



## EXEMPTION NOTE

### Section 31 Investigations and legal proceedings

This note is one of a series intended to provide practical guidance on the exemptions set out in the Isle of Man Freedom of Information Act 2015 (FOI).

Requests for information must be considered on a case by case basis and the Information Commissioner will review decisions on the facts of each case.

## THE EXEMPTION

Section 31 states:

### 31 Investigations and legal proceedings

- (1) Information held by a public authority is qualified exempt information if it has at any time been held by the public authority for the purposes of —
  - (a) an investigation that the public authority has a duty to conduct to ascertain whether —
    - (i) a person should be charged with an offence; or
    - (ii) a person charged with an offence is guilty of it;
  - (b) an investigation, conducted by the public authority, that in the circumstances may lead to criminal proceedings being instituted; or
  - (c) any criminal proceedings that the public authority has power to conduct.
- (2) Information is qualified exempt information if —
  - (a) it was obtained or recorded by the public authority for the purposes of its functions relating to
    - (i) investigations covered by subsection (1);
    - (ii) criminal proceedings that the public authority has power to conduct;
    - (iii) investigations other than investigations covered by subsection (1) that are conducted by the public authority, by virtue of powers conferred by or under any enactment, for a purpose specified in section 32(3) (purposes for which law enforcement exemption available); or
    - (iv) civil proceedings that are brought by or on behalf of the public authority, which arise out of investigations mentioned in this subsection or subsection (1); and
  - (b) it relates to the obtaining of information from confidential sources.

## THE MAIN POINTS

1. This is a qualified exemption.
2. To apply the exemption the PA does not have to demonstrate that disclosure would cause prejudice.
3. If the PA determines that the exemption can be applied to some, or all, of the information sought in a request, the PA must still go on to consider the public interest in the information and determine whether “the public interest in maintaining the exemption outweighs the public interest in disclosing the information”.

The Information Commissioner has published guidance on the public interest and further advice is contained in Section 3 of the Code of Practice.

4. There are two distinct parts to the exemption. Subsection (1) concerns information held by the PA in relation to investigations and criminal proceedings conducted by the PA under statutory functions, whilst subsection (2) protects information obtained by a PA from confidential sources for the purpose of its investigations or criminal proceedings.

**Subsections 31(1)(a)&(b): information held by a PA in relation to investigations and criminal proceedings**

5. The exemption set out in subsection (1) can only be applied to information held by a PA that has duties or powers to investigate offences and institute criminal proceedings. A duty is something that the PA is obliged to do, whereas a power simply allows the public authority to do something. A PA has discretion over whether it exercises its powers.
6. Although this exemption is most likely to be applied to information held by the Constabulary, there are other PAs who have a duty to investigate offences which may lead to a suspect being charged. The PA must be able to demonstrate how, by reference to common law or statute, the duty to investigate arises and which offence or offences are relevant.
7. Any investigation must be, or have been, conducted by the PA with a view to ascertaining whether a person should be charged with an offence, or if they have been charged, whether they are guilty of it.
8. The exemption may be applied to information held by a PA as a result of an initial process intended to determine whether a particular matter warrants an investigation, provided that the further investigation would be to determine whether to charge someone with an offence, or whether someone charged is guilty, regardless of the outcome.
9. It is not necessary for the investigation to result in someone being charged with, or being convicted of an offence. The exemption can be applied to protect information even if the investigation fails to establish that an offence has been committed, or concludes that there is insufficient evidence to charge anyone.
10. The exemption may be applied to information held by the PA that was obtained through investigations that took place after someone has been charged.
11. The PA may apply the exemption to information that it has held at any time for investigations or proceedings provided the other requirements of the exemption are satisfied. The exemption can be applied to protect information that the PA continues to hold when the information is no longer required for a specific investigation or proceeding.
12. Usually the powers or duties are conferred on the PA. However, some powers are conferred upon specific officers within the PA, for example a Constable. This does not prevent the PA from applying the exemption.
13. The exemption can be applied to information obtained by a PA during an investigation where initially no criminal proceedings had been envisaged but subsequently are. In contrast, where, after investigation, a PA decides that no criminal proceedings may be instigated; the exemption may be applied to information held by the PA that was created or obtained prior to that decision but not to information created or obtained thereafter.

**Subsection 31(1)(c): criminal proceedings that the PA has power to conduct**

14. This exemption can be applied by a PA that lacks investigative functions but has the power to conduct criminal proceedings, such as the Attorney General's Chambers.
15. The exemption is intended to dovetail with subsections 31(1)(a) and (b) to provide protection throughout the investigative and prosecution stages of the criminal justice system. For example, section 31(1)(a) may be applied to protect information held by the police for its investigation, while section 31(1)(c) can be applied to protect the information and any additional information generated by Chambers.

### **Subsection 31(2): confidential sources**

16. Confidential sources are an important means of gathering intelligence. The exemption may be applied by a PA to protect confidential sources and thereby ensure sources continue to provide information. The need to safeguard the supply of such information is an important factor when considering the public interest.
17. To apply the exemption information must relate to the PA's investigations or proceedings and relate to confidential sources.
18. The exemption can be applied to information that was not obtained or recorded for a particular investigation provided it was obtained or recorded by the PA for its functions relating to those investigations or proceedings. For example, confidential sources are used by the police to assist in their investigations and therefore the exemption can be applied to information obtained from a confidential source in relation to the general duty to investigate criminal offences even though the information may not have been obtained for a particular investigation.
19. The relevant investigations and proceedings for which this exemption can be applied are set out in subsection 31(2)(a). Broadly they are same as those described in subsections 31(1)(a) and (b) but also include investigations conducted for the various purposes specified in subsection 32(3) and any civil proceedings that may arise as a result of such investigations.

### **OTHER CONSIDERATIONS**

1. The exemption from the duty to communicate information provided by section 32 (law enforcement) cannot be applied to information that is exempt under section 31; they are mutually exclusive.
2. Section 32 protects a range of investigations which are not covered by section 31, but any information relating to the use of confidential sources in those investigations is protected by subsection 31(2).
3. The two exemptions complement one another, for example:
  - The police could use section 31 to protect information obtained from a public authority whilst investigating a crime on its premises. Section 32 could be used to protect the same or similar information held by the public authority if its disclosure by the public authority would prejudice the police's investigation.
  - Section 31 would protect forensic evidence gathered during a police investigation and section 32 could protect information detailing the procedures for collecting that forensic evidence if disclosing it would prejudice the detection of crime.

### **FURTHER RESOURCES**

**APPENDIX 1: IOM Commissioner Decisions & IOM Case law**

**APPENDIX 2: Other Commissioner Decisions & Case law**

## APPENDIX 1 IOM Commissioner Decisions & Case law

### IOM Commissioner Decisions

None

### IOM Case law

None



## **APPENDIX 2**

### **Other Commissioner Decisions & Case law**

#### Note

Neither the Commissioner nor the Court are obliged to follow decisions or case law from other jurisdictions.

#### **UK Information Commissioner Decisions**



## Scottish Information Commissioner (SIC) Decisions

The SIC's decisions are available at: [www.itspublicknowledge.info/decisions](http://www.itspublicknowledge.info/decisions)

Decision Number	Parties	Summary
250/2014	Tom Minogue and Police Scotland	Mr Minogue asked for information about a gold wreath recovered by the police, which was the subject of a civil action to establish its true owner. The SIC rejected Mr Minogue's argument that the Chief Constable had raised the action in a personal rather than a professional capacity, and went on to conclude that Police Scotland were entitled to apply the exemption. Considering the public interest, the SIC accepted that the action engaged Mr Minogue's civil rights, as he was a party to the action, but did not accept that determination of these rights required disclosure of the information. On balance, the SIC concluded that there was a greater public interest in maintaining the exemption and allowing the information to be considered by the court in the course of the civil action.
087/2010	Lyndsay Moss and NHS Lothian	Ms Moss wanted to know how many dentists had wrongly made claims to NHS Lothian and how much money it was trying to get back from those dentists. NHS Lothian was in the process of pursuing civil proceedings against a number of dentists, so applied the exemption. The SIC decided that the information Ms Moss had asked for (the total sum NHS Lothian was trying to get back) was too far removed from the specific civil proceedings to be considered as information obtained or recorded for the purposes of civil proceedings.
019/2010	Russell Findlay and Northern Constabulary	Mr Findlay asked Northern Constabulary for background information about an alleged assault which had been the subject of a press release. The Constabulary refused to disclose the information. The SIC agreed that it was exempt from disclosure and concluded that, on balance, the public interest lay in maintaining the exemption: while there was a public interest in scrutinising the actions of the police and in ensuring that criminal investigations are carried out thoroughly, this was outweighed by the public interest in ensuring that ongoing investigations were not compromised
037/2009	Steven Stewart and various police forces	Mr Stewart wanted to know how much individual police forces had paid informants. While the SIC accepted that individual payments could be linked to a particular investigation, the total amount paid to informants was not information which was, or had been, held for the purposes of an investigation, but was recorded for accounting purposes and not exempt.

Decision Number	Parties	Summary
104/2007	Catherine Cameron and Strathclyde Police	Ms Cameron wanted to know the identity of an individual who had been reported to the prosecutor. The SIC was satisfied that the exemption applied to the information.
085/2007	Robert Dowdles and Strathclyde Police	Mr Dowdles asked the Police about a Fraud Squad investigation. Although no proceedings had been taken, the Police had a duty to conduct an investigation to ascertain whether someone should be prosecuted for an offence. The SIC accepted that the information was created and held for the purposes of an investigation and, as such, fell within the exemption.
057/2007	Lilian Gordon and Grampian Police	Mrs Gordon asked for a copy of the report compiled by Northern Constabulary into complaints she and her son had made about Grampian Police. Grampian Police withheld the report under a number of exemptions, including section 34(3). The SIC took the view that the purpose of this exemption was not to protect the information gathered from confidential sources, or necessarily the confidentiality of the source itself, but to protect information relating to the obtaining of information from those sources. In other words, information is exempt if it is about the process of gathering the information - how such information is gathered, how informants are recruited and how information obtained from confidential sources is transmitted.

## Case law

### UK Tribunal decisions

