

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 13 June 2019

**Public Authority:** Crown Prosecution Service  
**Address:** 8th Floor  
102 Petty France  
London  
SW1H 9EA

#### Decision (including any steps ordered)

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1. The complainant requested information concerning the investigation into the death of a British citizen, Helen Smith, in Saudi Arabia in May 1979.
2. The Crown Prosecution (CPS) disclosed some information but withheld the remainder, ultimately citing sections 31(1)(c) (law enforcement), 38(1)(a) (health and safety) and 40(2) (personal information) of the FOIA.
3. The Commissioner has investigated its application of sections 31 and 38.
4. The Commissioner's decision is that the CPS has demonstrated that sections 31(1)(c) and 38(1)(a) are engaged in relation to the withheld information and the public interest favours maintaining the exemptions. The Commissioner also found that the CPS breached section 17(1) of the FOIA.
5. The Commissioner requires no steps to be taken as a result of this decision.

#### Request and response

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6. On 9 July 2018, the complainant wrote to the CPS and requested information in the following terms:

*"I understand that during September - November 1981, the Director of Public Prosecution asked for a copy of a West Yorkshire*

*Police report looking into the death of British Nurse, Helen Smith, in Jeddah Saudi Arabia on the 20th May, 1979.*

...

*I would like all documents concerning this matter to be released to me under the Freedom of Information Act”.*

7. The CPS responded on 2 August 2018. It confirmed that it held information that fell within the scope of the request but refused to disclose it citing the following exemptions of the FOIA:
  - section 30(1)(c) (investigations and proceedings);
  - section 38 (health and safety); and
  - section 40(2) (personal information).
8. Following an internal review the CPS wrote to the complainant on 24 September 2018 in which it revised its position. While it continued to cite sections 30(1)(c) and 40(2) of the FOIA, it said that it was no longer relying on section 38.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 25 September 2018 to complain about the way his request for information had been handled.
10. As is her practice, the Commissioner wrote to the CPS, asking it to justify its position and to provide her with its full submission.
11. After a lengthy delay, the CPS provided its substantive response. It revised its position, having identified some information within the scope of the request that could be disclosed to the complainant. It also confirmed that it was no longer relying on section 30(1)(c) to withhold the requested information. Instead, it considered that section 31(1)(c) (law enforcement) applied. It confirmed its application of section 40(2) and, additionally, reinstated its application of section 38(1)(a).
12. Following the intervention of the Commissioner, the CPS wrote to the complainant, providing him with a copy of the information it had identified as disclosable and advising him of its revised position.
13. In correspondence with the Commissioner, the complainant confirmed that he remained dissatisfied with the CPS’s position.
14. Later, during the course of her investigation, the complainant referred the Commissioner to a First-Tier Tribunal decision relating to a similar

request for information, made to another public authority. The Commissioner acknowledges that the complainant considers that that decision “*maybe useful for consideration regarding this case*”. However, in the Commissioner’s view, each case must be considered on its merits.

15. In order to assist with her investigation, the CPS provided the Commissioner with an index outlining the material that was being withheld, marked up to show which exemptions it considered applied. The Commissioner also viewed the withheld information.
16. The Commissioner will not discuss the contents of the withheld information in detail in this decision notice to avoid any inadvertent disclosure. However, she notes that, in correspondence with the complainant, the CPS variously described the withheld information as “*investigative documents collected as part of an investigation*” and “*correspondence and witness statements about the circumstances leading up to the death of the British Nurse ...*”.
17. The analysis below considers the CPS’s application of the exemptions at sections 31, 38 and 40(2) to the withheld information.

## Reasons for decision

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### *Section 31 law enforcement*

18. Section 31 of the FOIA creates an exemption from the right to know if releasing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities. Section 31 can be claimed by any public authority, not just those with law enforcement functions.
19. In this case, the CPS is relying on section 31(1)(c) of the FOIA.
20. Section 31(1)(c) states that:

*“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, -*

...

*(c) the administration of justice...”.*
21. In order to engage a prejudice based exemption such as section 31 there must be likelihood that disclosure would cause prejudice to the interest that the exemption protects. In the Commissioner’s view, three criteria must be met in order to engage a prejudice based exemption:

- first, the actual harm which the public authority alleges would, or would be likely to, occur if the disputed information was disclosed, has to relate to the applicable interests within the relevant exemption;
  - secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the disputed information and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance;
  - thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold (would be likely), the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility: rather, there must be a real and significant risk. The Commissioner considers that the higher threshold places a stronger evidential burden on a public authority to discharge. The chances of the prejudice occurring should be more probable than not.
22. Consideration of the exemption at section 31 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
23. The Commissioner considered that, in its correspondence with the complainant, the CPS relied to a large degree on the requested material being self-evidently exempt, without making extensive effort to provide supporting material or penetrating analysis.
24. It was not until her investigation that the CPS explained in detail to the Commissioner why it considered the exemption was engaged.

*The applicable interests*

25. The first step in considering whether this exemption is engaged is to address whether the prejudice predicted by the public authority is relevant to the law enforcement activity in section 31(1)(c).
26. The complainant disputed the CPS's application of section 31(1)(c). In light of the age of the case and other information in the public domain, he disputed that there was a realistic case for future prosecution. He told the Commissioner:

*"I do not believe the CPS position of citing this exemption stands up to scrutiny..."*

27. In contrast, in its submission to the Commissioner, the CPS considered that release could put at risk law enforcement matters, in this case the administration of justice.
28. In that respect it argued that, if information, passed to the CPS by the police as a result of an investigation which involved a number of agencies, was released, it would prejudice any future investigation or proceedings if any further evidence came to light. It told the Commissioner:

*"... despite the age of the case this cannot be discounted".*

29. The Commissioner is satisfied that the prejudice the CPS is envisaging in this case is relevant to the particular interest that the exemption is designed to protect.

#### *The nature of the prejudice*

30. The Commissioner next considered whether the CPS demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that section 31(1)(c) is designed to protect. In her view, disclosure must at least be capable of harming the interest in some way, ie have a damaging or detrimental effect on it.
31. In its correspondence with the complainant, the CPS simply told him that the requested information was exempt from disclosure.
32. In its submission to the Commissioner, however, the CPS put forward arguments about the ability of the CPS to deliver effective criminal justice and maintain public confidence in this process. It argued that, although a high profile case, the specific information and level of detail contained within the withheld information would not have been in the public domain.
33. The Commissioner is satisfied that the prejudice alleged by the CPS is real and of substance, and there is a causal relationship between the disclosure of the requested information and the prejudice which the exemption is designed to protect.

#### *The likelihood of prejudice*

34. The CPS considered that disclosure of the information *would be likely* to have the stated detrimental effect.

*Is the exemption engaged? Would disclosure be likely to prejudice the administration of justice?*

35. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is 'real, actual or of substance'.
36. The Commissioner has considered the applicability of the exemption at section 31 of the FOIA. With regard to the first criterion of the three limb prejudice test described above, the Commissioner accepts that potential prejudice to law enforcement activity relates to the applicable interests which section 31(1)(c) is designed to protect.
37. With regard to the second criterion, the Commissioner accepts, having viewed the withheld information and taken into account the arguments advanced by the CPS, that there is a causal relationship between the potential disclosure of the withheld information and the prejudice which the exemption is designed to protect. Furthermore, she is satisfied that the resultant prejudice would be real and of substance.
38. Having had the benefit of examining the withheld information, the Commissioner accepts that it comprises material obtained by the police in the course of an investigation into a death that occurred overseas.
39. She accepts that such information could be useful to a future police investigation.
40. Consequently, she is satisfied that its disclosure would be likely to represent a real and significant risk to law enforcement matters.
41. With regard to the third criterion, the Commissioner is mindful of the age of the withheld information. Nevertheless, she is satisfied that there is a more than hypothetical risk of prejudice occurring if the withheld information was disclosed.
42. The Commissioner is therefore satisfied that the exemption at section 31(1)(c) of the FOIA is engaged.

*Public interest test*

43. Section 31 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 31(1)(c) outweighs the public interest in disclosing the information.

*Public interest arguments in favour of disclosure*

44. Arguing in favour of disclosure, the complainant told the CPS:

*"I would argue that there is greater public interest in releasing the document to understand why a prosecution was not sought when it came to this case. The police have expressed no interest in re-opening the case ...".*

45. The CPS acknowledged that transparency increases public confidence in the CPS and the wider Criminal Justice System and also increases public understanding of the CPS decision-making and prosecuting process.
46. More specifically, it recognised that there is a public interest *"in this high profile case concerning the death in 1979 of British nurse Helen Smith..."*. It also told the Commissioner that the CPS appreciated:

*"... that there has been a significant amount of media attention and a number of books written about it".*

*Public interest arguments in favour of maintaining the exemption*

47. In favour of maintaining the exemption, the CPS told the complainant:

*"The material held is comprised of investigative documents collected as part of an investigation; disclosure of this type of material would inhibit the ability of the CPS, or other bodies such as the police to reconsider the case as other parties would then be aware of the material held by the CPS.*

*There is a profound public interest in the defendant/s receiving a fair hearing.*

*The application of this exemption will protect information if its disclosure would undermine proceedings relating to the potential apprehension of offenders, or the process for prosecuting offenders. The CPS considers that disclosure of the material held would or would be likely to prejudice the administration of justice in the event that new information comes to light that may impact any investigation".*

48. In its submission to the Commissioner, the CPS re-iterated what it had told the complainant, namely that disclosure in this case would inhibit the ability of the CPS, or other bodies such as the police, to reconsider the case. In that respect it emphasised that:

*"The ability of the Crown Prosecution Service to deliver effective criminal justice and maintain public confidence in this process is of paramount importance".*

*Balance of the public interest arguments*

49. In reaching a view on where the public interest lies in this case, the Commissioner has taken into account the nature of the withheld information as well as the views of both the complainant and CPS.
50. The Commissioner is mindful of the age of the disputed information. She also notes the complainant's view that there is little prospect of a future prosecution.
51. However, she also considers that there is a strong public interest in the CPS being effective in its role as a prosecutor, particularly in relation to high profile cases such as the one under consideration in this case.
52. While she cannot provide an expert opinion on this matter, the Commissioner cannot rule out the possibility that further evidence may come to light which would enable the investigation into the death of Helen Smith to be progressed.
53. On balance, the Commissioner is satisfied that the public interest arguments in favour of maintaining the exemption outweigh the public interest arguments in favour of disclosing this information.
54. The Commissioner has next considered the CPS's application of section 38 to the information withheld by virtue of that exemption.

*Section 38 health and safety*

55. Section 38(1) of the FOIA states that:

*"Information is exempt information if its disclosure under this Act, would, or would be likely to –*

*(a) endanger the physical or mental health of any individual, or*

*(b) endanger the safety of any individual."*

56. In order to engage this exemption the public authority must demonstrate that there is a causal link between the endangerment and disclosure of the information.
57. The public authority must also show that disclosure would, or would be likely to, have a detrimental effect on the physical or mental health of any individual, or the safety of any individual. The effect must be more than trivial or insignificant.
58. During the course of the Commissioner's investigation, the CPS told the Commissioner:

*"Having reviewed the material held by the CPS we consider that exemption Section 38(1) (a) should be reinstated. The Head of Security and Information Assurance personally reviewed a folder of photographs and judged them 'distressing'."*

59. In its submission to the Commissioner, the CPS confirmed that it considered that section 38 applied in respect of the withheld information comprising photographs, witness statements and post mortem reports.
60. With regard to the likelihood of endangerment, the CPS cited the lower level of likelihood: in other words, it argued that disclosure would be likely to endanger the physical or mental health of an individual.
61. Specifically, it confirmed that it considered disclosure would be likely to endanger the mental health of the deceased's surviving family.
62. The Commissioner's guidance<sup>1</sup> recognises that, while information involving living individuals will be covered by section 40 (personal information), the focus of section 38 is on other information that might pose a risk, if disclosed. This may be information about someone who has died (and is therefore not covered by the personal information exemption) where disclosure might endanger the mental health of surviving relatives.
63. It is not in dispute that there is information in the public domain surrounding the death of the individual named in the request. The CPS acknowledged that there has been a significant amount of media attention and a number of books written on this topic.
64. However, in correspondence with the complainant, albeit in relation to the public interest test, the CPS told him:

*"The detailed information contained in the West Yorkshire Police Report, correspondence and witness statements ... the photographs of the body and the post mortem reports of the deceased's injuries would not have been in the public domain".*

#### *The applicable interest*

65. The Commissioner accepts that the outcome of disclosure in this case would be counter to the physical or mental health of an individual and

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1624339/health-and-safety-section-38-foia.pdf>

that the arguments from the public authority in this respect are relevant to the prejudice described in section 38(1)(a).

*Likelihood of prejudice*

66. The Commissioner takes the view that the phrase '*would be likely to endanger*' is a lower threshold than '*would endanger*'. She considers that this means that even if there is below a 50% chance, there must be a real and significant likelihood of the endangerment occurring.
67. Given the nature of the requested information, the CPS explained that it considered that the disclosure would be likely to endanger the mental health of surviving relatives or others involved in the case. Furthermore, the CPS told the Commissioner:

*"It is also reasonable to argue that the individuals may wish to move on from the matter many years after the event. For the CPS to release material passed to the CPS by the investigators, some of which contains distressing images, into the public domain would be likely to cause further harm".*

*Is the exemption engaged?*

68. The Commissioner has previously accepted an individual's mental wellbeing to fall within the scope of section 38. In this she includes emotional and psychological wellbeing, including the likelihood of causing significant upset or distress.
69. The Commissioner cannot give an expert opinion on this matter. However, having considered the submissions provided by the CPS, she is satisfied that there is evidence of a significant risk to the mental health of an individual or individuals that amounts to endangerment, being more than mere stress or worry.
70. Having considered the nature of the material to which section 38 has been applied, the Commissioner considers that the consequences of the disclosure of this information into the public domain, is such that it would cause significant distress to those who knew the deceased and constitute an endangerment to their mental health.
71. As such the Commissioner is satisfied the exemption is engaged in relation to the requested information.

*The public interest test*

72. Having concluded that section 38(1)(a) is engaged, the Commissioner has gone on to consider the balance of the public interest.

*Public interest arguments in favour of disclosing the requested information*

73. The complainant argued that photographs had been published in the past. In support of the public interest in disclosure, he also told the CPS:

*"Up to his death ... the victim's father would give detailed descriptions of the injuries that his daughter has suffered. This is even graphically re-told in a book..."*

*Public interest arguments in favour of maintaining the exemption*

74. Arguing in favour of maintaining the exemption, the CPS told the complainant:

*"Release of the case material would be likely to endanger the mental health of the deceased's surviving family and release of this material after such a prolonged period of time would be likely to have the same endangering effect on the mental health of the surviving relatives as releasing it for the first time".*

75. In correspondence with the Commissioner it told her that it would not be in the public interest to release distressing images that would be likely to cause further harm.

*The balance of the public interest*

76. The Commissioner will invariably place significant weight on protecting individuals from risk to their physical and mental well-being. The natural consequence of this is that disclosure will only be justified where a compelling reason can be provided to support the decision.
77. The Commissioner recognises that the complainant has a specific interest in the subject matter under consideration. However, in reaching a decision in this case she must take into account the fact that disclosure under the FOIA is effectively an unlimited disclosure to the public at large, without conditions. The wider public interest issues and the fairness to those parties involved must therefore be considered when deciding whether or not the information requested is suitable for disclosure.
78. She also accepts that both the content, and context, of the information will be relevant when considering the balancing test and determining the appropriate weight to be given to the benefits and detrimental effects of disclosure.
79. In balancing the opposing public interest factors in this case, the Commissioner has given greatest weight to those factors which she considers support the maintenance of the exemption, in other words avoiding the significant distress and endangerment to mental health

which release would be likely to cause in all the circumstances of this case. It follows that the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in favour of disclosure.

*Section 40 personal information*

80. The CPS considered that section 40(2) applied to some of the withheld information that it also considered exempt by virtue of section 31 and/or section 38. However, in light of the findings above, it has not been necessary for the Commissioner to consider the CPS application of section 40(2) to that information.

*Procedural matters*

81. Section 1(1) of FOIA states:

*"Any person making a request for information to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him."*

82. Section 17(1) of FOIA states:

*"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, **within the time for complying with section 1(1)**, give the applicant a notice which –*

*(a) 'states that fact,*

*(b) specifies the exemption in question, and*

*(c) states (if that would not otherwise be apparent) why the exemption applies."*

83. Breaches of section 17 will also be found if the public authority seeks to rely on another exemption during the investigation which it had not mentioned at or before internal review.

84. In this case, the CPS relied on section 31(1)(c) during the course of the Commissioner's investigation thereby breaching section 17(1).

## Right of appeal

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85. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

86. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

87. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Gerrard Tracey  
Principal Adviser  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**