

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 7 May 2024

**Public Authority:** Attorney General's Office  
**Address:** 102 Petty France  
London  
SW1H 9EA

#### **Decision (including any steps ordered)**

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1. The complainant requested information relating to specific material that was gathered during a review commissioned by the then Attorney General.
2. The Attorney General's Office (AGO) refused to provide the requested information, citing section 31(1)(c) (law enforcement) of FOIA.
3. The Commissioner's decision is that the AGO is entitled to rely on section 31(1)(c) of FOIA to refused to disclose the withheld information.
4. The Commissioner requires no steps to be taken as a result of this decision.

#### **Background**

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5. Following the Court of Appeal's judgment in the Unaoil case (R v. Akle and Anor) in December 2021, the then Attorney General commissioned

Sir David Calvert-Smith to conduct an independent review into the Serious Fraud Office's (SFO's) handling of the case<sup>1</sup>.

6. The purpose of the review<sup>2</sup> was to:
- (a) consider the findings of the Court of Appeal in R. v Akle & Anor [2021] EWCA Crim 1879 (10 December 2021); and
  - (b) make recommendations to the Attorney General in the light of those findings, including as to the SFO's policies, practices, procedures, and related culture.

## Request and response

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7. Following earlier correspondence, on 3 August 2023 the complainant wrote to the AGO and requested information in the following terms (names have been redacted):
- "1. Please confirm whether the AGO (through the Calvert-Smith Review) holds any material in connection with [name redacted]'s involvement in PVT02; and
  - 2. If so, provide material which, from within the 76 records already identified (as set out above) and following de-duplication, is responsive to the following search terms:
    - a. Search 1:
      - i. Search term: Petrofac OR [redacted] OR "PVT02"
      - ii. Date range: 1 July 2019 to 31 December 2019
    - b. Search 2:

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<sup>1</sup> <https://hansard.parliament.uk/commons/2023-05-24/debates/23052456000005/SeriousFraudOfficeHandlingOfTheUnaoilCaseIndependentReview>

<sup>2</sup>

[https://assets.publishing.service.gov.uk/media/6202844fd3bf7f31548fb815/Terms\\_of\\_Reference.pdf](https://assets.publishing.service.gov.uk/media/6202844fd3bf7f31548fb815/Terms_of_Reference.pdf)

- i. Search term: (Petrofac OR "PVT02") AND [redacted]
    - ii. Date range: None.
  - c. Search 3:
    - i. Search term: ([redacted] OR [redacted]) AND [redacted]
    - ii. Date range: None.
8. The AGO responded on 4 September 2023. It cited section 41 (information provided in confidence) and section 31(1)(c) (law enforcement) of FOIA.
9. Following an internal review, the AGO wrote to the complainant on 9 October 2023. It maintained its application of section 31 but said that it no longer considered that section 41 applied.

### **Scope of the case**

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10. The complainant disputes the AGO's application of section 31(1)(c) to the requested information. The Commissioner acknowledges that the complainant provided further information in support of their complaint while his investigation was in progress.
11. During the course of his investigation, the Commissioner had access to all of the withheld information. That information comprises 76 electronic records, of varying sizes.
12. With respect to his consideration of the withheld information, the Commissioner was greatly assisted by the manner in which it was presented for his inspection and consideration.
13. The analysis below considers the AGO's application of section 31(1)(c) of FOIA to the requested information.

### **Reasons for decision**

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#### **Section 31 Law enforcement**

14. Section 31(1) of FOIA creates an exemption from the right to know if disclosing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities.
15. In this case, the AGO is relying on subsection (c), the administration of justice.

16. Section 31 is a prejudice-based exemption. This means a public authority can only rely on it where disclosing the information (or confirming or denying that it holds the information) could cause harm. To demonstrate the harm, it must satisfy a prejudice test.
17. In order for the exemption to apply, it must be the case that if the withheld information was disclosed, it would, or would be likely to, cause prejudice to the matters referred to in the subsection cited. Three criteria must be met:
  - the actual harm which the AGO envisages must relate to the applicable interests within the limb of the exemption it has cited;
  - there must be a causal relationship between disclosure and prejudice to those interests. This prejudice must be real, actual or of substance; and
  - the AGO must show that the level of prejudice it envisages is met – ie it must demonstrate why disclosure 'would be likely' to result in prejudice or, alternatively, why disclosure 'would' result in prejudice.
18. Accordingly, the Commissioner expects the AGO to answer the following three questions:

“Which law enforcement interest(s), protected by section 31, could be harmed by the disclosure?

Is the harm you have identified real, actual or of substance and is there a causal link between disclosure and that harm?

What is the likelihood of that harm actually occurring: would it occur, or is it only likely to occur?”.
19. Consideration of the exemption at section 31 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **The AGO's position**

20. By way of background, the AGO told the complainant:

“The Attorney General superintends the SFO and, in that capacity, receives information from it in relation to ongoing investigations and prosecutions for the purposes of ensuring its effective and efficient administration. It was in this capacity that the Attorney General ordered the Calvert-Smith Review and received the information which you have requested”.

21. In correspondence with the complainant, the AGO referred to the SFO's published case update where it states:

"Petrofac Limited's conviction and sentencing [brought] a conclusion to the investigation into suspected bribery and corruption as far as the corporate entity (and its subsidiaries) [was] concerned. The investigation into the conduct of individual suspects continues".

22. The AGO argued, not only that charges may still be brought, but also that it is standard for further investigation to take place, even after a charging decision has been made, in part to bolster the prosecution.

23. It also explained:

"The release of material into the public domain relating to an ongoing investigation at any stage, except as deemed appropriate by the prosecuting authority or required by the criminal law, is likely to prejudice the administration of justice and prosecution of offenders".

24. Similarly, in its submission to the Commissioner, the AGO explained that there is a real risk that the disclosure, outside of ordinary criminal procedure, of information relating to the continuing investigation and prosecution could be prejudicial, including with respect to possible further lines of enquiry.

25. With respect to the likelihood of prejudice, it confirmed that it is relying on the lower threshold – would be likely to.

### **The complainant's view**

26. The complainant considers that neither the AGO's supervisory role nor the court proceedings could be harmed by disclosure of the information in scope of the request.

27. They also dispute that the existence of other access regimes prevents the AGO from disclosing the requested information under FOIA.

28. They told the Commissioner that the disclosure process in relation to criminal proceedings under the CPIA [Criminal Procedure and Investigations Act 1996] is entirely separate from the duty of a public authority to disclose information under FOIA.

29. They argued that they are separate processes, with different criteria, and different material may fall to be disclosed under each of them. They emphasised that their FOIA request to the AGO "includes information that will not be covered by CPIA disclosure".

## **Is the exemption engaged?**

30. In his published guidance<sup>3</sup>, the Commissioner states:

“In broad terms, the exemption will apply where disclosing information would harm either your ability, or the ability of another body, to enforce the law”.

31. The Commissioner also recognises that:

“The administration of justice is a broad term. It applies to the justice system as whole. Amongst other interests, the exemption protects information whose disclosure could undermine particular proceedings”.

32. Of relevance in this case, he acknowledges that the purpose of section 31(1)(c) is not only to protect information whose disclosure could undermine particular proceedings, but also to protect law enforcement agencies from disclosures that could interfere with their efficiency, effectiveness or their ability to conduct proceedings fairly.

33. The withheld information in this case relates to information provided to the AGO in connection with an independent review into the Serious Fraud Office’s (SFO’s) handling of a particular case.

34. The AGO has argued that disclosure would be likely to interfere both with the ongoing investigatory process and with other access regimes by which such information is provided, namely the common law and statutory disclosure regimes. These are clearly matters that relate to the administration of justice.

35. The Commissioner recognises the importance of protecting information which, if disclosed, is capable of undermining law enforcement activity.

36. On the evidence provided, the Commissioner is satisfied that the AGO has demonstrated a causal link between the requested information and the applicable interests relied on, and that disclosure is capable of having a detrimental impact on law enforcement.

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<sup>3</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-31-law-enforcement/>

37. Having considered the arguments put forward by the AGO, the Commissioner is satisfied that the lower level of 'would be likely to occur' is met in this case.
38. As the three criteria set out above are satisfied, the Commissioner considers that section 31(1)(c) of FOIA is engaged.

### **Public interest test**

39. Section 31 is subject to the public interest test, as set out in section 2 of FOIA. This means that although section 31 is engaged, the information must be disclosed if the public interest in disclosing the information is equal to, or greater than, the public interest in protecting the matters referred to in subsection 1(c).
40. The Commissioner addresses the matter of when to consider the public interest test in his guidance:<sup>4</sup>

"In carrying out the public interest test, you should consider the circumstances at the time you respond to the request in accordance with statutory timeframes for compliance. That is, at the 20 working days limit.

[...]

The [Montague] decision also means that the ICO will take a similar approach when investigating complaints under section 50 of FOIA. That is, the Information Commissioner will assess how you carried out the public interest test by reference to the time of your decision which will not include the time of the internal review, if you conducted one".

### **Public interest in disclosure**

41. The complainant argued that there is clearly a public interest in the disclosure of the material in scope of the request. They argued that disclosure would provide transparency by enhancing public understanding and ensuring good decision making.
42. They also considered that it would be in the public interest if disclosure in this case avoided a costly and unnecessary trial.

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<sup>4</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/the-public-interest-test/#pit6>

43. The AGO recognised the public interest in transparency, particularly where there have been issues in the handling of a case.

### **Public interest in maintaining the exemption**

44. In favour of maintaining the exemption, the AGO told the complainant that the public interest in understanding the events which resulted in the judgement of the Court of Appeal was met by publication of the Calvert-Smith Review, which was part of a process to ensure the good conduct and decision-making of the SFO.
45. In its submission to the Commissioner, the AGO referred to the context in which it holds the requested information. In that respect, it argued:

“... that there is a public interest in maintaining the strength of the Attorney General’s superintendence relationship with the SFO. That accountability relationship requires the full, frank and candid exchange of information between the SFO and AGO. It would be damaged by the disclosure of information which was provided by the SFO to AGO for a clear and limited purpose”.

### **The balance of the public interest**

46. The Commissioner accepts that the complainant believes that there is a strong public interest in transparency, particularly in light of the findings of the Court of Appeal and of the independent review that provides context to the request in this case.
47. In the circumstances of this case, the Commissioner recognises the need to ensure transparency and accountability.
48. However, in carrying out the statutory balancing exercise in this case, the Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption. In this case he has considered the public interest in avoiding likely prejudice to law enforcement matters, specifically in avoiding prejudice to the administration of justice.
49. While the Commissioner recognises the valid public interest in favour of disclosure of the requested information relating to the Calvert-Smith review, he nevertheless considers that the public interest in avoiding prejudice to the administration of justice is the weightier factor here.
50. His decision, therefore, is that the AGO was entitled to rely on section 31(1)(c) to withhold the information.



## Right of appeal

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51. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

52. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
53. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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