, it may be against the public interest to disclose specific immigration service strategies for action against those failing to pay fines or other penalties.

3.5 The administration of justice

Information is also exempt under section 31(1)(c) if its disclosure would prejudice the **administration of justice**. There is no definition of "administration of justice" but it may be construed widely:

- the exemption is not just about the courts – justice is administered through courts and tribunals, through arbitrators, and through alternatives to litigation;
- justice is commonly classified by subject matter – for example criminal, civil, family, or administrative;
- justice may be administered by professional judges and adjudicators, or by lay magistrates or panel members, or by jurors;
- administration of justice need not imply an adversarial context - it includes non-contentious or uncontested business, and inquisitorial processes (such as inquiries and coroners' courts);
- ensuring people's access to justice is part of the administration of justice;
- the administration of justice may be prejudiced in an individual case, or by something happening to the general process by which justice is delivered.

Some aspects of the administration of justice that could be prejudiced by the disclosure of information include:

- the ability of a judge to deliver justice effectively, fairly and fearlessly in a particular case;
- the ability of a judge, or of the judiciary, to perform this function more generally;
- the business of running of the courts and tribunals (though other exemptions might also be relevant);
- the ability of litigants to bring their cases, or a particular case, to court;
- the prospects of a fair trial taking place;
- the effectiveness of relationships between different agencies involved in the administration of justice (for example premature disclosure of plans to redistribute functions between different agencies could lead to a breakdown of co-operation);
- a range of other matters and systems that support the administration of justice (e.g. the operation of the legal aid system, or IT systems – disclosure of the security systems on computer systems would facilitate unauthorised access and thereby make them vulnerable to interference);
- the maintenance of an independent and effective legal profession.

The public interest balancing test

The public interest in the administration of justice is very high. It is moreover a public interest which is explicitly recognised by the courts as fundamental to their work and as permeating their approach to the common law and to statutory interpretation. Not only, therefore, is this a public interest which the courts will expect the Government to respect highly, it is a public interest which the courts will expect Government to acknowledge to be the courts' particular domain, a matter on which the courts themselves are ultimately the constitutional arbiters within the law.

The respect owed by IND as part of the Home Office to the proper administration of justice indicates a need for special care in concluding that the public interest in avoiding prejudice is outweighed.

Precisely because prejudice to the administration of justice comprehends such a wide range of circumstances, the specific factors relevant to individual cases may be particularly important to the operation of this exemption.

3.6 Responding to an applicant

Where staff have decided to apply the exemption and not to communicate the information requested, there will still be another separate assessment to be made under the Act's information access provisions as to whether to confirm or deny in response to the applicant that IND holds the information. Again this assessment must be made with reference to the public interest balancing test.

If staff make this further assessment and decide that confirming or denying whether the information is held by IND **would not** be likely to prejudice any of the matters in section 31(1), a reply should be sent by IND Directorates who should adapt the example template contained in Section 5 Annex H of this IDI Chapter.

Using a neither confirm nor deny response to the applicant

Staff may decide, however, that confirming or denying whether the information is held in IND would in itself be likely to prejudice any of the matters in section 31(1). Where this occurs, the reply to the applicant should state that it can be neither confirmed nor denied (NCND) whether the information is held under section 31(3) of the Act. A standard template for IND Directorates to use and adapt in such circumstances is also attached at **Appendix A** entitled: '**Standard template letter for use to an applicant where the duty to confirm has been exempted under section 31 (3) and a neither confirm nor deny response is engaged**'.

3.7 The purpose linked parts of this exemption

As well as the specified sectors of law enforcement contained under sections 31(1) (a) to (f) of this exemption, there is also a more general list of law enforcement areas contained in 31(1) (g) to (i) which are linked to relevant purposes specified in the Act.

Section 31(1)(g) is engaged where a disclosure would be likely to prejudice the exercise of a public authority's functions for a relevant "purpose".

Section 31(1)(h) is engaged where a disclosure would be likely to prejudice an authority's civil litigation arising out of certain investigations for a relevant "purpose".

Section 31(1)(i) is engaged where a disclosure would be likely to prejudice certain fatal accident inquiries held under Scottish legislation for a relevant “purpose”

It is unlikely that many staff within IND will be regularly required to apply these particular parts of this exemption. Further details on the operations of these parts can be found on the DCA website at:

<http://www.dca.gov.uk/foi/guidance/exguide/sec31/chap06.htm>

4. APPENDIX A

STANDARD LETTER TEMPLATES

STANDARD LETTER TEMPLATE FOR USE WHEN APPLYING AN EXEMPTION UNDER SECTION 30 AND THE DUTY TO COMMUNICATE HAS BEEN EXEMPTED

Our Ref:

Your Ref:
Date

Dear **[enter applicant name]**,

Thank you for your *letter/fax/email* **[delete as appropriate]** of **[insert date of letter from applicant]** where you have requested information about **[insert type of information requested by the applicant]** . This falls to be dealt with under the Freedom of Information Act 2000.

I can confirm that this information is held by *IND/IND Directorate* **[delete and or insert relevant Directorate name as appropriate]**

[If Section 30(1) of the exemption is used-]

I have decided not to communicate this information to you pursuant to the exemption under section 30(1)(a)/(b)/(c) **[IND Directorates to delete as appropriate with reference to whether information falls into categories 30(1) a-c described in Point 2.3]** of the Freedom of Information Act 2000. This allows us to exempt information in relation to investigations and proceedings conducted by public authorities.

Or

[If Section 30(2) of the exemption used in relation to in relation to confidential sources]

I have decided not to communicate this information to you pursuant to the exemption under section 30(2)(a) **[IND Directorates to delete as appropriate with reference to whether information falls into categories 30(2) (a) (i)-(iv)- described in Points 2.4-2.5 above]** of the Freedom of Information Act 2000. This allows us to exempt information in relation to investigations and proceedings conducted by public authorities.

The information being exempted here **[IND Directorates to explain why this exemption applies to the requested information and describe how it falls into the categories under section 30(1) or section 30(2) as far as this is possible without disclosing exempt information.]**

The use of this exemption also requires us to consider whether in all the circumstances of the case the public interest in maintaining the exemption stated above outweighs the public interest in disclosing the information.

We have considered the public interest there may be in the circumstances of this case in disclosing the information to you. There may be a public interest in **[IND Directorates to insert the public interest test argument in favour of disclosure on particular request. See point 2.6 for details]**

We have also considered the public interest there may be in maintaining the exemption to the duty to communicate. **[IND Directorates to include the public interest considerations against disclosure on particular request. See point 2.6 for details.]**

We have considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. We have concluded that the balance of the public interests identified lies in favour of maintaining the exemption **[IND Directorates need to insert reasons for concluding that the arguments for withholding the information requested outweighs the arguments for disclosure].**

If you are dissatisfied with this response you may request an independent internal review of our decision to turn your request down. During the independent review the department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. An internal review can be requested by submitting your complaint to:

IND Complaints Unit
11th Floor, West Wing
Block 'C'
Whitgift Centre
Wellesley Road
Croydon
CR9 1AT

Should you remain dissatisfied after this internal review, you will have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely,

[Signature of staff member]
[Insert full name of IND staff member dealing with request]
[Insert IND Directorate]

STANDARD TEMPLATE LETTER FOR USE TO AN APPLICANT WHERE THE DUTY TO CONFIRM HAS BEEN EXEMPTED UNDER SECTION 30 (3) AND A NEITHER CONFIRM NOR DENY RESPONSE IS ENGAGED.

[Insert details of relevant Directorate address here]

Our Ref:

Your Ref:

Date

Dear **[insert name of applicant]**,

Thank you for *your letter/fax/email* **[delete as appropriate]** of **[insert date of letter from applicant]** where you have requested information about **[insert type of information requested by the applicant]**. This falls to be dealt with under the Freedom of Information Act 2000.

I have considered your request carefully and have decided that we are not obliged to inform you whether the IND holds the information of the description specified in your request.

We are not obliged to inform you whether or not the requested information is held pursuant to section 30 (3) of the Freedom of Information Act 2000 which exempts information which relates to investigations and proceedings conducted by public authorities.

[IND Directorate to insert explanation for using the exemption under section 30 to the extent this is possible without disclosing exempt information.]

[IND Directorate give reasons for the public interest balancing test concluding that the public interest in the maintenance of the exemption outweighs the public interest in disclosing – to the extent this is possible without disclosing exempt information.]

You should not infer from this response that the information you request is or is not held.

If you are dissatisfied with this response you may request an independent internal review of our decision to turn your request down. During the independent review the department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. An internal review can be requested by submitting your complaint to:

IND Complaints Unit
11th Floor, West Wing
Block 'C'
Whitgift Centre
Wellesley Road
Croydon
CR9 1AT

Should you remain dissatisfied after this internal review, you will have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely,

[Signature of staff member]

[Insert full name of IND staff member dealing with request]

[Insert IND Directorate]

STANDARD TEMPLATE LETTER FOR USE TO AN APPLICANT WHERE THE DUTY TO CONFIRM HAS BEEN EXEMPTED UNDER SECTION 31 (3) AND A NEITHER CONFIRM NOR DENY RESPONSE IS ENGAGED.

[Insert details of relevant Directorate address here]

Our Ref:

Your Ref:

Date

Dear **[insert name of applicant]**,

Thank you for *your letter/fax/email* **[delete as appropriate]** of **[insert date of letter from applicant]** where you have requested information about **[insert type of information requested by the applicant]**. This falls to be dealt with under the Freedom of Information Act 2000.

I have considered your request carefully and have decided that we are not obliged to inform you whether the IND holds the information of the description specified in your request.

We are not obliged to inform you whether or not the requested information is held pursuant to section 31 (3) of the Freedom of Information Act 2000 which exempts information which prejudices law enforcement. **[IND Directorate to insert law enforcement activity e.g the operation of immigration controls which under subsection (1) would be prejudiced. See point 3.1 above for further details.]**

[IND Directorate to insert explanation for using the exemption under section 31 to the extent this is possible without disclosing exempt information.]

[IND Directorate give reasons for the public interest balancing test concluding that the public interest in the maintenance of the exemption outweighs the public interest in disclosing – to the extent this is possible without disclosing exempt information.]

You should not infer from this response that the information you request is or is not held.

If you are dissatisfied with this response you may request an independent internal review of our decision to turn your request down. During the independent review the department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. An internal review can be requested by submitting your complaint to:

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Wellesley Road
Croydon
CR9 1AT

Should you remain dissatisfied after this internal review, you will have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely,

[Signature of staff member]

[Insert full name of IND staff member dealing with request]

[Insert IND Directorate]