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Good afternoon everyone, my name is Susan Duffy, SCO. *Before we start, I've been asked to mention that our policy team are reviewing Part 3 of our Law Enforcement guidance & want to canvas opinion with key stakeholders Anne and Sharon Nutall, will be available at break times today and would be interested in hearing your views.*

There should be time for questions or a discussion at the end of the presentation but feel free to ask questions as we go along if that helps.

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Today we're looking at the exemptions s30 and s31 and evidencing the application of the prejudice test and public interest test.

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When you receive a request you must initially identify all information that you actually hold. In section 30/31 cases there may be some overlap in the content, as some of the information in a specific investigation may also contain law enforcement details. However, it is important to remember that these two exemptions are mutually exclusive and cannot be cited together, unless you are taking an NCND position.

See <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4027001/ic-230070-b8n2.pdf> as an example of where this has happened incorrectly.

If you were dealing with a specific investigation then it is likely that you should consider s30 whereas s31 may be more appropriate for general policing matters. You can cite both exemptions if they are being applied to different parts of the information, provided this is clear.

If you do a thorough job before a complaint reaches us then this may convince a complainant not to proceed. Also, if you have provided a particularly convincing refusal and internal review, then there is every possibility that we may not need to further trouble you and may proceed directly to a decision notice having received a complaint. We will not do this if we intend to find against you, unless it is purely a non-response complaint.

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There has been some confusion around the timing for considering the public interest test. It has now been determined by the Upper Tribunal that the time to be taken into consideration is either the time at which a request is actually responded to, or the time that it should have been

responded to if no response has been provided. This means that it is not the date that the request is received rather it is the date that you provide a substantive reply. If you issue your response outside of the statutory time limit, the time for assessing whether you dealt with the request in accordance with Part I is the date by which you **should have** responded, ie after 20 working days.

However, if new facts and evidence emerge after that response such as a criminal case review, the Commissioner has the discretion to take this into account.

See <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/the-public-interest-test/#pit6>

(the public interest must be assessed as of the date of the final refusal of the request, per R (Evans) v Attorney-General [2015] UKSC 21 and Maurizi v IC, CPS & FCO [2019] UKUT 262 (AAC).)

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The information may be exempt under s30 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 ... (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...”

However, for s31 to apply, you must be able to demonstrate that its disclosure would make it more difficult for you to enforce the law. Sections 31(1)(a) and (b) are commonly used: “where disclosure of the relevant information would, or would be likely to, prejudice the prevention or detection of crime and the apprehension or prosecution of offenders.”

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Section 30 exemptions exist to ensure the effective investigation and prosecution of offences and the protection of confidential sources. I’m only covering section 30(1) as this is the one most commonly cited by forces.

30(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

Police forces all have powers to conduct criminal investigations so can properly cite section 30 for related material when it has been held **at any time** in connection with a **specific criminal** investigation. Provided the information falls into the 'class' of being part of a specific criminal investigation then the exemption is engaged and you can immediately go on to consider the PIT, ie there is no prejudice test **but** remember to cite which limbs of section 30 you are relying on.

In respect of investigations, it **must** be a **specific** criminal investigation that the force has the statutory power to investigate itself, even if it is subsequently NFA'd. It should not be relied on generally to cover police investigations – this would be a section 31 area.

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It includes the following pointers:

- The exemption will typically be available to regulators that have both the power to investigate and, where appropriate, institute criminal proceedings. This obviously applies to police forces.
- The investigation must be one, "which in the circumstances may lead to the decision to institute criminal proceedings".

The guidance also includes information about the remaining limbs of section 30 which may be of relevance but we won't have time to consider here. The general principles of evidencing and the public interest will be the same.

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In your initial refusal, try to include as much detail as possible as a convincing response may mean that the requester understands why they cannot have the information they want. Don't presume that they know very much or understand the legislation. Try to point them to similar cases where Decision Notices already exist – if you don't already do so, it may be helpful for you to keep a list of these ready to hand from our website. Explain why the requested information falls under this class exemption, even if it seems obvious.

Always ensure that you have responded to all parts of the request, even if it is to say that they are invalid. And ensure you respond to any relevant arguments that the complainant has put forward when you provide an internal review.

Whilst some generic arguments may be relevant, such as saying that there is an an-going investigation which would be likely to be harmed if disclosure was made, please also ensure that you provide arguments that are specific to the particular investigation/s that the request is about.

When we write to you, if we have told you of any further arguments that the complainant has also sent to us, then please also respond to these.

When corresponding with our officers, if you are worried about disclosing sensitive arguments to us, please let us know that they are being provided 'in confidence' and should not be disclosed to the complainant. This is something we are happy to facilitate.

Protecting information about a recent or on-going investigation is a clear reason to support non-disclosure. However, information connected to old cases may also be withheld where it remains unresolved. There is an example on the next slide.

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To explain why section 30 was still engaged, despite the age of the case and no requirement to do so for a class-based exemption, the force helpfully provided arguments to explain why, which were also of some relevance to the PIT:

"The case remains an open and unsolved murder and attempted murder case.

An unsolved murder case is never closed.

The case is periodically reviewed by the Head of the Cold Case Team which had recently been undertaken therefore ensuring the case was not an 'historical' record.

Whilst named individuals were all deceased any held information would be part of an open and unsolved murder investigation file.

The passage of time makes no difference to the previous decisions and Lord Lucan remains circulated as wanted for the murder of Sandra Rivett.

By way of evidence the force provided examples of historical cases where suspects have since been located and said:

"...there is a public interest in continuing to protect the integrity of unsolved investigations as it is not known when or how information may come to light to help progress or solve a case. Underlying the media interest and public intrigue into this murder, it is vital to remember that this matter still and more importantly relates to the tragic death of a woman with an outstanding murder suspect".

The rationale presented here was realistic and demonstrated how information may come to light which helps to solve murder investigations and other serious crimes many years after they have occurred.

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For disclosure:

"The death of Sandra Rivett continues to be a very high profile case. There has already been a significant amount of information placed into the public domain through media articles and official press releases from the MPS. The public therefore have a genuine interest in being informed as to the nature and circumstances of this incident and who may have been involved".

"In consideration of the high profile nature of this investigation there is an increased public interest in obtaining information held pertinent to the investigation. In light of the length of time that has passed since the death of Sandra Rivett, there could be a perceived increased public interest in disclosing information that would provide the public with an awareness of previous actions taken and any evidence considered by the MPS in this high profile investigation.

Disclosure would therefore enhance transparency and accountability in terms of methodology employed by the MPS in respect of its role, action and considerations in this case.

Media interest in the murder of Sandra Rivett was still current with the ITV based drama in December 2013 and BBC documentary in February 2012".

Against disclosure:

"During the course of any ongoing investigation enquiries are made to secure evidence. These enquiries are made for the duration of the case and are based upon proven methods as well as the judgement and experience of the officer(s) in charge of the investigation.

The MPS is reliant upon these techniques to conduct its investigations and the public release of the modus operandi employed during the course of this enquiry could prejudice the ability of the MPS to conduct further, similar investigations.

It cannot be clear at present what effect disclosures of investigation material through the Act may have upon this case but care must be taken not to compromise any strand of the investigation, cause any undue harm to the families involved, or compromise an individual's right to a fair trial".

"To disclose material pertinent to this ongoing investigation would prejudice the investigation itself as the investigation is a live unsolved murder investigation.

Disclosure of the information would undermine the currently open investigation by disclosing operational methodology and techniques engaged by the MPS in respect of the murder. Disclosing copies of all documents, photographs, artist impressions, witness statements, investigating officer note books, internal communication regarding the murder of Sandra Rivett and maps including documentation and material relating to the hunt for or possible sightings of Lord Lucan would impede the current investigation and affect our ability to detect crime in this case. This would also prejudice the MPS ability to apprehend or prosecute any offenders. Should the information be utilised or alerted to those seeking to evade the law, which would not be in the public interest.

To disclose the information pertinent to this ongoing investigation risks undermining the rights of any possible suspect to a fair trial in the future. It also risks undermining the rights of the victims' family who are alive if a prosecution were to fail due to an adverse disclosure under the Act.

It would not be appropriate to release any information in connection with this investigation as any response may expose police lines of enquiry, may alert any potential suspects and may lead to the interference of witnesses.

The MPS is often required to utilise and rely on information provided by confidential sources to solve crimes. Disclosing information pertinent to an open murder investigation, such as witness statements, would be irresponsible and inappropriate. Witness statements held are likely to identify individuals even if their name was redacted. Those who assist police on criminal matters do not expect their personal statements to be disclosed under FoIA. Disclosing witness statements relating to any area of this case would send a concerning message to the public in respect of this murder case as well as unconnected cases. Individuals with vital information on unconnected cases may be less forthcoming in assisting with investigations, should the MPS be seen to disclose personal statements pertinent to high profile ongoing investigations. This would not be in the public interest.

Public disclosure of information and work undertaken to detect and apprehend a suspect would not be in the public interest to disclose information pertinent to investigating this death as the information could be used to undermine the investigation by individuals who may wish to avoid the solving of this murder.

As per the Information Commissioner's guidance titled 'Exemption for Investigations and proceedings it states:- 'There is general recognition that it is in the public interest to safeguard the investigatory process. The right of access should not undermine the investigation and prosecution of

criminal matters nor dissuade individuals from coming forward to report wrongdoing. It is also not in the public interest to undermine the prosecution process and the role of the criminal courts as the bodies responsible for determining guilt. Where it is quite clear that disclosure could prejudice the right to a fair trial, it would not be in the public interest to release it.'

There is a public interest in allowing investigations the necessary space to determine the course of investigations that they have a duty to conduct. Premature disclosure of the information requested prior to the conclusion of related investigations and proceedings may undermine these investigations, the future prosecution of individuals and the role of the criminal courts as the sole forum for determining guilt...

... The possibility still remains that further evidence may come to light and/or additional lines of enquiry may become available and it is not uncommon for investigations and related prosecutions to span a long period of time. Investigations relevant to Sandra Rivett are still open and active; the investigation remains an unsolved murder investigation.

Finally, there is much media and public interest in this murder however it is vital to remember that the information relates to the tragic and violent death of a woman whose family are still alive and also involves the attempted murder of another woman who along with her three children is still alive. Disclosure would cause these individuals great distress".

These arguments are clearly presented and relate specifically to this case. Despite the passage of time, the arguments demonstrate how premature disclosure in this investigation has the potential to be harmful as the murder remains unsolved.

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This exemption will apply where disclosing information would harm either your ability, or the ability of another body, to enforce the law.

Section 31(1) of FOIA creates an exemption from the right to know if disclosing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities. For police forces this is usually one or more of the limbs on the slide.

You need to specify which limb/s of the exemption you wish to rely on, and explain why each one is relevant. We understand that there is often an overlap, so we will accept an explanation covering more than one limb provided this clearly explains why each applies.

If you wish to rely on section 31, this is qualified so there is a different approach to section 30 and you need to evidence why the exemption is engaged.

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You will need to clearly explain why disclosure of the information would prejudice, or be likely to prejudice these limbs. Prejudice in these circumstances means 'harm' so you need to say what you think the resulting harm would be if the information was disclosed, which must be realistic. You also need to state the likelihood of this harm occurring, ie whether you think its disclosure 'would' or 'would be likely to' result in the harm occurring; the 'would' arguments will need to be stronger than 'would be likely'.

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The case relates to abuse at a Detention Centre between the 1960s and 1990s. Cleveland Police launched the investigation under Operation Magnolia in 2014. It is one of the largest ever conducted by the force.

It is initially of note that this may also be an example of where section 30 could have been relied on as it is a specific investigation.

In its refusal notice Cleveland Police said to the requester: "Disclosing what Cleveland Police holds could compromise law enforcement tactics which would lead to a hindrance on the Police Force's ability to prevent and detect crimes. Vulnerable areas could be identified by disclosure leading to more criminal activity placing the public in harm's way". Whilst this is relevant, it is fairly generic and doesn't provide much detail. For example, it didn't confirm whether the investigation was live and it didn't explain what information was actually held or give a clear explanation as to why disclosure would be harmful. At internal review it again didn't clarify what it held; at this stage the requester therefore understandably believed that there was a generic policy or procedure that is being withheld and he thought this type of information should be available.

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During the Commissioner's investigation, Cleveland Police advised the complainant that "There are not any policies or procedures held by Cleveland Police that would provide guidelines on how to investigate an investigation such as Operation Magnolia". It did not provide any further rationale.

However, it explained to the Commissioner that in major or serious and organised crime investigations, an SIO will be allocated to lead the investigation. The SIO will maintain what is called a policy file for the

duration of the investigation and each policy file will be different and specific to the investigation, it is not a policy as such. The policy file is used to record all strategic, tactical and investigative decisions, including the rationale behind those decisions. It would have been helpful if this detail had been provided to the complainant.

Cleveland Police told the Commissioner that a policy file has been maintained by the SIOs throughout the operation in question. It also confirmed that it was still being maintained as it was an ongoing investigation.

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Regarding the harm arising from disclosure, it told the Commissioner that disclosure of the requested information could compromise the effectiveness of law enforcement. In that respect it told the Commissioner: "...[disclosure] would allow criminals to note the tactical capabilities [of] the Force which offenders could use this to their advantage which would compromise public safety and more worryingly encourage offenders to carry out further crimes. This would be to the detriment of providing an efficient policing service and a failure in providing a duty of care to all members of the public".

In the same way, it argued that disclosure of the SIO Policy File would, in this case, provide the public with an in-depth knowledge of policing tactics and strategies. It argued that this would be harmful as this would inform any offenders of the capabilities available to Cleveland Police in investigating criminal offences and apprehending offenders. It further argued that this would enable offenders to take steps to counter the police's methods and techniques and affect its ability to fulfil the core function of law enforcement effectively in the future.

It may also suggest the limitations of police capabilities, which may further encourage criminal activity by exposing potential vulnerabilities.

With regard to the likelihood of prejudice, in correspondence with the Commissioner, it confirmed that it considered that the lower level of likelihood, namely 'would be likely' applied in this case.

This explanation clearly identifies what is being withheld and why it is important for it not to be disclosed. By way of harm it evidences that disclosure could prejudice an ongoing investigation by revealing its position and giving valuable information to potential criminals. It would also disclose current policing tactics.

The force could also have referred directly to the Operation itself as disclosure may have undermined all of the work that had been done by revealing the current status of the enquiries.

Further background was also explained to the Commissioner:

“Operation Magnolia is a historic inquiry, by their very nature, involves piecing together events from the past with meticulous care. This process is time-consuming as it requires the examination of a vast array of records, witness statements, and other evidentiary material that span over many years.

Cleveland Police are committed to conducting a thorough and comprehensive investigation, no matter how complex or long-standing the case maybe. The fact that the investigation is still ongoing is a testament to the dedication to uncovering the truth and ensuring that justice is served.

Operation Magnolia is utilising available resources and expertise to resolve the case effectively. Please be assured that the length of time does not diminish its importance or the commitment of the investigative team. It is often the case that such diligence leads to more robust and conclusive outcomes. Cleveland Police understand the significance of this operation and are working to bring it to a resolution that upholds the principles of justice and accountability.

The Chief Inspector for the investigation has personally invited [the complainant] to visit and discuss any concerns he may have about the investigation”.

This is all useful and relevant information evidencing harm. Unfortunately, it may have been more productive had it been provided to the requester at an early stage rather than to the Commissioner in response to his enquiries.

Having engaged the exemption, it was subject to a PIT. The arguments provided were:

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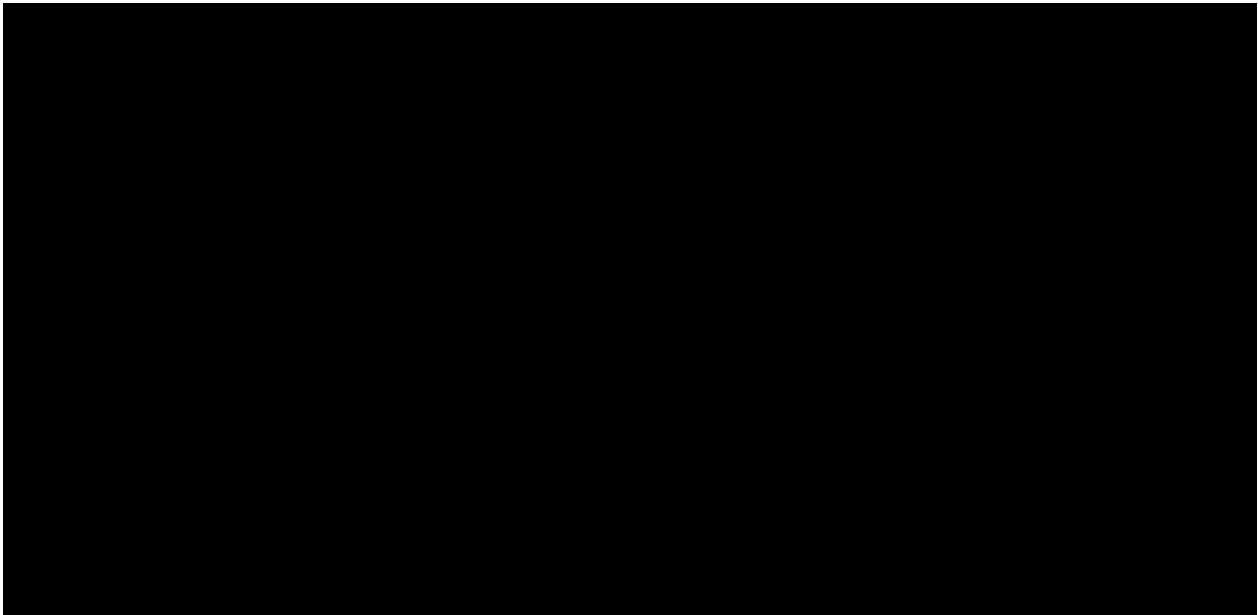
For disclosure

Cleveland Police is charged with enforcing the law, preventing and detecting crime and protecting the communities we serve and there is a public interest in the transparency of policing operations to ensure investigations, enquiries, etc. are dealt with appropriately.

Against disclosure

Disclosing the SIO’s policy file could compromise law enforcement tactics which would lead to a hindrance on the Force’s ability to prevent and detect crimes. Vulnerable areas could be identified by disclosure leading to more criminal activity placing the public in harm’s way. The arguments

are fairly limited, but they are relevant. The main issues here have been identified in the earlier harm test.



Any questions, comments etc?

Thanks for your time today, in closing I can't emphasise enough that our website has lots of resources available to help with request handling. As case officers we would much prefer to have a couple of phone calls to help clarify things, your FOI teams