

# FOIA – Evidencing application of the prejudice test and public interest test for exemptions such as s30 and s31

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# What will we cover?

- Receipt of a request
- Timing of public interest
- Section 30
- Section 31

# General starting point

- Identify what is held
- Choose the correct exemption

<https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4027001/ico-230070-b8n2.pdf>

- Try to do the bulk of the work prior to receiving a complaint.

# Timing of public interest

- What is the correct date to work to?

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

# Class-based and prejudice-based exemptions

- When considering the public interest test, there is a difference between “prejudice-based” and “class-based” exemptions.
- Section 30 is class based whereas section 31 is prejudice based.

# Section 30 – Investigations and proceedings

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

# ICO guidance

Our guidance can be found here:

- <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

It gives advice on whether section 30 is engaged.

# What should we evidence in a response?

## Requester

- Presume the requester knows little about FOIA
- Ensure you try to respond to all points made, especially after an Internal Review request
- Don't just rely on generic arguments

## ICO

- Make sure you include everything



# Example of a case

Here is an example which included good rationale:

- <https://ico.org.uk/media/action-weve-taken/decision-notice/2024/4030087/ic-305612-n0c7.pdf>

The request, the fourth in succession by the same person, was: for:

“material held by the police service which relates to the murder of Ms Sandra Rivett on 7 November 1974 and or the subsequent disappearance of John Bingham, who was then the 7th Earl of Lucan. Please note that unless stated otherwise I'm interested in information generated between 6 November 1974 and 7 November 1976”.

# PIT arguments

## For disclosure

- It recognised that the case remains high profile and of significant public and media interest
- Disclosure would enhance transparency

## Against disclosure

- Disclosure of techniques / lines of enquiry
- Potential compromise to investigation
- Undermining right to a fair trial

# Section 31 – Law enforcement

31(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

# ICO guidance

Our guidance can be found here:

<https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-31-law-enforcement/>

It gives advice on the application of section 31.

# Example of a case

Here is an example of a section 31 case:

<https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4030213/ic-284213-h2j1.pdf>

“Under the FOIA would you please provide me with all Cleveland Police Policies and Procedures regarding how an investigation such as operation Magnolia should be conducted and with any other background information dating from 2010 up until the present date”.

# What happened next?

Subsequent change of position. Complainant was advised:

“I can confirm that the response was erroneous in relation to the response to point 1 and the exemption applied, please accept my apologies for this. Our response would be no information held. 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”.

# What harm was identified

Disclosure would be likely to:

- Allow criminals to note and take advantage of tactical capabilities
- As a result, this could compromise public safety
- Offenders may learn how to counter police methods and techniques
- Reveal any limitations of police capabilities exposing potential vulnerabilities

# PIT arguments

## For disclosure

- There is a public interest in the transparency of policing operations to ensure investigations, enquiries, etc. are dealt with appropriately.

## Against disclosure

- Disclosure could compromise law enforcement tactics which would hinder the force's ability to prevent and detect crimes.
- Vulnerable areas could be identified leading to more criminal activity placing the public in harm's way.



# Questions and comments?

[www.ico.org.uk](http://www.ico.org.uk)

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Terna Waya – Senior Upstream Regulation Officer

# What will I cover?

Refusing requests based on the cost of compliance

Refusing requests based on the burden of compliance

Whistle stop tour of additional supportive products for public authorities.



# Refusing costly requests section 12 FOIA



# Calculating costs – what can I include?

- Determining whether you hold the information
- Locating the information
- Retrieving the information
- Extracting the information

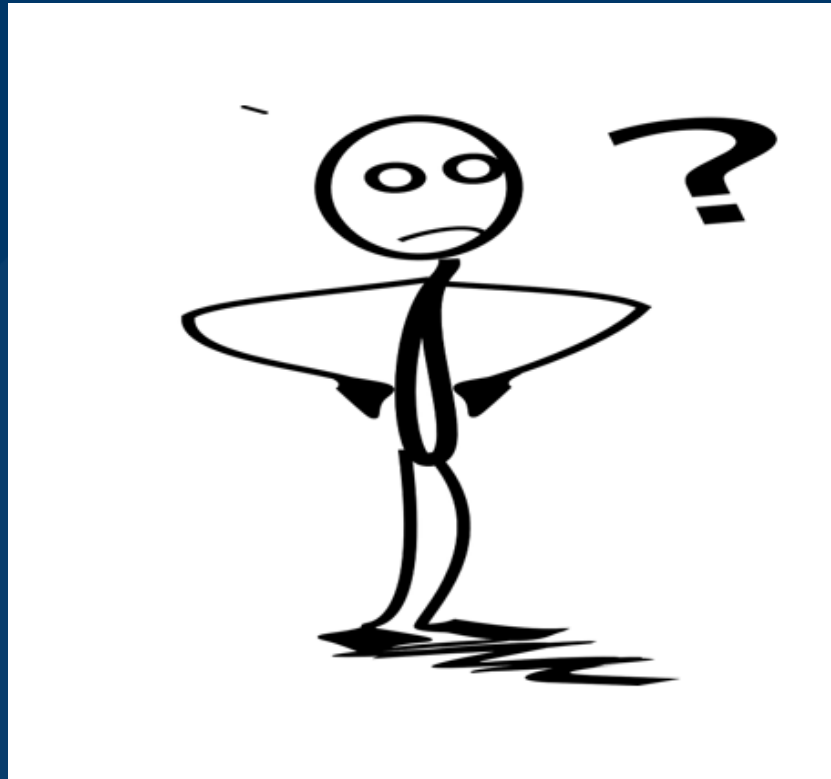
# Refusing burdensome requests section 14(1) FOIA



# Assessing burden – what can I consider?

- The requester has asked for a substantial volume of information; AND
- You have real concerns about potentially exempt information, which you will be able to substantiate if asked to do so by the ICO; AND
- Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material

ANY QUESTIONS?



# Additional resources for FOI practitioners



Advice Services

<https://ico.org.uk/global/contact-us/>

Upstream Regulation Team

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