

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 29 March 2016

**Public Authority:** Attorney General's Office  
**Address:** 29 Victoria Street  
London  
SW1H 0NF

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to a specific investigation being carried out by the Serious Fraud Office, and details of any foreign bribery or overseas corruption cases regarding which the Attorney General had engaged with the Serious Fraud Office, since 2012. The Attorney General's Office applied sections 31(1)(b) (prejudice to the apprehension or prosecution of offenders) and (c) (prejudice to the administration of justice) to some of the information, and would neither confirm nor deny holding the remainder by virtue of section 31(3) (law enforcement).
2. The Commissioner's decision is that the Attorney General's Office has applied sections 31(1)(b) and (c) and section 31(3) appropriately.
3. The Commissioner does not require the Attorney General's Office to take any steps as a result of this decision.

#### Request and response

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4. On 8 January 2015 the complainant wrote to the Attorney General's Office (AGO) and requested information in the following terms:  
  
*" 1. How many times the Attorney General has sought Ministerial Representations in a public interest consultation exercise under section 4 (e) of the Protocol between the Attorney General and the Prosecuting Bodies since 2012.  
2. How many meetings the Attorney General has held with officials from other government departments to discuss the GPT case, on what dates,*

*and from which departments since August 2012.*

*3. How many representations the Attorney General has received a) from government departments or ministers and b) from others with regard to the SFO investigation of GPT since August 2012.*

*4. On how many foreign bribery or overseas corruption cases the Attorney General has engaged the Director of the Serious Fraud Office under section 4d(2) of the Protocol between the Attorney General and the Prosecuting Bodies since 2012.*

*5. Whether the Attorney General has a) given advice to or b) engaged in discussion with the Director of the Serious Fraud Office with regard to the suitability of a Deferred Prosecution Agreement in relation to the GPT case.*

*6. Whether the Attorney General has received representations from a) government departments and b) others, with regard to the suitability of a Deferred Prosecution Agreement for GPT."*

5. The AGO responded on 5 February 2015. It answered question 1 but refused to provide information in relation to questions 2-6, citing section 31(3) of the FOIA and neither confirming nor denying whether it held the requested information. It also pointed the complainant to the protocol between the Attorney General and the Prosecuting Departments and provided a link.
6. Following an internal review the AGO wrote to the complainant on 25 March 2015, upholding its original position in relation to questions 2, 3, 5 and 6. It explained that it was an important part of the superintendence role of the Attorney General that "live" cases should be discussed between the Attorney General and the prosecuting authorities without it being disclosed that the case was "sensitive" or whether a particular issue in an investigation has been raised, for example if Deferred Prosecution Agreements (DPA) have been discussed in relation to GPT.
7. With regard to question 4, the AGO confirmed that it held the requested information but was withholding it under section 31, explaining that disclosure would be likely to prejudice the apprehension or prosecution of offenders and/or the administration of justice.

## **Role of the AGO in relation to SFO cases**

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8. The AGO explained that it is responsible for the work of the prosecutors in both the Crown Prosecution Service and the Serious Fraud Office (SFO). This role is called superintendence. There is a written protocol in

place between the Attorney General and the prosecuting departments (the protocol) which describes respective responsibilities.

9. Amongst the key features of the protocol, the AGO pointed out that the Attorney General:
  - Is accountable to Parliament for the work of the directors of the prosecuting departments and the prosecuting departments, including answering Parliamentary Questions and correspondence from members of Parliament.
  - Safeguards the independence of the prosecutors.
  - Acts independently of the Government, issues guidance to prosecutors.
  - Is not informed of, nor has any involvement in, the conduct of the vast majority of cases around the country.
  - Does not give any direction in any individual case unless very exceptionally, it is necessary to safeguard national security.
10. The AGO also explained that in practice it meets regularly with the directors of both departments to discuss performance, resources and any sensitive or important issues affecting the agencies.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 7 April 2015 to complain about the way her request for information had been handled. She explained that she considered that the AGO had not applied the exemptions or considered the public interest correctly.
12. The Commissioner notes that the complainant has pointed out that the SFO has already acknowledged that it is carrying out an investigation into GPT Special Project Management Ltd (GPT).
13. The Commissioner will consider whether the AGO has applied sections 31(1)(b) and (c) appropriately in relation to question 4 and section 31(3) appropriately in relation to questions 2, 3, 5 and 6.

## Reasons for decision

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### Section 31 – law enforcement

14. Sections 31(1)(b) and (c) state that:

*"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under the Act would, or would be likely to, prejudice –*

*(b) the apprehension or prosecution of offenders,*

*(c) the administration of justice".*

15. Section 31 provides that a public authority is not obliged to disclose information if to do so would prejudice any of the matters mentioned in section 31(1). This is a qualified exemption and is therefore subject to the public interest test.

16. As section 31 is a prejudice-based exemption, in order to be engaged, the following criteria must be met:

- the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- 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.

17. The Commissioner notes the complainant's reference to 4(d)(2) of the protocol in relation to question 4. This refers to the Attorney General's responsibilities for superintendence and accountability to Parliament, which means that he or she, acting in the wider public interest, needs occasionally to engage with a director about a case because it:

- is particularly sensitive; and/or
- has implications for prosecution or criminal justice policy or practice; and/or

- reveals some systemic issues for the framework of the law, or the operation of the criminal justice.
18. The Commissioner will consider whether sections 31(1)(b) and (c) are engaged in relation to question 4.
  19. The relevant applicable interests cited in these exemptions are the apprehension or prosecution of offenders (section 31(1)(b)) and the administration of justice (section 31(1)(c)). The Commissioner accepts that the arguments made by the AGO set out below address the prejudice at sections 31(1)(b) and (c).
  20. When considering the second point, the Commissioner must be satisfied that the nature of the prejudice is "*real, actual or of substance*" and not trivial or insignificant. He must also be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.
  21. The AGO argued that by answering a question about the specific types of SFO cases in certain years, it would set a precedent that would be likely to prejudice the apprehension or prosecution of offenders or the administration of justice.
  22. Furthermore, the AGO argued that if it were revealed by a process of elimination that a particular case was discussed with the Attorney General, it may be interpreted to mean that it involves sensitive issues or national security concerns which may have implications for any prosecution.
  23. With regard to the third point, the AGO has claimed the lower level of prejudice ie the prejudice would be likely to occur, applies.
  24. The AGO explained that such a disclosure would undermine its ability to carry out its superintendence role when necessary, as prosecutors would question whether they could share information with it in confidence. In turn, this would be likely to prejudice the matters set out in sections 31(1)(b) and (c).
  25. The AGO also explained that even if it is in the public domain that an ongoing investigation is being carried out by a prosecuting authority, it does not follow that the case would have been discussed with the Attorney General.
  26. Taking everything into account, the Commissioner is satisfied that in disclosure of the requested information would be likely to prejudice the matters set out in section 31(1)(b) and (c).

27. The Commissioner will go on to consider the public interest test ie whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

**Public interest arguments in favour of maintaining the exemption (section 31(1))**

28. The AGO explained that it considered that the public interest in maintaining sections 31(1)(b) and (c) outweighs the public interest in disclosure.
29. The AGO argued that if it provided the number of cases that have been discussed with it, this was likely to lead to further narrower questions, for example requests of details of the number of bribery cases concerning a particular country.
30. It explained that if it were revealed by a process of elimination that a particular case had been discussed with the Attorney General, this might be interpreted to mean that it involved sensitive issues or national security concerns which have implications for a prosecution. It concluded that it considered that it was in the public interest to protect this information.
31. The AGO also pointed out that the directors needed to be able to provide updates and information about current investigations and prosecutions to the Attorney General in confidence.

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

32. The AGO acknowledged that there was a public interest in knowing that cases involving foreign bribery or overseas corruption cases have been raised/discussed with the Attorney General, as it could provide reassurance that the prosecuting authorities were being superintended.
33. The complainant pointed out that the SFO had publically announced that it was investigating GPT, in August 2012. She also explained that she was not asking for information about the investigation itself, only if the Attorney General had received any representations for the government about the investigation.
34. The complainant also argued that the AGO had not applied the public interest test correctly, as the question of whether political representations are put to prosecuting bodies about specific investigations is a matter of grave public interest. She also argued that without transparency about such representations, the public could not have full confidence in the independence of the prosecuting bodies.

Furthermore, the complainant argued that such a lack of confidence could seriously undermine public trust in the prosecuting bodies.

35. The complainant pointed out that the GPT investigation was also a matter of strong public interest because of its resonances with the BAE/Al Yamamah investigation which was terminated in 2006, to huge international and domestic outcry. She argued that political representations to the Attorney General about the GPT case must be a matter of public record otherwise the independence of the SFO in this case would be seriously compromised.
36. Furthermore, the complainant pointed out that she was not asking the Attorney General to routinely provide information about what cases he has provided superintendence to the SFO. She was asking the AGO to supply statistics on how many foreign bribery investigations he has provided superintendence on since 2012.

### **Balance of the public interest arguments**

37. The Commissioner has considered the public interest arguments from both parties.
38. The Commissioner accepts the complainant's argument that disclosure of the information could provide reassurance that the prosecuting authorities are being superintended. He also accepts the complainant's argument that disclosure could help ensure transparency.
39. The Commissioner notes the complainant's comments that it is already in the public domain that the SFO is investigating GPT. However, he also notes that this does not include any reference to the AGO.
40. The Commissioner accepts the AGO's argument that if it provided the number of cases that have been discussed with it, this was likely to lead to narrower questions. He notes the example provide by the AGO of requests for details of the number of bribery cases concerning a particular country. Given that the part of the protocol identified by the complainant in question 4 of her request deals with the Attorney General's responsibilities for superintendence and accountability to Parliament, as set out in paragraph 18, the Commissioner is satisfied that disclosure of the requested information, if held, could allow a requester to find out whether a case had been discussed with the Attorney General and could indicate that the case was of a sensitive nature.
41. Furthermore, the Commissioner accepts the AGO's argument that the directors need to be able to provide updates and information about

current investigations and prosecutions to the Attorney General in confidence.

42. The Commissioner considers that appropriate weight must be given to the public interest inherent in the section 31 exemptions cited; that is, the public interest in avoiding likely prejudice to the apprehension or prosecution of offenders or the administration of justice. The Commissioner considers that it is clear that there is a very substantial public interest in avoiding that prejudice and that this is a strong public interest factor in favour of maintenance of the exemptions.
43. The Commissioner has weighed the public interest in avoiding prejudice to the apprehension or prosecution of offenders or the administration of justice against the public interest in the openness and transparency of the SFO and the complainant's arguments regarding disclosure. His conclusion is that the public interest in avoiding this prejudice is a strong factor and so considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.

## **Conclusion**

44. Taking all of the above into account, the Commissioner is satisfied that sections 31(1)(b) and (c) have been applied appropriately to question 4 and that the public interest in maintaining the exemptions outweighs the public interest in disclosure.
45. The Commissioner will go on to consider the application of section 31(3) to questions 2, 3, 5 and 6.
46. Under section 1(1)(a) of the FOIA, a public authority is obliged to advise the applicant whether or not it holds the requested information. This is known as the "duty to confirm or deny". However, the duty to confirm or deny does not always apply; public authorities may issue a neither confirm nor deny response (NCND) through reliance on certain exemptions under the FOIA.
47. Section 31(3) states that:  
  
*"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)".*
48. As set out in paragraph 16, section 31 is a prejudice-based exemption, therefore in order to be engaged, certain criteria must be met.
49. The relevant applicable interests cited in these exemptions are the apprehension or prosecution of offenders (section 31(1)(b) and the administration of justice (section 31(1)(c)). The Commissioner accepts



that the arguments made by the AGO set out below address the prejudice at sections 31(1)(b) and (c).

50. When considering the second point, the Commissioner must be satisfied that the nature of the prejudice is "*real, actual or of substance*" and not trivial or insignificant. He must also be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.
51. In relation to questions 2 and 3, the AGO explained that confirming or denying whether it holds the requested information would enable suspects and their legal representatives to ascertain the extent of the evidence held by the SFO and anticipate where any future enquiries may be directed.
52. In relation to questions 5 and 6 the AGO explained that the questions were about discussions regarding the suitability of a Deferred Prosecution Agreement (DPA) and any representations received. The AGO explained that the new DPA scheme came into force in 2014 as a way for prosecutors to dispose of criminal cases against corporates. DPAs allow prosecutors flexibility to deal with corporate offending when a civil remedy is insufficient, but where prosecution and associated consequences might be disproportionate. Negotiations for a DPA are strictly confidential and any company looking to enter into one would be expected to fully co-operate with the prosecutor.
53. The AGO also argued that if it held relevant information in relation to questions 2, 3, 5 and 6, disclosure of it would be very useful to suspects and their representatives, as it would provide an insight into the SFO's view of the strength of its case and the manner of its disposal.
54. Furthermore, the AGO argued that if it was revealed by a process of elimination that a particular case was being discussed with the Attorney General, this may be interpreted to mean that it involved sensitive issues or national security concerns, which have implications for any prosecution.
55. With regard to the third point, the AGO has claimed the lower level of prejudice applies, ie the prejudice would be likely to occur.
56. The AGO explained that even if it is in the public domain that an ongoing investigation is being carried out by a prosecuting authority, it does not follow that the case would have been discussed with the Attorney General.
57. In addition, the AGO argued that if it confirmed or denied whether it held the information in relation to questions 2, 3, 5 and 6, it would be confirming or denying whether it was carrying out its role of

superintendence in the SFO investigation into GPT. The AGO explained that such a disclosure would undermine its ability to carry out its superintendence role when necessary, as prosecutors would question whether they could share information with it in confidence. In turn, this would be likely to prejudice the matters set out in sections 31(1)(b) and (c).

58. Furthermore, the AGO argued that even if it is in the public domain that an ongoing investigation was being carried out by a prosecuting authority, it does not follow that the case would have been discussed with the Attorney General.
59. The Commissioner is satisfied that complying with the requirements of section 1(1)(a) would constitute a disclosure of information regarding whether the AGO is engaged in its role of superintendence or not, with regard to the SFO's investigation into GPT. The need to adopt a consistent approach to applying an NCND exemption ie applying it both in instances where information is and is not held is vitally important to ensuring that the exemption successfully fulfils its intended purpose.

### **Public interest arguments (section 31(3))**

60. The Commissioner will go on to consider the public interest arguments relating to section 31(3): ie whether, in all the circumstances of the case, the public interest in maintaining NCND outweighs the public interest in confirming or denying whether information is held.

### **Public interest arguments in favour of maintaining the NCND response**

61. The AGO explained that it considers that the public interest in maintaining section 31(3) outweighs the public interest in disclosing the information in relation to questions 2, 3, 5 and 6.
62. The AGO argued that it was in the public interest for prosecutors to be able to raise and discuss cases with the Attorney General in confidence. It explained that these cases may, in accordance with the protocol be: particularly sensitive; have implications for prosecution or criminal justice policy or practice; and/or reveal some systemic issues for the framework of the law or the operation of the criminal justice system.
63. The AGO also argued that there is a compelling public interest in ensuring that there is a free flow of information between the Attorney General and the directors of the prosecuting agencies.
64. The AGO pointed out that the directors need to be able to provide updates and information about current investigations and prosecutions to the Attorney General in confidence. It also explained that the

Attorney General needs this information in order to carry out his superintendence function effectively, whenever necessary.

65. Furthermore, the AGO argued that if it held the requested information regarding DPAs, disclosure of information showing whether the SFO was proposing to enter negotiations with a company, may alter defendant behaviour significantly or jeopardise the negotiation process. The AGO also argued that disclosure of the information if held, may be disclosed in the course of any legal proceedings.

**Public interest arguments in favour of either confirming or denying whether the requested information is held**

66. The AGO acknowledged that there was a public interest in knowing that cases involving foreign bribery or overseas corruption cases have been raised or discussed with the Attorney General, as it could provide reassurance that the prosecuting authorities were being superintended.
67. The complainant pointed out that the SFO had publically announced that it was investigating GPT, in August 2012. She also explained that she was not asking for information about the investigation itself, only if the Attorney General had received any representations for the government about the investigation.
68. The complainant also argued that the AGO had not applied the public interest test correctly, as the question of whether political representations are put to prosecuting bodies about specific investigations is a matter of grave public interest. In addition, the complainant argued that without transparency about such representations, the public could not have full confidence in the independence of the prosecuting bodies. Furthermore, the complainant argued that such a lack of confidence could seriously undermine public trust in the prosecuting bodies.
69. The complainant also pointed out that the GPT investigation was a matter of strong public interest because of its resonances with the BAE/Al Yamamah investigation which was terminated in 2006, to huge international and domestic outcry. She argued that political representations to the Attorney General about the GPT case must be a matter of public record otherwise the independence of the SFO in this case would be seriously compromised.
70. Furthermore, the complainant pointed out that she was not asking the Attorney General to routinely provide information about what cases he has provided superintendence to the SFO. She was asking the AGO to supply statistics on how many foreign bribery investigations he has provided superintendence on since 2012.

## **Balance of the public interest arguments**

71. The Commissioner has considered the public interest arguments from both parties.
72. He accepts the complainant's argument that disclosure of the information if held by the AGO, could provide reassurance that the prosecuting authorities are being superintended. He also accepts the complainant's argument that disclosure could help ensure transparency and notes the complainant's comment that it is already in the public domain that the SFO is investigating GPT. However, the Commissioner also notes that this does not include any reference to the AGO.
73. The Commissioner also considers that there is a public interest in confirming or denying whether the information is held. He considers that this would allow the public to know whether the AGO has been contacted by the SFO in relation to its investigation into allegations of corruption in a deal between the UK government, GPT Special Project Management (a subsidiary of the arms company EADS) and Saudi Arabia and that it is transparent in its handling of such matters.
74. However, the Commissioner finds that there is a stronger public interest in protecting the AGO's role of providing superintendence. He accepts the AGO's argument that in order for prosecutors to have confidence in it, the Attorney General must be able to carry out this role when needed. He also considers that when necessary, the AGO must be able to liaise with prosecuting departments in confidence, without outside interference which might jeopardise those investigations and the Attorney General's role of superintendence.
75. The Commissioner also accepts that there needs to have a free flow of information between the Attorney General and the prosecuting authorities, as the directors need to provide updates and information about current investigations and prosecutions to the Attorney General in confidence. The Commissioner also accepts that the Attorney General needs this information to carry out his role of superintendence.
76. The Commissioner notes that in its internal review of 25 March 2015 the AGO explained that it was an important part of the superintendence role of the Attorney General that "live" cases should be discussed between the him and the prosecuting authorities without it being disclosed that the case was "sensitive" or whether a particular issue in an investigation has been raised, for example if Deferred Prosecution Agreements (DPA) have been discussed in relation to GPT.

77. The Commissioner attaches weight to the point that the investigation in question is "live". He considers that there is a strong public interest in ensuring that whilst an investigation is ongoing, information about it should not to be disclosed.
78. Furthermore, the Commissioner notes that the AGO is answerable to Parliament and also answers questions from MPs. He considers that this shows that it is accountable and goes some way to satisfying the public interest.
79. The Commissioner also considers that appropriate weight must be given to the public interest inherent in the section 31 exemptions cited; that is, the public interest in avoiding likely prejudice to the apprehension or prosecution of offenders or the administration of justice. The Commissioner considers that it is clear that there is a very substantial public interest in avoiding that prejudice and that this is a strong public interest factor in favour of maintenance of the exemption.

## **Conclusion**

80. Taking all of the above into account, the Commissioner is satisfied that in relation to questions 2, 3, 5 and 6, the AGO was entitled to issue an NCND response under section 31(3) and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

## Right of appeal

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81. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

82. 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.
83. 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 .....**

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**