



## MOD FOI/EIR Compliance Notes

### FOI Exemptions

#### CN26 and CN27: Sections 30 and 31 (Investigations & Proceedings / Prejudice to Law Enforcement)

##### *Document history*

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##### *What this is about:*

This note provides an overview on exemption sections 30 and 31 of the Freedom of Information Act – information held or obtained for the purposes of criminal investigations and related proceedings conducted by public authorities (including Courts Martial); information which, if disclosed and not exempt under s30, would prejudice law enforcement. It also provides an outline of MOD compliance points to consider when engaging section 30 and section 31, and other exemptions to consider.

##### *Detail:*

Section 30 is concerned with preserving the integrity of proceedings and investigations conducted by public authorities. There are two main ways in which it may be triggered relating to investigations and proceedings, either the category of information itself or circumstances in which it was obtained:

- 30(1)(a)(i) where information has at any time been held for the purposes of ascertaining whether a person should be charged with an offence;
- 30(1)(a)(ii) whether a person charged with an offence is guilty of it;
- 30(1)(b) any investigations prior to a decision being made about future criminal proceedings;
- 30(1)(c) criminal proceedings that the authority has power to conduct.

and

- 30(2)(b) where information relates to any of the above and was obtained from confidential sources. In other words, for 30(2) to be engaged the information, as well as being held for the purposes of a criminal investigation as at 30(1), must also derive from confidential sources (e.g. security sources) and/or expressly have been provided by a person in confidence.

**Section 31 only applies to information that does not fall into any of the categories in section 30.** For this reason sections 30 and 31 are sometimes referred to as being **mutually exclusive**, hence this joint compliance note on their application. It provides for the withholding of information if it would or would be likely to prejudice law enforcement purposes, including (from an MOD perspective):

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- the prevention or detection of crime;
- the apprehension or prosecution of offenders;
- the administration of justice;

and

- the exercise by a public authority of its functions for any of the following specified purposes:
  - the purpose of ascertaining whether any person has failed to comply with the law;
  - the purpose of ascertaining whether any person is responsible for any conduct which is improper;
  - the purpose of ascertaining the cause of an accident;

Note: these are not all the categories to which this exemption can apply, just the most likely ones that are relevant to MOD information requests – see legislation at section 31(1) for full details.

### *MOD compliance points:*

- Criminal investigations and proceedings and prejudice to law enforcement include matters dealt with by the Armed Forces either summarily or before a court-martial.
- Sections 30 and 31 are closely related but have very different structures: section 30 refers to the purposes for which an authority holds information and section 31 refers to the prejudice a disclosure would or would be likely to cause.
- Section 31 only applies in cases which do not fall within section 30. Application of section 30 should therefore be considered first in respect of any information acquired in the course of relevant investigations and proceedings. However, the scope of section 30 is limited to the information held for its law enforcement purposes whereas, section 31 can be applied to withhold information that is relevant to the law enforcement purposes of other bodies.
- Sections 30 and 31 are both qualified exemptions and therefore subject to public interest testing. However, section 30 is a 'class-based' exemption. This means that it is not necessary to identify a particular case of potential prejudice or harm that may arise as a result of disclosure in order to engage the exemption. Section 31 is 'prejudice based' and as part of that you need to decide the level of harm in relation to disclosure 'would' or 'would be likely to' cause prejudice before concluding the public interest testing.
- The Act does not define "would prejudice" or "would be likely to prejudice". However, case law suggests that "prejudice" should be taken to mean actual "harm" or "damage"; and "likely to prejudice" to mean "a very significant chance of harm or damage".
- The likelihood of actual prejudice existing is a matter of fact that has to be determined on a case by case basis.
- Release being "likely to prejudice" is a lower test involving a degree of hypothetical certainty that there may very well be prejudice to UK internal relations if the information were released.

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- Notwithstanding such interests may be prejudiced, disclosure of the information must still be made if the public interest in disclosing the information outweighs the public interest in withholding it.

### *MOD Casework example:*

Both exemptions can be applied to separate pieces of information within a file:

- A crime file held for the purposes of an investigation attracting use of section 30 may contain a policy or procedural note related to the investigation to which section 31 would apply if its release would prejudice law enforcement.

You can also argue that they should be applied in the alternative in which case your response needs to state:

- Section 31 applies “only to the extent that the information is not exempt under section 30”.

### **Other exemptions:**

- There is a direct read-across to **section 40 (personal information)** which will apply to information about living individuals mentioned in investigation files.
- There is also potential for overlap between the two exemptions regarding **historical records**. Section 63 states that section 30(1) cannot apply to records that are over 30 years old, whereas section 31 can apply until the records are 100 years old. This means that it may be possible for MOD to apply section 30 to information until it is 30 years old, and then seek to apply section 31 to the same information after that for a further 70 years.

For further information – see the ICO’s detailed guidance:

[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/freedom\\_of\\_information\\_and\\_environmental\\_information.aspx](http://www.ico.gov.uk/for_organisations/guidance_index/freedom_of_information_and_environmental_information.aspx)