

NOTE: This guidance is currently undergoing revision. An updated version will be published here when the revision process is complete.

Section 31- Law Enforcement

Section 31 is concerned with protecting a wide range of law enforcement interests and its application turns on whether disclosure would be likely to prejudice those interests. Some interests that are protected by section 31 are drawn quite widely, for example: the administration of justice, the prevention or detection of crime and the operation of immigration controls. But section 31 also applies where the exercise by any public authority of certain specified functions would be prejudiced by disclosure. Those functions include: ascertaining whether a person is responsible for improper conduct, determining the cause of an accident and ascertaining a person's fitness to carry on a profession.

Key points:

- Section 31 only applies in cases where the information does **not** fall within section 30;
- The structure of section 31 is quite complex and it will be necessary to have careful regard to the important differences between the way in which the various categories of information are framed
- The categories within section 31 may overlap and consideration should be given to all categories that may apply.
- Section 31 is subject to a public interest balance.

Chapter 01: The exemption under section 31

Stating the exemption:

Section 31 of the Freedom of Information Act provides that:

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,
 - (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
 - (e) the operation of the immigration controls,
 - (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
 - (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
 - (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
 - (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

2. The purposes referred to in subsection (1)(g) to (i) are-
 - (a) the purpose of ascertaining whether any person has failed to comply with the law,
 - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
 - (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
 - (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
 - (e) the purpose of ascertaining the cause of an accident,
 - (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
 - (g) the purpose of protecting the property of charities from loss or misapplication,
 - (h) the purpose of recovering the property of charities,
 - (i) the purpose of securing the health, safety and welfare of persons at work, and
 - (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.
3. 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).

General introduction to the 'law enforcement' exemption

1.1 This exemption covers a very large number of aspects of what may generally be termed 'law enforcement'. A number of general points should be noted at the outset.

Nature of the exemption

1.2 Section 31 is an exemption turning on the likely effects of a response to a request for information. It requires a prejudice test to be applied. And it is a qualified exemption - before information may be withheld in reliance on it, the public interest balance set out in section 2 must be considered.

Mutual exclusivity with section 30

1.3 The Act makes express provision for mutual exclusivity with section 30. This is an important point, because there would otherwise be a large area of potential overlap between the two sections. In the first place, that is because both sections operate in a context which is recognisable as 'law enforcement'. But more specifically, it is because section 30 is an exemption which is focused in various ways on the source of the information and the purpose for which it has been held, while section 31 is an exemption which is focused on the effects of disclosure on the process. There is a clear potential for both criteria to be satisfied in any particular case.

The mutual exclusivity provision directs attention in the first place to section 30. Only if information falls outside section 30 does section 31 come into play. Much substantive information relating to a public authority's own law enforcement purposes will therefore be caught by section 30. The effect of giving predominance to section 30 over section

31 is to obviate the need, where section 30 applies, to demonstrate any specific prejudice in disclosure. It essentially recognises that premature disclosure of investigation material can jeopardise or prejudice that investigation. But if it is clear that one or the other exemption applies, but there is room for uncertainty about exactly which, then they may be claimed in the alternative. A complete account of the applicability of each section must, however, be set out in full if this course is pursued.

One of the most important reasons why a request for information may fall to be considered under section 31 rather than section 30 is because of section 30's limitations to information held by an authority for its own law enforcement purposes. Section 31, by contrast, will be relevant in cases in which authorities hold information for the law enforcement purposes of other bodies.

Different aspects of law enforcement in section 31

1.4 Section 31 operates by reference to a wide range of law enforcement interests which may be prejudiced by disclosure of information. Some of these are very widely drawn, and some are very specific. There is a large potential for overlap between the various subcategories within this exemption. Where a disclosure may fall under any category set out in section 31, careful thought should be given to whether or not another category may also be relevant; if so, additional considerations may apply.

But to help clarify the application of this exemption, each aspect to which it relates is considered separately in this guidance, both in terms of the meaning of the exemption and also by way of an indication of the most likely aspects of the public interest which may need to be taken into account in making disclosure decisions.

The structure of section 31

1.5 The structure of section 31 is quite complex, and the difference between its components needs to be carefully noted.

- Section 31(1)(a) - (f) - these provisions stand by themselves. The exemption works here by indicating a list of 'law enforcement' interests which may be prejudiced by disclosure. These are broad, and potentially overlapping areas - the administration of justice in general, crime, tax, immigration and prisons.
- Section 31(1)(g) - (i) and section 32(2) - these provisions need to be read together.
 - Section 32(2) is a list of law enforcement "purposes". Some of these are quite general, some focused on very specific sectors of law enforcement. The list does not stand on its own. The exemption does not work by applying the prejudice test directly to these purposes. The test is applied indirectly through section 31(1)(g), (h) or (i). That means that one or more of the "purposes" has to be engaged by one or more of those provisions before a disclosure falls within the terms of this exemption.
 - Section 31(1)(g) is engaged where a disclosure would be likely to prejudice the exercise of a public authority's functions for a relevant "purpose".
 - Section 31(1)(h) is engaged where a disclosure would be likely to prejudice an authority's civil litigation arising out of certain investigations for a relevant "purpose".

- Section 31(1)(i) is engaged where a disclosure would be likely to prejudice certain fatal accident inquiries held under Scottish legislation for a relevant "purpose".

All of these provisions are considered in greater detail in the following chapters.

Chapter 02: Section 31(1)(a) - the prevention or detection of crime & Section 31(1)(b) - the apprehension or prosecution of offenders

2.1 Application of the exemption

There is no special definition of the terms used in section 31(1)(a) and (b); the terms should therefore be accorded their natural meaning. They are capable of being applied not only to consideration of particular crimes or offenders, but also to certain types of crime or offender, and crime and offenders in general. The exemption in section 31(1)(a) is designed to cover all aspects of the prevention and detection of crime. Section 31(1)(b) is intended to cover all stages of the apprehension process and the subsequent prosecution of criminal activity, including, for example, making or preparing to make an arrest or an application for an arrest warrant, and all stages of prosecution, including for example making or preparing to make an application for a summons (or 'written charge and requisition').

This section is not restricted to information of any particular description; it turns on consideration of the likely effects of any disclosure. Examples of circumstances in which the prejudicial effects referred to in this part of this exemption are most likely to be relevant could include the following disclosures:

- intelligence about anticipated criminal activities (disclosure here has a high potential to prejudice the prevention or detection of the crime in question, and the apprehension of the alleged offenders);
- information relating to planned police operations, including specific planned operations, and policies and procedures relating to operational activity;
- information relating to the identity and role of police informers (to which a number of other exemptions are also likely to be relevant, including those under sections 30, 38, 40 and 41);
- information relating to police strategies and tactics in seeking to prevent crime (the disclosure of such information has a high potential to undermine legitimate police objectives carried out in the public interest);
- information whose disclosure would facilitate the commission of any offence; and
- information whose disclosure would prejudice the fair trial of any person against whom proceedings have been or may be instituted (to which again a number of other exemptions may also be relevant, particularly, with reference to section 44, in relation to disclosures which would breach Article 6 of the ECHR).

The police play the major role in the prevention and detection of crime in the UK, but they are not the only public authorities who have such a role. There are a number of other bodies who are responsible for law enforcement in a range of areas. These include HM Customs and Excise, the Immigration Service, the Health and Safety Executive, trading standards officers and many others. All such bodies are potentially entitled to rely on this exemption if disclosure would prejudice their ability to prevent and detect crime in their particular area of responsibility.

But the exemption is not limited in its applicability to public authorities with formal crime functions; it may apply to any disclosure likely to prejudice the outcomes and activities in question.

2.2 The Public Interest Test

If it is clear that prejudice would, or would be likely to, arise, the balance of the public interest in disclosing and withholding the information must be considered. In common with other prejudice-based exemptions, the nature, degree and likelihood of the prejudice to be caused will need to be taken into account in considering the balance of public interest in disclosure (see part 3.3 for general guidance on the application of the public interest test).

Maintaining confidence in law enforcement and the criminal justice system is crucial to the public interest. This is a public interest consideration which, depending on circumstances, may weigh both for and against disclosure. Much is done through police/community consultation and the media to keep citizens informed about the ways in which the police carry out their responsibilities. But on occasions, there will be some tension between this emphasis on openness and the need to maintain the confidentiality of specific operations or policies. Similar considerations will apply to other law enforcement bodies.

It is particularly important in this context to be aware that "prejudice" may arise on an incremental basis, as well as in respect of a single disclosure. For example, disclosure of information on a single specific police operation designed to apprehend alleged offenders would be likely to be prejudicial, as would disclosures of more generalised information relating to police strategies and tactics where this was considered to undermine legitimate police objectives and hamper future operational activity in view of limiting the value of the strategies and tactics in question once disclosed or providing valuable intelligence to perpetrators of crime.

In weighing the public interest it will be necessary to consider the public interest that applies to the particular case. Examples of considerations which might be specifically relevant to this section include:

- The effects of crime on individuals. For example, it would not be in the public interest to disclose details of a surveillance operation and thus potentially compromise that operation, where the target was a person suspected of a series of violent assaults;
- The effects of crime on society. For example, it may not serve the public interest to disclose in advance the arrangements for an operation to combat graffiti and other criminal damage in a specific area; and
- The effects of crime on the economy. For example, it may be against the public interest to disclose specific police strategies for action against those failing to pay fines or other penalties.

Other more complex examples might include disclosing the location of speed cameras - this may reduce the number of offences detected, but still have a positive effect in terms of cutting offending behaviour, at least in specific locations.

2.3 Potential overlap with other exemptions

Within section 31 itself:

- the provision on the administration of justice may need to be considered in particular in relation to criminal justice
- the criminal enforcement aspects of obligations relating to tax, immigration, prison discipline, charity administration and health and safety may be relevant.

Elsewhere within the Act:

- section 35 (formulation of government policy)
- section 36 (effective conduct of public affairs) and
- section 40 (personal data)

are the most likely areas of overlap. For example, when a government policy was to re-categorise a particular dangerous drug to facilitate stronger criminal enforcement action, premature disclosure of that policy might enable dealers to take evasive action. Open disclosure of strategies to combat benefit fraud have a clear potential to prejudice the effective conduct of public affairs. Where personal information relating, say, to offenders or police officers is concerned, then section 40 is likely to have to be considered.

Chapter 03: Section 31(1)(c) - the administration of justice

3.1 Application of the exemption

Under this subsection, information is exempt if its disclosure would prejudice the administration of justice. There is no definition of "administration of justice" but it may be construed widely. Bear in mind:

- the exemption is not just about the courts - justice is administered through courts and tribunals, through arbitrators, and through alternatives to litigation;
- justice is commonly classified by subject matter - for example criminal, civil, family, or administrative.. All categories are covered, as are matters which may not fit that classification or which are general in nature;
- justice may be administered by professional judges and adjudicators, or by lay magistrates or panel members, or by jurors;
- administration of justice need not imply an adversarial context - it includes non-contentious or uncontested business, and inquisitorial processes (such as inquiries and coroners' courts);
- ensuring people's access to justice is part of the administration of justice;
- the administration of justice may be prejudiced in an individual case, or by something happening to the general process by which justice is delivered.

In view of the potential breadth of section 31(1)(c) it is important to consider whether the information might be covered by a more specific exemption. There are separate exemptions in section 30 and section 32 which cover investigations and proceedings by public authorities and information held in court records. Information relating to the prevention and detection of crime, apprehension and prosecution of offenders, and maintenance of good order and security in prisons is covered by other limbs of section 31.

Here are some aspects of the administration of justice that could be prejudiced by the disclosure of information:

- the operation of the judicial appointments system;
- the ability of a judge to deliver justice effectively, fairly and fearlessly in a particular case;
- the ability of a judge, or of the judiciary, to perform this function more generally;
- the business of running of the courts and tribunals (though other exemptions might also be relevant);
- the enforcement of sentences and the execution of judgements;
- the ability of litigants to bring their cases, or a particular case, to court;
- the prospects of a fair trial taking place;
- the effectiveness of relationships between different agencies involved in the administration of justice (for example premature disclosure of plans to redistribute functions between different agencies could lead to a breakdown of co-operation);
- a range of other matters and systems that support the administration of justice (e.g. the operation of the legal aid system, or IT systems - disclosure of the security systems on computer systems would facilitate unauthorised access and thereby make them vulnerable to interference);
- the maintenance of an independent and effective legal profession.

3.2 The Public Interest Test

The public interest in the administration of justice is very high. It is moreover a public interest which is explicitly recognised by the courts as fundamental to their work and as permeating their approach to the common law and to statutory interpretation. Not only, therefore, is this a public interest which the courts will expect government to respect highly, it is a public interest which the courts will expect government to acknowledge to be the courts' particular domain, a matter on which the courts themselves are ultimately the constitutional arbiters within the law.

Although, therefore, in common with other prejudice-based exemptions, the nature, degree and likelihood of prejudice to the administration of justice will be an essential part of weighing the balance of public interest for and against disclosure, the respect owed by government departments to the proper administration of justice indicates a need for special care in concluding that the public interest in avoiding prejudice is outweighed. Circumstances where prejudice in a particular case is outweighed by the prevention of prejudice more generally will be one example where the balance might come down in favour of disclosure. For example it may be necessary to disclose information relevant to the safety of individuals even if this causes the collapse of a case before the courts. There may be other circumstances, particularly at the administrative margins rather than the judicial centre of the system of the administration of justice, where the operational impact of a prejudicial disclosure is more diffuse, and considerations of administrative transparency weigh more strongly. Precisely because prejudice to the administration of justice comprehends such a wide range of circumstances, the specific factors relevant to individual cases may be particularly important to the operation of this exemption.

3.3 Potential overlap with other exemptions

The constitutional significance of the administration of justice is reflected in its being protected in a large number of specific ways, for example through provisions on:

- contempt of court and the right to a fair trial (see section 44),
- legal professional privilege (section 42),
- court records (section 32).

And specific, sectoral issues relating to the administration of justice are of course covered throughout section 31 itself.

Chapter 04: Section 31(1)(d) - tax

4.1 Application of the exemption

The terms tax, duty and imposition of a similar nature cover a range of charges relating to the raising of revenue for government purposes. They are linked by the idea of the imposition of an obligation to pay where the primary - or a significant - purpose of imposing the payment is to raise revenue over and above the cost of any service to which the payment is related. As such, they are distinct from a payment for commercially provided goods or services, or a proportionate fee charged for a statutory service.

Examples of taxes, duties and impositions of a similar nature include

- income tax
- corporation tax
- VAT
- insurance premium tax
- petroleum revenue tax
- national insurance contributions
- climate change levy
- excise duties (on, for example, tobacco, oil, beer, spirits, wine)
- motor vehicle duties
- air passenger duty
- stamp duty

Impositions of a similar nature is a category of charges which, although not called a 'tax' or 'duty', nonetheless have similar characteristics to a tax or duty. Difficult issues may arise, for example, at the margins of the distinction between such impositions and a proper charge for services (particularly in some areas of the charging of fees by public authorities) and in cases of uncertainty legal advice should be sought.

Examples of disclosures with a high potential for prejudicing the assessment or collection of taxes, etc, include:

- details of plans to close tax loopholes;
- information held in relation to the tax affairs of companies or individuals;
- information which informs plans for future investigations;
- third party information which aids the collection of tax or duties; and

- details of strategies, investigative practices or even negotiating tactics used to assist in the collection of taxes or duties.

Disclosure of such information could prejudice the collection of taxes, for example, by allowing those targeted by tax changes or investigations to take evasive steps, damaging the relationship of trust between the tax authorities and companies/individuals, or undermining the tax authorities' strategies/tactics.

4.2 The Public Interest Test

There is a strong public interest in having stable and secure public finances. This is crucial to the stability and sustainable growth of the UK economy and delivers the resources to fund public services. An efficient and well administered tax system also improves the competitiveness of business and supports the government's social and welfare objectives. A central requirement of a modern and fair tax system is that everyone pays the proper amount of tax and receives the benefits they are entitled to. Tax avoidance and evasion distort the incentives that the tax system aims to deliver and unfairly shift a greater tax burden onto honest and compliant taxpayers. They also reduce the revenue available for delivering public services. On the other hand, disclosure of information has a part to play in promoting greater public awareness of how taxes work, and that in turn helps make it simpler for people and business to pay taxes. Where this part of this exemption is engaged, it is important that Departments are clear about existing taxation policies and systems, and follow an approach to disclosure which fully takes into account the public interest in the proper administration of taxation both in general and in particular cases, and in avoiding disruption and distortion of markets or of the successful delivery of tax policy objectives.

4.3 Potential overlap with other exemptions

The tax assessment and collection process is underwritten by an enforcement regime with criminal, civil and regulatory components. In any case where they are engaged, the relevant wider provisions of section 31 may be engaged, as also may section 30.

Where the wider effectiveness of the tax collection system is relevant, consideration may also need to be given to the possible relevance of section 29 (the economy).

Section 35 may be relevant, in cases relating to the development of taxation policy, and section 36 in cases where a disclosure could prejudice the effective conduct of public affairs - for example by impeding the implementation of taxation changes, facilitating tax avoidance and forestalling, or releasing market-sensitive information which could prejudice the delivery of revenue policy goals.

Where disclosure relates to particular cases, section 41 (information provided in confidence) and section 40 (personal information may be relevant). There are also specific statutory prohibitions on the disclosure of certain information concerning tax liabilities (section 44).

Chapter 05: Section 31(1)(e) - operation of the immigration controls

5.1 Application of the exemption

The term "immigration controls" is not defined in the FOI Act. It does not cover simply the physical immigration controls at points of entry into the United Kingdom, but more

generally the arrangements made (whether in or under legislation, or as a matter of policy or procedure) in connection with entry into, and stay in, the United Kingdom, including the investigation of offences relating to immigration¹.

The disclosure of information would, or would be likely to, prejudice the operation of the immigration controls if its release into the public domain would, or would be likely to, undermine the effectiveness of our immigration controls by enabling or assisting people to evade those controls. Information does not have to be about immigration controls, although it may be, as long as its disclosure would cause prejudice.

Examples of circumstances where disclosure might prejudice the operation of immigration controls include disclosure of:

- Information that there was extensive counterfeiting of travel documents of a particular country, on the basis of which travel documents purportedly issued by that country were to be subjected to particular scrutiny. In this case, the disclosure of the information or the identity of the targeted country might prejudice the operation of the immigration controls because it would alert counterfeiters (and persons making use of their services) to use another country's travel documentation for these purposes instead.
- Information which would reveal an incidence of suspected illegal working which was to be investigated by the immigration service. In this case, the disclosure of the information about the proposed investigation might prejudice the operation of the immigration controls because it would alert the employers and the illegal workers in advance and would enable them to escape investigation.
- Information on proposed changes to visa regimes. The imposition or amendment of visa regimes usually takes place with little or no notice being given to the public. This is because visa regimes are generally introduced in order to prevent evasion or abuse of immigration controls by nationalities who, over time, have been shown to pose a higher risk of evasion or abuse than other nationalities when seeking to enter the United Kingdom. Therefore the disclosure of information relating to visa regimes could, in some cases, prejudice the operation of immigration controls because it would encourage persons from the countries which are due to be affected to seek to enter the United Kingdom before the changes are introduced, thus avoiding the more stringent regime which has necessarily been developed.

5.2 The Public Interest Test

In the immigration context there are a number of public interest considerations which may, in the context of a particular request, favour disclosure. There is a public interest in ensuring that there is public confidence in the operation of our immigration controls, and one way of ensuring this is to keep the public informed of policies, developments, proposals for the future, etc, together with explanations of them. Linked in with this, there is a public interest in ensuring that the public have access to correct information - because immigration is an emotive issue set in a complex framework, it is inevitable that there may be inaccurate information about immigration issues circulating in the public domain which ought to be corrected.

¹ See, in a different context, S.I. 2003 / 2818 which contains a broad definition of "immigration control" along similar lines

In particular, it will be in the public interest to provide information which confirms the performance of immigration control for example in providing statistics on the number of passengers and applications that are handled by the Immigration and Nationality Directorate. There is also a public interest in establishing that the implementation of immigration control is carried out in accordance with the published statements and policies by providing, wherever possible, details of implementation of immigration control.

There is also a public interest in ensuring that those who are subject to immigration controls are aware of those controls and how they operate, as this may discourage such persons from seeking to enter the United Kingdom illegally.

Equally there are a number of public interest considerations which may, in the context of a particular request, favour non-disclosure. There is a public interest in ensuring that:

- people are not able to evade or abuse our immigration controls in order to enter the United Kingdom illegally;
- the efficiency and integrity of our immigration controls are not undermined; and
- investigations into suspected immigration offences can be conducted effectively.

Immigration controls are important in order to regulate entry to and settlement in the United Kingdom, in which there is a clear public interest.

5.3 Potential overlap with other exemptions

In cases where it is considered that this exemption may apply, there may be an overlap with some of the other exemptions, in particular:

- section 31(1)(a) and (b) (prevention or detection of crime; apprehension or prosecution of offenders) - for example in relation to criminal offences such as people trafficking or illegal working which are designed to reinforce the system of immigration controls;
- section 35 (formulation of government policy - for example in relation to the formulation of immigration policy);
- section 36 (prejudice to effective conduct of public affairs - for example to the extent to which the effective conduct of public affairs relies on the free and frank provision of advice in the context of formulating immigration policy/policy on immigration controls); and
- section 40 (personal data - for example in relation to specific immigration cases).

Chapter 06: Section 31(1)(f) - the maintenance of security and good order in prisons

6.1 Application of the exemption

The terms "security" and "good order" are not defined in the FOI Act. The term "security" will include all matters related to the secure custody of those detained, the safety of all persons in the institution, and the detection and prevention of activity (including but not limited to criminal activity) not permitted within the institution. The term "good order" will include all matters addressing disobedience on the part of individuals

or concerted indiscipline by groups of persons in the institution, and promoting a safe and orderly regime.

The exemption is intended to prevent disclosure of information under the Act from prejudicing "security and good order" not only in "prisons", but "other institutions where persons are lawfully detained". This term includes, but is not limited to:

- Young Offenders Institutions;
- Secure Hospitals;
- Secure Training Centres;
- Local Authority Secure Accommodation; and
- Immigration Detention and Removal Centres.

This exemption focuses on the effects disclosure of the information would have. Information might prejudice the "maintenance of security and good order in prisons" in two ways:

- By in some way causing security to be compromised or good order to break down.
- By impairing an institution's ability to restore security or good order or to prevent them from breaking down in the first place.

A key aspect of good order is the need to ensure that any changes to the routine in a prison are introduced in a carefully managed way and with the prisoner reaction assessed and expectations managed so that when the change is introduced, there is not an immediate adverse reaction that can put staff and prisoners at risk. Accordingly, an example of the first type of prejudice might be prematurely released information about a potentially unpopular policy change either being put in place or being considered. An unwelcome change in the regime of an institution could potentially lead to concerted indiscipline or worse. Hypothetical examples of such information relevant to good order might be information about proposed changes in the Home Detention Curfew ("tagging") policy or Incentives and Earned Privileges scheme, or information about changes in meal times or visits arrangements.

An example of the first type of disclosure covered by the exemption related to security, might be information detailing the times and routes of prisoner escorts. Release of this information might aid an escape attempt, as might detailed information regarding locking procedures or perimeter security systems.

An example of the second type of prejudice might be the disclosure of information about the strategy for dealing with concerted prisoner indiscipline or the contingency plans for responding to other types of incident. Releasing such information could compromise the ability of an institution to restore good order.

Conversely, information on physical security at a prison which was assessed as having little or no impact on the risk of prisoner escape if disclosed might not be considered to prejudice security and should therefore be disclosed.

6.2 The Public Interest Test

Section 31 is subject to the "public interest test" set out in section 2. The operation of this test may mean that even if section 31(1)(f) covers a requested piece of information

(e.g. disclosure of it would prejudice the maintenance of security or good order), there may still be an obligation to disclose it.

When it is decided by a public authority that section 31(1)(f) covers a requested piece of information, the following rule or "test" must be applied to determine whether or not the information is exempt: does the public interest in withholding the information outweigh the public interest in disclosing it? If not, it must be disclosed.

There will often be cases where there are strong public interest arguments in favour of disclosure and non-disclosure. There is a public interest in ensuring that there is public confidence in the operation of the prison system, and one way of ensuring this is to keep the public informed of policies, developments, proposals for the future etc, together with explanations of them. The public interest is not served however by releasing information which might aid an unlawful escape or put anybody within an institution at real risk of harm.

Hypothetical examples of varying public interest considerations which will need to be weighed in the balance are:

Example 1: A request is received by a prison for the contract made with the private company who installed the perimeter fence. Some parts of the contract will be disclosable in any event, as not falling within any exemption. For those parts of the contract that do fall within the section 31(1)(f) exemption (as being likely to prejudice security etc.), for example, technical information about the strength or depth under the ground of the fence:

- There is a public interest in keeping the public informed about how public money is being spent;
- There is a public interest in keeping the public informed about how the public are being protected from offenders;
- It is not in the public interest for an authority to release information which might aid an escape;
- It is not in the public interest for an authority to release information which might aid the transmission of contraband into the prison.

Example 2: A request is received for a report which highlights serious security failings in a prison.

- There is a public interest in keeping the public informed if public money has been badly spent;
- There is a public interest in informing the public that they have been put at risk by the actions of a public authority;
- It is not in the public interest for a public authority to release information which would alert prisoners to serious security deficiencies.

The timing of disclosure may well be relevant when weighing up public interest arguments. If the request for the perimeter fence contract were to be received the day after the prison had been permanently shut down there would be no argument against disclosure. Likewise, if the request for the report were received long after the security deficiencies had been rectified.

The arguments on each side must be weighed up and a decision made. If it is deemed that the arguments balance perfectly, the information should be disclosed.

6.3 Potential overlap with other exemptions

In cases where it is considered that this exemption may apply, there may be an overlap with some of the other exemptions, in particular:

- section 31(1)(a) and (b) (prevention or detection of crime; apprehension or prosecution of offenders - for example where the crime relates to the maintenance of good order - for example assaulting another prisoner or prison officer);
- section 35 (formulation of government policy on prisons generally);
- section 36 (prejudice to effective conduct of public affairs - not sure we can give a specific example - it might cover the need for candor when advising Ministers in respect of prison policy/matters etc.);
- section 40 (personal data -of individual prisoners or prison officers.).

The "Purpose"-Linked Parts of Section 31(1)

As indicated above, the exemptions in section 31(1)(g) to (i) all work as follows. A request for information will be refused where disclosure would prejudice:

- one of the processes described in subsection (1)(g), (h) or (i)
- if but only if and to the extent that that process is for one of the purposes set out in subsection (2)
- and the balance of the public interests in disclosing and withholding the information comes down in favour of withholding it.

The interplay of these components needs to be borne carefully in mind. The structure of the Act means that the prejudice must be to the process and not the purpose. To put that another way, it is not enough that the purpose is prejudiced - the prejudice must be caused by the effect of disclosure on the process. In practice, it is likely that the two aspects will be very closely linked indeed, but care will need to be taken in articulating the application of the exemption properly. The public interest, on the other hand, must be considered in the round. In each case:

- the nature, degree and likelihood of the prejudice,
- the public interest in the avoidance of prejudice to the particular process, and
- the public interest in the furtherance of the relevant purpose are all likely to be very relevant.
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It should be remembered that the request for information may not be directed towards the public authority whose functions might be prejudiced so it will be necessary, in the context of any such requests, to consider the impact of disclosure on an other public authority.

This guidance now considers

- firstly, the nature of the processes in subsections (1)(g) to (i) and how disclosure of information might prejudice those processes; and

- secondly, the nature of the "purposes" in subsection (2).

In each case, an indication of the most relevant public interest considerations is also suggested.

Chapter 07: Section 31(1)(g) - functions of a public authority

A public authority's functions are all the things it has the power or duty to do. Functions may be general or specific, and may derive from statute or from the exercise of the prerogative.

The nature of the "purposes" in subsection (2) are indicative of the sorts of functions which are most likely to engage section 31(1)(g). All of these purposes have to do in a general sense with systems for ensuring that proper standards of conduct and safety are complied with, so the functions in question are likely to be connected with the enforcement of those standards. Some public authorities have a clear remit to investigate and enforce certain standards of behaviour, such as HSE and professional bodies such as the General Medical Council. The functions will in these cases be central to those authorities' activities.

But the Act does not limit the functions to which these provisions apply to the central functions of public authorities. They merely need to be functions exercised for a relevant purpose. There is no basis for artificially limiting their application. For example, all government departments are very likely to exercise functions for the purposes of:

- ascertaining whether any person has failed to comply with the law
- ascertaining whether any person is responsible for any conduct which is improper
- ascertaining the cause of an accident
- securing the health, safety and welfare of persons at work in relation to their own internal management.

There is a general public interest in ensuring that public authorities are able to carry out their functions properly. There is a particularly strong public interest in public authorities being able to carry out their duties. It is likely to be in only the most exceptional circumstances that it will be appropriate to prejudice the discharge of a legal duty. But there is also a public interest in the proper exercise of discretionary functions. In addition there is a public interest in public authorities being accountable to the public in ensuring that the law enforcement purposes referred to subsection (2) are pursued appropriately and that robust systems are in place to prevent and detect unlawfulness, impropriety or unnecessary health and safety risks. The nature of the function and the purpose in question will of course be highly relevant.

This aspect of section 31 has some potential for overlap with section 36 (effective conduct of public affairs).

Chapter 08: Section 31(1)(h) - civil proceedings arising out of statutory or prerogative investigations

'Civil proceedings' certainly comprises legal action (other than criminal proceedings) before a court or tribunal; it is possible that in some circumstances a wider meaning

may be indicated, to include, for example, some forms of regulatory enforcement measures, but much will depend on the circumstances and on the terms of any regulatory regime involved.

The 'prejudice' must be to the civil proceedings themselves, but there is no need to give that an artificially narrow interpretation. It is capable, for example, of applying to prejudice to the authority's position in such proceedings.

The proceedings must arise, directly or indirectly, out of an investigation. The investigation, in turn, must have been conducted for one of the "purposes".

It should be noted, therefore, that the civil proceedings themselves do not have to be for one of the "purposes" - though that in practice may be likely. For example the proceedings may be the result of an investigation for one of the purposes. Having ascertained that an individual has improperly disclosed sensitive information to journalists, a public authority may seek to restrain publication of that material by a breach of confidence action.

The investigation must have been conducted either

- by virtue of the Royal Prerogative (many investigations undertaken by government departments are undertaken under prerogative powers, because the residual source of their legal powers - where not expressly conferred by statute, for example - resides in the Crown; this is particularly the case regarding investigations in the context of the internal management of government departments), or
- by or under an enactment - that is to say, by virtue of provisions in an Act of Parliament or in an instrument made under powers contained in an Act (that will include, in particular, statutory regulations).

Both the civil proceedings and the investigation may be undertaken either by the authority itself, or by another body on the authority's behalf.

This provision has potential to overlap with s.31(1)(c) (the administration of justice) and with sections 32 (court records) and 42 (legal professional privilege). The general public interest considerations likely to be engaged are therefore those relating to the administration of justice and the proper conduct of legal proceedings.

Chapter 09: Section 31(1)(i) - an inquiry held under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976

The 1976 Act provides for public inquiries to be held in respect of fatal accidents, deaths of persons in legal custody, sudden, suspicious, or unexplained deaths, or deaths which occur in circumstances giving rise to serious public concern. As the Lord Advocate's powers to investigate deaths in Scotland under this legislation are wide-ranging, this provision will have relevance to UK government departments operating in Scotland in a wide variety of circumstances where a death occurs, even where the death does not occur in "legal custody". For Whitehall departments, these will of course be in areas of 'reserved' policy/operations, such as, for example, defence (deaths of MoD service personnel based in Scotland) or immigration (deaths of asylum seekers in Home Office

detention in Scotland). And in such cases the relevant exemptions (s.26, s.31, etc) may also be relevant.

Like section 31(1)(h), this provision is limited by the following factors:

- the prejudice must be to the inquiry;
- the exemption applies only to the extent that the inquiry arises out of an investigation;
- the investigation must have been conducted for one of the "purposes";
- the investigation must have been conducted under statutory or prerogative powers (although not necessarily under the 1976 Act itself).

Some statutes, which have their own provisions about inquiries into deaths, expressly allow for the disapplication of the 1976 Act, to prevent a death triggering two parallel statutory inquiries. Examples include section 14(7) of the Health and Safety at Work etc Act 1974, and section 271(6) of the Merchant Shipping Act. Such provisions will limit the application of this provision.

The section 31 (2) "purposes" most likely to be relevant to the investigations referred to in connection with the 1976 Act are:

- ascertaining whether any person has failed to comply with the law;
- ascertaining whether any person is responsible for any conduct which is improper;
- ascertaining whether circumstances which would justify statutory regulatory action exist;
- ascertaining the cause of an accident.

Chapter 10: Section 31(2)(a) - ascertaining whether any person has failed to comply with the law.

Ascertaining whether any person has failed to comply with the law is limited only by the features that this provision:

- looks to the establishment of historical fact, and
- is concerned with failure to comply with legal requirements and not with any less formal standards of conduct.

The law in question may be civil or criminal.

This purpose is therefore capable of being engaged by criminal investigations of any sort (including, for example, employee theft), investigations into compliance with regulatory requirements which have legal force, and investigations into compliance with the requirements of, for example, employment law or company law. It is not necessary for particular legal or other action to be in contemplation as an outcome of the 'ascertaining'.

This subsection cannot apply in circumstances which fall within section 30. But there is otherwise scope for substantial overlap between this provision and those provisions of section 31(1) dealing with law enforcement and the administration of justice.

There is a general public interest in ensuring that the law is complied with. The likelihood of ascertaining whether the law has been complied with, the action which might be taken as a result, the nature of the law and of the possible lack of compliance, are all matters which would have to be taken into account.

Chapter 11: Section 31(2)(b) - ascertaining whether any person is responsible for any conduct which is improper

'Improper conduct' certainly includes conduct which is contrary to the law, but is also capable of extending much wider than that. On the other hand, to be 'improper', conduct must be more than merely a failure to follow good practice, more even than conduct which is undesirable. Conduct will be improper if it falls below proper standards. Although this provision is capable of applying to generally applicable standards (of honesty, integrity, etc), this "purpose" is likely to be particularly relevant to standards of conduct which are either formalised (in, for example, a code of conduct) or which are specific to certain business sectors or professions. Again, not every breach of a code of conduct will necessarily amount to 'impropriety'; the expression denotes a failure to comply with reasonable minimum standards of propriety. And it may need to be distinguished from conduct which, for example, falls below standards of competence.

Examples of 'conduct which is improper', might therefore include conduct which falls below standards of proper conduct set:

- for the management of companies, or the conduct of a business in the financial services sector
- for professionals such as health professionals or lawyers - including standards set by the General Medical Council, the Law Society or the Bar Council
- for public office holders, MPs, ministers or civil servants - including standards set by the ministerial code and the civil service code
- in the disciplinary provisions of employees' terms and conditions of employment or found in staff handbooks.

Examples of processes or functions of government departments which are undertaken in order to ascertain whether any person is responsible for any conduct which is improper may be:

- leak inquiries
- inquiries into breaches of security
- disciplinary inquiries in accordance with departmental rule books

There is likely to be considerable overlap between such investigations and inquiries, and of course, one may lead to another. The significance of "any person" in subsection (2)(b) is that inquiries into how a state of affairs arose may not immediately come within its scope. However, if such an inquiry develops into one where individuals' conduct comes into question, it will apply to the subsequent consideration of that issue but not catch the wider scope of the inquiry. But in such circumstances there may be overlap with the prejudice to the proper conduct of public affairs exemption in section 36.

As already made clear in the introduction to this guidance chapter, the mutual exclusivity between section 30 and section 31 means that the information gathered by a

public authority during its own conduct of such an investigation or inquiry, and which relates to the obtaining of information from confidential sources, will be protected under section 30 and even though its disclosure may well prejudice the investigation process, section 31 will not apply. This exemption is therefore aimed at other information the disclosure of which would prejudice the public authority's ability to carry out such investigations. Such prejudice might be general or relate to a specific investigation. For example, disclosure of the detail of the techniques in the course of an inquiry or investigation might undermine their effectiveness because those who might be the subject of such investigation will be able to take measures to evade detection. Likewise, if the existence of a particular inquiry is made known, it may tip off the perpetrator and who will take extra care to cover his or her tracks. Reports or assessments that highlight vulnerabilities in the system may well encourage the exploitation of those areas. For example if it is acknowledged that an internal misconduct investigation unit is under-resourced, those who might otherwise be deterred for fear of being found out may not be so deterred.

11.1 The Public Interest Test

There is a very strong public interest in particular in ensuring proper conduct by those in positions of trust, those in public office, and those upon whose proper conduct others rely for the protection of their interests. That, however, is capable of weighing both for and against disclosure of information, depending on the circumstances of individual cases. It is important that a department's ability to investigate and take action in the event of improper conduct is not prejudiced. At the same time, there is a public interest in ensuring that such investigations are pursued effectively and in an accountable manner. There will almost always be a tension in conducting the public interest balance between protecting the investigation process and demonstrating that good mechanisms exist which are exercised appropriately.

Again, the likelihood of ascertaining whether the improper conduct has taken place, the action which might be taken as a result, the nature of the conduct and of standard breached, are all matters which would have to be taken into account in determining where the public interest balance lies in relation to this exemption. If the prejudice that would be caused by the disclosure of the information in question is such as to render the process ineffective for any future investigation, it is highly unlikely that the circumstances of a particular case would justify causing such damage. If however, the prejudice is of a lesser order - perhaps having the effect of prolonging an investigation, one can envisage circumstances where the public interest in demonstrating a commitment to dealing with impropriety or that something is being done would outweigh the public interest in not causing some prejudice to the process. Factors which need to be taken into account in the balance could include the following:

- the degree of prejudice to the exercise of a public authority's functions
- whether the prejudice is to a particular exercise of those functions or will impair future exercise of them
- the nature of the conduct under investigation
- the potential impact of that conduct - for example have significant amounts of public money been squandered or national security put at risk
- whether the conduct is a one - off or there is a pattern of behaviour that needs to be tackled
- what information is in the public domain already

- whether disclosure of the information in question would have the effect of deterring other potential perpetrators
- the importance of the department being seen to take improper conduct seriously
- the importance of departments having demonstrably robust systems to investigate and take action against improper conduct
- the importance of not highlighting weaknesses unnecessarily

Several of these public interest factors can cut both ways in terms of disclosure or non-disclosure. Care must be taken in weighing the relative weight of these factors in the light of the facts of each case.

This provision is capable of extensive overlap with those provisions dealing with unlawful conduct; it is likely, however, that if conduct is not only improper but unlawful, its unlawful character will predominate and this provision is likely to add little. Likewise if there is a national security element to the improper conduct, the application of section 24 ought to be considered. Its main, effect, therefore, will be felt in those cases where other exemptions do not apply.

Chapter 12: Section 31(2)(c) - ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise

12.1 Key components

The following components of this "purpose" are particularly important:

- It focuses on ascertaining whether circumstances exist or may arise which would justify action (rather than whether an unlawful or improper act has taken place)
- The action which might be taken in consequence must be 'regulatory'
- The regulatory action in question must be in pursuance of any enactment - that is to say, the provision is exclusive to statutory regulation.

12.2 "Regulatory activity"

There is no special definition of 'regulatory' action, but the term is widely recognised as referring to a system of formal or legal governance of particular sectors or particular activities, as opposed to more generally applicable legal requirements. 'Regulatory action' has a wide ambit and will typically include the exercise of powers by a responsible body –

- To grant a licence to undertake certain activity, or to refrain from granting such a licence;
- To investigate whether a person is precluded from holding a licence (e.g. because he is not "fit and proper" to do so, in the regulator's judgement, or where the legislation limits the number of licences a particular person and his associates may hold);
- To require a regulated body to comply with the law or with guidelines (e.g. by giving directions);
- To undertake remedial or reparatory measures;
- To impose sanctions (e.g. financial penalties for breach of licence conditions or revocation of licence);
- To comment on conduct, as well as issue warnings or formal advice.

There are now a substantial number of bodies responsible for statutory regulatory action, including, for example, in the areas of charities (Charity Commission), health and safety (HSE), the communications industry and broadcasting (OFCOM); the rail industry (Office of the Rail Regulator); the water and sewerage industries (OFWAT); financial services (Financial Services Authority); pensions (OPRA), medicines and healthcare (MHRA); the electricity and gas industries (OFGEM) and other industries and activities. This provision is not limited to the purposes of such bodies although it will include them.

12.3 Scope of section 31(2)(c) - general points regarding limitations and overlap

a. Sections 21 and 44

Most enactments providing for regulatory action also make specific provision for disclosure and non disclosure of information obtained and held for the statutory purposes. Authorities engaged in regulatory investigations or action themselves should therefore look first to the relevant domestic and EC framework and consider the potential applicability of sections 44 (prohibitions) and 21 (alternative rights of access) before turning to consider the application of sections 30 and 31.

For example, the FSA has powers to investigate firms currently and formerly authorised under the Financial Services and Markets Act 2000. To encourage disclosure to the FSA, the Secretary of State, and experts appointed to report on a firm, section 348 of the FSMA 2000 restricts the disclosure of confidential information. Thus, for the FSA and those involved in regulating authorised firms, section 44 of the Act will need to be considered first when a request is received under the Act. (It should be noted that section 348 of the FSMA 2000 would not apply to internally generated information, such as policy documents.)

Similarly, OFCOM has functions under the Communications Act 2003 to consider complaints in relation to broadcasting. Those receiving requests under the Act will first need to consider section 393 of the 2003 Act, as this imposes limits on the disclosure of information relating to the affairs of any particular business obtained under the 2003 Act.

In addition, in some instances the regulatory authority will be obliged, either as a result of procedural requirements, or as a matter of policy, to provide full disclosure to the subject of the investigation at the outset of any regulatory action.

b. Section 30

It has been noted above that section 31 does not apply where section 30 does.

The statutory frameworks which govern many regulatory authorities provide for the sanction of criminal prosecution for non-compliance. Information relating to investigations in relation to the exercise of such powers may be covered by section 30(1), provided that the investigations fall within the detailed terms of the subsection.

In addition, subsection 30(2) will apply where the investigation (including investigations conducted for the purposes described in section 31(2)) is conducted by virtue of the prerogative or by virtue of statutory powers, and where it relates to the obtaining of information from confidential sources.

c. Section 31(2)(a) and (b)

Section 31(2)(a) and (b) will apply for the purposes of ascertaining whether a person has failed to comply with the law or whether any person is responsible for any conduct which is improper (these two categories will cover much information held by a regulatory authority).

Other potentially overlapping provisions

Other provisions particularly likely to overlap with section 31(2)(c):

Section 35 (formulation of government policy) but only where the regulatory authority holding the information is a government department or the National Assembly for Wales.

Section 36 (prejudice to the conduct of public affairs)

Section 40 (personal information) (absolute exemption.)

Section 41 (Information provided in confidence) (absolute exemption)

Section 42 (commercial interests).

d. Types of information likely to be covered by section 31(2)(c)

Section 31(2)(c) applies to the "purpose" of consideration by a person or body as to whether regulatory action should be taken in a particular case or class of cases, as distinct from whether unlawful or improper conduct has occurred.

Examples of the type of disclosure to which Section 31(2)(c) would be likely to be relevant might be:

- The disclosure of policy documents, which describe the type of circumstances in which enforcement action should be taken, or in which action short of enforcement is appropriate, and what evidence is necessary for the taking of enforcement action; and
- Details of the decision-making process in a particular case, as to whether enforcement action should be taken or not.

e. The prejudice test and the Public interest balancing test

The section 31 (2) purpose is linked to the prejudice test imposed by section 31 (1) and the test of the balance of the public interest. The information will only be exempt information if:

- Its disclosure under the Act would be likely to prejudice the exercise of an authority's regulatory functions for the purposes specified in section (2); and
- In all the circumstances of the case, the public interest in withholding the information outweighs the public interest in disclosing it.

How these tests will play in different regulatory contexts will depend on the nature of the regulatory regime and the particular information sought. But it should be borne in mind that there is a clear public interest in the satisfactory operation of statutory regulatory regimes in particular - a public interest which has after all been reinforced by Parliament in the parent legislation itself. Where a disclosure would or would be likely to have an adverse impact on that regime (that is, prejudice a relevant function), the regime's underlying policy should be clearly understood, considered, and where necessary articulated as part of the process of balancing the public interest both for and against disclosure. If the prejudice test has been satisfied, the policy underlying the statutory

regime in question is to some extent put in jeopardy, and the public interest to that extent weighs against disclosure. But the nature, magnitude and probability of the prejudice always have to be taken into account in balancing the public interest.

An example of the prejudice and public interest tests in the context of section 31(2)(a) to (c) can be seen from the exercise by the FSA of its powers to investigate problems which have been identified in a particular market. Disclosure of the fact that an investigation was taking place, the methods used (such as the use of mystery shoppers) and the factors taken into account in deciding whether to take regulatory action, might allow firms to take evasive action and artificially represent themselves in a favourable light and thus undermine the effectiveness of the investigation. That would be likely to prejudice its regulatory functions. There is a clear public interest in the proper operation of the markets; that is fundamental to the stability of the economy and the security of individuals and companies who rely on it, and underlies the entire regulatory regime. The prejudicial disclosure has a clear potential to inhibit the proper operation of market controls and therefore of the markets themselves. There is therefore a clear public interest weighing against disclosure.

On the other hand, disclosure of information itself has a part to play in the delivery of the policies underlying statutory regulatory regimes. Very often, these regimes are designed to provide public reassurance that particular activities are being conducted to reliable standards and by reliable people or bodies. Public confidence in regulated activities does rely to some extent on public confidence in the regulators and the proper conduct of regulatory activity. That can be enhanced by transparency, and the public interest in the disclosure of information in these areas must be fully taken into account.

It is therefore likely to be necessary at the same time to consider disclosure from the point of view of its potentially prejudicial effects in an individual case, and its potentially prejudicial effects on the operation of a regime more widely, at the same time. The public interest in avoiding that prejudice then has to be carefully weighed against the advantages of transparency and the public interest in disclosure.

An example

The following example considers the application of section 31(2)(c), with particular emphasis on the tests in the context of material potentially exempt under 31(2)(c): Ofsted receives a request for information relating to an investigation of a registered childcare provider that has been carried out with a view to ascertaining whether that provider should be de-registered, or whether other remedial action short of de-registration should be taken.

- **Where is the prejudice in disclosure?**

In performing its function of regulating childcare providers, Ofsted may exercise its discretion to pursue with providers the taking of steps to improve, rather than prosecuting or de-registering a provider. It may well be a better outcome to improve a childcare resource rather than lose it. However, the provider may be less likely to take a co-operative attitude, and to focus on the improvement of its performance, if information passing voluntarily between them and Ofsted, potentially damaging to their business, is disclosed. Thus, in disclosure, there is a likelihood of prejudice to Ofsted's functions, as they may be less able to deliver

improved standards in childcare; instead of better childcare, the result may be, unnecessarily, less childcare.

- **How does the public interest balancing test apply in this context?**

The public interest in being able to rely on the fitness and competence of childcare providers is acute - both in general terms and in particular cases. It is vital to the public interest that reliable childcare is available, and that providers of childcare are fit and competent, and supported in the maintenance of standards. The public interest in withholding the information under section 31(2)(c) might be that it gives support to remedial action short of de-registration. This, ultimately, increases the stock of good childcare available to the public, and impacts on the main function of having a regulatory system, the protection of children. It also helps maintain relationships between Ofsted and registered childcare providers in general.

But to maintain the exemption, this aspect of the public interest test will need to outweigh the public interest in parents knowing whether failings have been found in any registered childcare providers, to inform their choice. The regulatory system is intended to reassure the public that their children will be safe in the care of any registered provider and this may be undermined by a refusal to disclose the information.

These considerations have to be weighed up in the context of individual cases. What would be the nature, magnitude and probability of the risk to Ofsted's functions and to the public interests that they serve - both in general and in the specific case in particular? And what would be the effect of disclosing or not disclosing its interest (or lack of interest) in a particular childcare provider on the confidence which could be placed in that provider's undertaking - and in the system more widely?

- **Relevance of neither confirm nor deny in this context**

If the exemption were maintained in this case, Ofsted may also need to consider the applicability of the "neither confirm nor deny" component of the exemption. Indicating whether or not information was held, could itself disclose information about whether there had been an investigation for remedial action, and that in itself could undermine the willingness of providers to improve their services. The public interest in maintaining the disapplication of the duty to confirm or deny would then be in improving the quality of childcare provision, although again it would have to be weighed against the public interest in awareness of regulatory interest (or lack of it) in a case.

f. Potential overlap with other exemptions:

Section 35 (formulation of government policy) - (Ofsted, is a Non Ministerial Government Department.)

Section 36 (prejudice to the conduct of public affairs) - premature disclosure of an investigation may allow childcare providers to give a false impression of the services they offer.

Section 40 (personal information) - if what was requested amounted to personal information then the request would have to be considered within the terms of section 40.

g. Duty to confirm or deny

The relevance of the exemption from the duty to confirm or deny may be of particular importance to regulators where a decision is being, or has been, taken as to whether it is appropriate to take regulatory action in a particular case. For example, in the context of the award of broadcasting licences, for OFCOM to reveal whether or not they had received a bid from a specified party is governed by the specific legislation governing licence awards (e.g. on awarding an ITV licence, OFCOM must publish certain information once bidding has closed, and invite representations), and the considerations underlying the maintenance of confidentiality in such circumstances would need to be taken into account. Sections 41 and 43 could also potentially be relevant here. Indeed, specific disclosure provisions may impliedly prohibit other forms of disclosure, in which case section 44 would be relevant.

Chapter 13: Section 31(2)(d) - the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on:

13.1 Fitness and competence

This "purpose" focuses on ascertaining a person's 'fitness or competence'.

- 'Competence' suggests 'ability' - the possession of adequate training, skills and experience for the function in question;
- 'fitness' on the other hand suggests 'suitability' - appropriate standards of good character and conduct or other general attributes.

'Fitness and competence' are applied to three separate groups of activities:

13.2 The management of bodies corporate

This relates to the fitness and competence of persons who are involved in management of corporate bodies. This will include company directors, but is not limited to them, and so can also include shadow directors or company secretaries. The management of corporate bodies is an extensively regulated activity and so there are may be considerable overlap with purpose at s.31 (2) (c).

For example, the Department of Trade and Industry carries out investigations into limited companies under the Companies Acts 1985 and 1989 and in some cases under the Financial Services and Markets Act 2000 and also considers complaints which may lead to investigations.

The Company Directors Disqualification Act 1986 ("the CDDA"), in particular, allows a court to order that a person be disqualified from being a director or shadow director of a company. The CDDA can also extend to directors of other bodies, such as NHS Trusts. Under the CDDA these persons can be prevented from being directly or indirectly concerned or taking part in the promotion, formation or management of a company or acting as an insolvency practitioner for various reasons. The reasons allowing the taking of such action include:

- following conviction for an indictable offence (section 2 CDDA);
- persistent breaches of companies legislation or following summary conviction for failing to file documents (ss.3 & 5 CDDA);
- fraudulent trading or fraud in the course of a company being wound up (s.4 CDDA);
- where the company has become insolvent and the director's conduct makes him unfit to be concerned in the management of a company (s.6 CDDA);
- where the Secretary of State ("SOS") considers it expedient in the public interest following specified types of statutory investigation or the use of specified statutory powers to obtain documents and the court is satisfied that the director's conduct makes him unfit to be concerned in the management of a company (s.8 CDDA)
- where an undertaking which is a company of which the person is a director commits breach of competition law and the court considers the director's conduct makes him unfit to be concerned in the management of a company (s.9A CDDA);
- following participation in wrongful trading (s.10 CDDA);
- following a debtor's failure to pay under a court administration order (s.12 CDDA).

In addition an un-discharged bankrupt person is automatically barred from acting as a director of a company or be concerned in the promotion, formation or management of a company etc. without the leave of the court (s.11 CDDA). And a person subject to a disqualification order under Part II of the Companies (Northern Ireland) Order 1989 may not act as a director of a company (as defined in s.22 of CDDA) or be concerned in the promotion, formation or management of such a company unless he has leave of the High Court of Northern Ireland, and such a person may not be an insolvency practitioner (s.12A CDDA).

On the specific issue of 'unfitness', s 9 of the CDDA provides that the court shall take into account certain matters when determining a person's unfitness for the purposes of the Act. Schedule 1 to the CDDA sets out some of those matters but it is not exhaustive. Part 1 sets out the matters applicable in all cases and Part II sets out the matters applicable where a company has become insolvent. Some matters applicable in all cases are :-

- any misfeasance or breach of a fiduciary or other duty owed by the director to the company, and
- any misapplication of assets or conduct making the director liable to the company,

and some matters applicable only where a company has become insolvent are :-

- the extent of the director's responsibility for the causes of the company's insolvency
- the extent of the director's responsibility for the company's failure to supply goods or services that have been paid for (in whole or part).

In circumstances where a disqualification order could have been sought under either s.6 or 8 of the CDDA, s.1A (inserted by the Insolvency Act 2000) allows the SOS to accept

a disqualification undertaking where he considers it expedient to do so. The OFT may accept a disqualification undertaking in the circumstances described in s.9B of the CDDA (inserted by the Enterprise Act 2002.)

Different maximum periods of disqualification apply depending on which sections of the CDDA is used to obtain a disqualification order or undertaking with the highest being 15 years. S. 13 of the CDDA makes it a criminal offence to act in contravention of a disqualification order or undertaking, and the maximum penalty is 2 years' imprisonment, an unlimited fine or both. A disqualified person may seek leave of the court to act as a director or in the management of a company (s.17 CDDA) or to vary the terms of a disqualification undertaking (s.8A CDDA). Companies House maintains a list of disqualified directors. CDDA applies to building societies and incorporated friendly societies as it does to companies. The provisions of the CDDA also apply to limited liability partnerships.

13.3 The Prejudice Test and the Public Interest Balancing Test

The section 31 (2) (d) purpose is linked to the prejudice test imposed by section 31 (1) and the test of the balance of the public interest. A request for information may be refused only if:

- its disclosure under the Act would be likely to prejudice the exercise of an authority's functions or civil proceedings for the purpose specified and
- in all the circumstances of the case, the public interest in withholding the information outweighs the public interest in disclosing it.

Much will depend on the nature of the information being sought.

Where a disclosure would or would be likely to prejudice an authority's functions or civil proceedings in this area, the public interest in avoiding that prejudice will need to be weighed against the public interest in disclosure.

To justify withholding the information requested, the public interest in doing so must outweigh the public interest in disclosing. In practice those who conduct investigations into and institute proceedings against those not fit and competent to manage companies rely heavily on information voluntarily disclosed from third parties. Disclosure of this information may inhibit the sources of information open to such public authorities and prejudice their functions.

In a free market, all those who deal with companies should be protected from misleading, unethical or incompetent practices, so there is a strong public interest in ensuring that there is an effective system in place to ensure that misconduct in relation to the running of companies comes to light and that applications for disqualification orders are made where appropriate.

On the other hand disclosures confirming an investigation is underway may serve to warn members of the public who have dealings with the company or individual being investigated e.g. those who own, or are considering buying franchises from a franchise operation whose directors are under investigation. This would have to be balanced against the risk of prejudice to the investigation that might be caused by premature disclosure. This will depend on the facts of the case.

13.4 Scope of section 31 (2) (d) - general points relating to limitations and overlap

a. Sections 21 and 44

There may be statutory provision for disclosure or non disclosure of information obtained for purposes under section 31 (2) (d). As with other exemptions public authorities will need to look at any relevant domestic or EC legislation to consider whether section 44 (prohibitions on disclosure) will apply. They should also consider whether section 21 (alternative rights of access) apply before considering sections 30 and 31.

For example, the Department for Trade and Industry has investigatory powers under section 447 of the Companies Act 1985. However, section 449 of the Companies Act 1985 prohibits disclosure of information obtained under section 447, and thus section 44 of the Act should be considered first.

There may well be an overlap with other exemptions such as: -

- Section 30 (investigations and proceedings conducted by public authorities), in particular, sections 30(2)(a)(iii) and (b) where the information has been obtained from confidential sources
- Section 31 - other purposes under section 31(2) such as ascertaining whether regulatory action should be taken
- Section 40 personal information
- Section 41 Information provided in confidence
- Section 43 (commercial interests) where a company director is subject to investigation by the DTI this may damage the confidence of consumers, creditors and shareholders
- Section 44 (Prohibitions on disclosure)

However, in many instances it will be more obvious that the exemption on which a public authority seeks to rely, in relation to all or some of the information, should be section 31(2)(d).

b. Any profession

There is no special definition of 'profession' in the Act but the term is widely recognised as referring to an occupation for which there are specific qualifications and which is subject to a code of conduct or ethics which might be regulated by the profession itself or by an independent body.

This part of the section 31(2)(d) 'purpose' is restricted to ascertaining whether a person is fit or competent in relation to any profession.

The functions most likely to be exercised by public authorities in relation to this purpose will be considering authorising a person to practice as a professional or investigating complaints against professional alleging they are not fit and competent to carry out the activities commonly carried out by such professionals.

Many professions are self-regulatory and unlike section 31(2)(c), section 31(2)(d) does not require the public authority to be exercising statutory functions when ascertaining whether a person is fit and competent.

However, many professions are regulated by statute and there will be considerable overlap with section 31(2)(c) in relation to information obtained when considering applications to licence person or in investigations as to whether to remove authorisation to practice as a professional. However, this information will more obviously fall within 31(2)(d).

Some examples of situations in which public authorities may exercise relevant functions follow:

- the Department for Education and Skills exercises functions pursuant to sections 141 and 142 of the Education Act 2002 for the purpose of ascertaining a person's fitness or competence to work in the education sector including the teaching profession;
- it is possible that a public authority may hold information which is highly relevant to the question of whether a solicitor due to appear before the Solicitors Disciplinary Tribunal for misconduct is guilty of such misconduct. This is particularly possible in the case of the Legal Services Ombudsman and Legal Services Complaints Commissioner, for example, dealing as they do with complainants about members of legal professional bodies.
- Under the Medical Act 1858, a doctor must be licensed by the General Medical Council ("GMC") in order lawfully to practice in the UK. In granting a licence the GMC will consider whether the person's competence to practice medicine by requiring them to show that they have a recognised medical qualification. The person must also show that they are fit to practise. The GMC will also consider complaints from the public and other bodies, which cast doubt on a doctors fitness to practise.

An example

The GMC receives a request from a member of the public for information relating to investigations into complaints received against doctors who practise at their local surgery.

- Where is the prejudice in disclosure?

In performing its function of protecting patients the GMC can exercise their discretion to send the doctor concerned a letter of advice or warning where the matter is not serious enough o warrant further action. Such measures will not be made publicly known, unlike other decisions on a doctors fitness to practise. If information of this nature was disclosed, it would undermine the effectiveness of the GMC's action because doctors may be less willing to co-operate with the GMC to improve their services if they could not be sure that their discussions and correspondence would remain confidential. Thus, in disclosure there is a likelihood of prejudice to the GMC's functions, as they may be less able to maintain the standards the public have a right to expect of doctors.

- How does the public interest balancing test apply in this context?

The public interest in withholding the information may well be that it gives support to warnings given so that doctors seek to improve their services impacting on the main function of the GMC of maintaining standards the public should expect from doctors. It may also harm the GMC's relationship with the medical profession at large if it was to routinely disclose such information.

The public interest in being able to rely on the fitness and competence of doctors is extremely high - both in general and to individual patients. The GMC is charged with maintaining the standards the public have a right to expect from doctors and in protecting patients from harm.

It could also be said that there is a public interest in patients being satisfied that appropriate action is taken against doctors falling short of proper standards of fitness or competence.

These considerations will need to be weighed up in the context of individual cases.

- Relevance of neither 'confirm nor deny' in this context?

If the exemption were to be maintained in this case, the GMC would then need to consider the applicability of the "neither confirm nor deny" component of the exemption indicating whether or not information was held, could of itself disclose information about whether there had been a complaint or investigation. This could undermine the willingness of doctors to improve their standards to those considered acceptable by the GMC and the professional body at large. The public interest in maintaining the disapplication of the duty to confirm or deny would then be in improving the standards of medical care, although it would have to be weighed against the public interest in awareness of the fact that the person may have fallen below the standards of a fit and competent doctor

c. Potential overlap with other exemptions

- | |
|---|
| <ul style="list-style-type: none">• Section 30 (confidential sources in investigations by public authorities)• Section 31 (2(c) (regulatory action pursuant to an enactment)• Section 40 (personal information) |
|---|

d. Any other activity which a person is, or seeks to become, authorised to carry on

- The activity must be carried on, or sought to be carried on, under 'authorisation', whether granted by the public authority or by some other body. This authorisation could take the form of a licence, permit etc but does not necessarily require authorisation to be under statutory criteria.
- The granting of the authorisation must be subject to considerations of fitness and competence.

Most 'authorisation' of this nature is pursuant to the statute and therefore covered by other subsections. Overlap with those sections will be considerable. This limb of the subsection is essentially aimed at ensuring that less formal authorisation for which the criteria will amount to fitness or competence can fall within the terms of the exemption. Examples in central government will be rare but departments may have information relating to authorisations by a public authority to drive vehicles on their sites for which no national licence is required (MOD authorise the driving of tanks), permissions to use

the land of the public authority by another person or body or the authorisation of individuals to carry out voluntary work on behalf of charities.

e. Public Interest Test

Of course each case must be considered on its facts but these types of authorisations tend to be of a lesser order than ones covered by earlier provisions. It may therefore be harder to demonstrate that the public interest in avoid prejudice to the process outweighs the public interest in the process of being transparent. The same public interest considerations may apply as referred to in relation to more highly regulated professions and activity above but the weight to be attached to them is likely to be lower so care should be exercised in seeking to rely on this section to withhold information.

There is a clear public interest in ensuring the probity and competence of the members of what may be still essentially self-regulating professions, but also in the transparency of investigations into allegations of misconduct or serious incompetence against them. The balance has to be drawn between ensuring transparency of process and potentially prejudicing the exercise by a public authority of its functions in relation to that process, and hence the public interest in the process being operated fairly and efficiently and not being affected by disclosures. Depending on the nature of the misconduct alleged (for example, if it involves fraudulent activity, or, say, a solicitor "laundering" for clients) there may be a read-across to other exemptions such as other aspects of section 31 where, for example, a criminal prosecution or other legal proceedings are a possible outcome.

f. Potential overlap with other exemptions

- Section 31(2)(b) (statutory regulation)
- Section 40 (personal information)

Chapter 14: Section 31(2)(e) - ascertaining the cause of an accident

This "purpose" is capable of covering any sort of accident investigation from, at one end of the spectrum, routine 'slips and trips' or other minor incidents in the work place, to, at the other, accident investigations which are reserved to specific bodies dedicated to such matters. As examples of the latter:

- the Health and Safety Commission and Executive play an important role in investigating accidents under Part I of the Health and Safety at Work etc Act 1974;
- the Air Accident Investigation Branch and Marine Accident Investigation Branches of the Department for Transport are responsible for investigating the causes of air and shipping accidents respectively (a Rail Accident Investigation Branch is due to become operational in spring 2005);
- the police and local authorities also play an important role in investigating road traffic accidents.

All accident investigations have in common the aim of improving safety by the establishment of the causes of accidents and subsequently making recommendations or reports with the aim of improving safety. It is important to note that there is a strong public interest in establishing the cause of accidents - and the more serious the

accident, the greater is likely to be the public interest. A disclosure likely to prejudice the exercise by a public authority of its functions for this purpose, therefore, would to that extent be contrary to the public interest.

The Air and Marine and future Rail Accident Investigation Branches (the AIBs) are required to determine the causes of accidents in order to learn lessons to prevent future accidents. To perform this function, accident investigators must be able to form a complete and independent view about the root causes of accidents. Statutory provisions (draft provisions in the case of the RAIB) prohibit the disclosure of information by the AIBs and help to achieve that independence (and to that extent section 44 of the FOIA needs to be considered). The policy underlying that is that unrestricted and premature disclosure can lead to speculative and unjustified conclusions about the causes of an accident and hence pressure for action that may be ineffective or inappropriate; as a result, the root causes of the accident, and the means of preventing them in future, may not be properly addressed. Unrestricted disclosure which is likely to prejudice the exercise by the AIBs of their functions will to that extent be contrary to the public interest.

Some of the information collected by AIB investigators is, for a variety of reasons (e.g. personal, commercially sensitive, technically advanced, etc.) provided in confidence specifically to assist the investigation. The disclosure of such information beyond the direct requirements of the investigation is likely to result in reduced co-operation from such sources in the future (there is another overlap here with the exemptions in sections 30(2) (information obtained/recorded by investigating authorities from confidential sources), 40 (personal information), 41 (information provided in confidence) and 43 (commercial interests). Again, such disclosures could prejudice the exercise by the AIBs of their functions and be contrary to the public interest. There may also be occasions where national security/defence exemptions will be relevant to information held by the AIBs.

But it is also important to recognise the public interest in the transparency of accident investigations. Particularly to the extent that the investigation is intended to reassure public opinion and restore confidence in public safety, there will be a corresponding public interest in demonstrating the competence of the investigation. For this reason, investigating authorities will seek to be as open as possible in ensuring that families of victims, those directly affected, and where appropriate the public are kept informed of the broad progress of investigations. In many cases a report or findings will be published (and in this context sections 21 and 22 may need to be considered).

Although this "purpose" focuses on ascertaining the causes of an accident, accident investigations are capable of serving more than one purpose. And public bodies other than the AIBs may simultaneously be undertaking investigations with a view to apportioning responsibility (including legal responsibility) for an accident. Because of that, other exemptions likely to be relevant in this area include:

- other limbs of section 31 (e.g. prejudice to the administration of justice) and section 32 (court records) - where, for example, a criminal prosecution or other legal proceedings are a possible outcome
- section 40 (personal information) - for example where the role of an individual in an accident is an issue

- section 43 (commercial interests) - for example where the role and reputation of a business is at stake

In cases concerning environmental information, the Environmental Information Regulations will of course have to be considered.

Chapter 15: Section 31(2)(f) - (h) - charities

These provisions address three "purposes" related to safeguarding the position of charities:

- protecting charities against misconduct or mismanagement in their administration (this would, for example, include the investigation of claims that charity trustees had been exercising their powers for their own personal benefit, instead of in the interests of the charity; such an investigation could be followed by the suspension or replacement of trustees who had been found to be acting in this way);
- protecting the property of charities from loss or misapplication (this would, for example, include the protection of charitable funds from the risk of misapplication by requiring their transfer to the Official Custodian for Charities);
- recovering the property of charities (this could ultimately involve the institution of civil proceedings for restitution against those who are responsible for breaches of trust causing loss to a charity, and/or against people who had improperly obtained a benefit as the result of a breach of trust).

These purposes are therefore strongly linked to the legal and regulatory framework which governs the administration of charities and their property. Official regulation is a part of the process of assuring public accountability, and gives confidence to those who support charities. The Charity Commission is established by law as the regulator and registrar for the majority of charities in England and Wales. The Commission's statutory functions are exercised for, amongst other purposes, the three purposes set out above. In fulfilling this role the Commission will investigate complaints or other evidence of cause for concern, and then take protective or remedial action, either through the direct use of its powers or through the threat/institution of civil proceedings.

This provision is not, however, limited to the purposes of the Charity Commission. Other public authorities also have functions exercised for the three purposes set out above; for example there are sector-specific regulators, such as the Housing Corporation in relation to registered social landlords, which have a substantial charitable constituency, and there is also the Attorney General.

The Attorney General has a substantial role under both statute and common law in protecting the interests of charity in general. For example the Attorney General may be a necessary party in claims concerning a charity, and he may also instigate or intervene in proceedings himself to protect the charity interest.

Public authorities also need to be aware of other less formal ways in which charity protection purposes may be encountered. Many aspect of public life are delivered in charitable contexts (for example all schools, except community schools and those conducted for private profit, are charities). The charity purposes in section 31 are not

limited to functions in relation to charities in general, nor to functions under specific legal frameworks.

The disclosure of information could prejudice the exercise by a public authority of its functions for one of these purposes in a variety of ways. For example, prematurely revealing details of an investigation designed to establish the existence of vulnerable property could lead to the dissipation of the property by those currently in control of it. Revealing a regulator's operational priorities could, in a general way, facilitate the abuse of charities by assisting people to structure the abuse in a way which is unlikely to attract regulatory attention.

The public interest in avoiding any prejudice to the exercise by a public authority of functions for one or other of the three purposes stated above is implicit in the fact that charities, by definition, operate in an altruistic way for the benefit of the public, and obtain tax and other privileges, such as easier access to public funding, on that basis. Of course, the section 2 balancing act still has to be performed. The prevention of more widespread "copycat" abuse through prompt publicity may be a more significant public interest consideration than securing an optimal outcome in one particular case.

Several other exemption provisions of the FOIA are of potential relevance to these charity "purposes". While the Charity Commission itself has not criminal investigation functions, some charity maladministration involves the commission of criminal offences. The investigation of these by the police, and their prosecution by the CPS does of course have an impact on the protection of charities and the Commission co-operates fully in such matters. Also, some charities are companies, subject to the DTI's regulatory jurisdiction.

Chapter 16: Section 31(1)(i) - (j) - health and safety

16.1 Background

The 'work' context of these two purposes locates them in the context of the legal and regulatory framework governing health and safety at work.

The principal source of that framework, the Health and Safety at Work etc. Act 1974, was largely based upon the report of the Robens Committee on Safety and Health at Work (1972 Cmnd 5034). Part I of the Health and Safety at Work etc. Act 1974 aims to secure the health, safety and welfare of persons at work; to protect persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work; controlling the keeping and use of explosive or highly flammable or otherwise dangerous substances, and generally preventing the unlawful acquisition, possession and use of such substances.

These aims are achieved by the progressive replacement of existing statutory provisions with a system of regulations and approved codes of practice operating in conjunction with other provisions found in Part I of the 1974 Act.

The provisions of Part I of the 1974 Act apply to employment and employers generally, including the government departments and the police (save that sections 21-25 and 33-42 do not bind the Crown). The duties of an employer (and the self-employed) towards employees and others are set down in general terms in sections 2-4 of the 1974 Act. The 1974 Act establishes the Health and Safety Commission and the Health and Safety Executive ("HSE").

The 1974 Act empowers HSE and other enforcing authorities (local authorities) to appoint inspectors (s.19) who have wide powers (ss. 20-25). Inspectors have powers to issue improvement and prohibition notices (ss21-23), requiring that breaches of health and safety law be corrected, or directing the cessation of activities giving rise to a risk of serious personal injury. There is also power to enter premises to deal with the cause of imminent danger (s.25). Inspectors have power to prosecute (s.38).

16.2 The health and safety "purposes"

The differences between these two "purposes" should be carefully noted.

- The first focuses on securing the health, safety and welfare of persons at work themselves. This therefore is likely to be a purpose encountered in every public authority in relation to its obligations towards its own staff.
- The second relates to the protection of third parties from health and safety risks connected with the actions of persons at work (eg by the use of dangerous machinery)

In other words, the first case looks at the protection of workers, the second at the protection of others from workers. There is an area of overlap: the activities of one group of workers may pose risks to others (for example during building work on office premises).

The key terms in relation to these "purposes" - health, safety and welfare are not defined in the Health and Safety at Work etc Act 1974, nor, definitively, in caselaw - although they have from time to time been considered by the courts.

In relation to health - this is apt to cover both physical and mental health, and these purposes comprehend not only the protection of good health but also protecting the sick from becoming worse. In the particular context of the 1974 legislation, it was intended to refer principally to employees' health (whether physical or mental) as affected by work activities; it was not in that context considered apt to refer to the health generally of persons who happened to be employees, nor to curative treatment (which were thought to be the concern of the NHS).

Safety may be given its natural meaning. It relates principally to physical integrity. A suggestion has been made in the case law that "safe" should too casually be equated with "not dangerous", because a concern with safety extends to the prevention of risk of injury arising from the state or condition of the work place and not just to the prevention of risks that are reasonably foreseeable.

Conceptually, and historically in terms of pre-1974 factories legislation, welfare is distinct from - and goes beyond - health and safety. Welfare in the work context covers what might be described as the "long term" end of the health spectrum - for example amenities such as seating facilities, washing arrangements, heating and lighting and so on. Lack of provision may not be directly damaging to health, but may in the long term have cumulative ill-effects upon health - e.g. bad backs, strained eyesight etc.

In one case decided at common law rather than under the 1974 Act, the court decided that a secretary who worked in a smoky atmosphere was entitled to claim constructive

dismissal. While smoke could not be proved to amount to a risk to her health, it was held that it certainly affected her welfare.

16.3 The Public Interest Test

The clear public interest in securing the health, safety and welfare of employees and others who may be affected by the activities of those at work is attested to by the legislative and regulatory framework which governs it. Clearly, these purposes are capable of being both advanced and impeded by the disclosure of information.

16.4 Related provisions

The regulatory and prosecutorial functions of the HSE and other enforcement authorities indicate several connections with other parts of section 31. Section 38 (health and safety) may also be relevant.