

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

### **Decision notice**

**Date:** 1 November 2022

**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 has requested information about the Attorney General's consent to prosecute in a particular case. The Attorney General's Office ('the AGO') refused the request, citing sections 31 (Law enforcement) and 42 (Legal professional privilege) of FOIA.
2. The Commissioner's decision is that the AGO was entitled to rely on section 31(1)(c) of FOIA to refuse the request.
3. The Commissioner requires no steps to be taken as a result of this decision.

#### **Request and response**

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4. On 10 May 2022, the complainant made the following request for information to the AGO:

"By way of reminder, we represent [name redacted] in connection with the charges brought against [him] by the Serious Fraud Office (SFO), relating to allegations that bribes were paid to officials in [redacted].

...

In our letter dated 3 March 2020, we made a request under section 8 of FOIA for confirmation of (a) the date the SFO [Serious Fraud Office] referred the matter to the SFO [sic] for consent to prosecute [name redacted] under the Prevention of Corruption Act 1906; (b) the date the Attorney General provided such consent to the SFO; and (c) the reasons why consent was given by the Attorney General. You

responded to our request under cover of your letter dated 2 April 2020, confirming that (a) the SFO first requested consent to prosecute in November 2016, (b) that consent was given on 10 December 2019 and, (c) the Attorney General made his decision by applying the well-established prosecution principles of evidential sufficiency and public interest.

In light of that response, pursuant to section 8 of FOIA, please provide confirmation of whether the Attorney General holds the information listed below (under section 1(1)(a)), and if so, please provide a copy of such information or where applicable confirmation of the following (under section 1(1)(b)).

1. Whether the SFO made any subsequent request(s) for consent to prosecute after November 2016 and if so, the date of such request(s), given your reference in your letter to the "first" request for consent.
  2. A copy of the SFO's request(s) for consent to prosecute.
  3. A copy of the Attorney General's consent to prosecute.
  4. Without prejudice to the generality of (1) – (3), a copy of any correspondence and/or file notes between the SFO and Attorney General in relation to:
    - a. the SFO's request for consent;
    - b. the SFO's investigation into the allegations of corruption in [location redacted] relating to [project name redacted]; and
    - c. the SFO's investigation into the allegations of corruption in [location redacted] relating to [project name redacted].
  5. A copy of any internal notes or other memoranda explaining the basis of or reasons for the Attorney General's decision to grant consent to prosecute."
5. On 8 June 2022, the AGO responded to the request. It confirmed that it held the requested information. It answered point (1) and provided the information requested in point (3). It said that the information requested in points (2), (4) and (5) was exempt from disclosure under sections 31(1)(c) (Law enforcement), 41 (Information provided in confidence) and 42(1) (Legal professional privilege) of FOIA.
6. At internal review, the AGO withdrew reliance on section 41. However, it maintained that sections 31 and 42 had been correctly applied. For section 31, it increased the likelihood of prejudice, from "would be likely to prejudice", to "would prejudice" the administration of justice.

## Reasons for decision

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### Section 31 – Law enforcement

7. Section 31(1)(c) of FOIA provides an exemption where disclosure of the relevant information would, or would be likely to, prejudice the administration of justice. The Commissioner's guidance on section 31<sup>1</sup> states the following regarding section 31(1)(c):

"The administration of justice is a broad term. It applies to the justice system as whole. Amongst other interests, the exemption will protect information if its disclosure would undermine particular proceedings. To this extent there is an overlap between section 31(1)(c) and the previous exemption, section 31(1)(b) which protects the process for prosecuting offenders.

...

As well as preventing any prejudice to particular cases, section 31(1)(c) can protect a wide range of judicial bodies...from disclosures that would in any way interfere with their efficiency and effectiveness, or their ability to conduct proceedings fairly."

8. The Commissioner will accept that prejudice to the administration of justice "would" occur where that outcome is more probable than not. As the AGO has argued that disclosure "would" prejudice the administration of justice, that is the test that the Commissioner has applied here.
9. The AGO explained that certain criminal offences cannot be prosecuted without the agreement of the Attorney General<sup>2</sup>. Prosecutors must first decide whether there is enough evidence for a charge. Then, an application for consent to prosecute must explain the prosecutors' reasoning, freely and frankly; in considering such an application, the Attorney General will receive legal advice on whether to grant consent, or explaining the reasons for and against granting consent. Such submissions must also be detailed, free and frank.

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

<sup>2</sup> <https://www.gov.uk/guidance/consent-of-the-attorney-general-to-prosecute-how-to-apply>

10. In explaining its position that prejudice would occur, the AGO argued that the administration of justice relies upon an expectation that the confidentiality of legal communications will be upheld. The information requested in points (2), (4) and (5) of the request reveals information that was pertinent to the decision taken by the Attorney General to grant consent to prosecute in a particular case. The AGO said that the information was compiled "in the expectation that they are not public documents and with an expectation of candour consistent with that."
11. The AGO argued that any perception that such information was potentially disclosable to the world at large, under FOIA, would, in future, result in fewer applications for the Attorney General's consent to prosecute being made. It would also have a 'chilling effect', in that the disclosure of detailed information about particular prosecution decisions would inhibit free and frank discussions on similar matters in the future. The resultant loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision-making in relation to serious criminal matters. The AGO argued that both outcomes would inevitably undermine the administration of justice.
12. It said:

"I consider it would prejudice the administration of justice if such documents were to be disclosed, contrary to the expectation in which they were produced...To be clear, disclosure would be prejudicial to the submission of applications for consent in the future including the ability of the AGO and SFO (and CPS [Crown Prosecution Service]) to correspond freely and frankly (about an application for consent or about live cases) and the Attorney to receive free and frank advice. That is not a trivial harm. I say "would" because future consent applications will undoubtedly be made, and there will continue to be cases on which the SFO (and CPS) needs to brief the AGO freely and frankly; in both cases that would undoubtedly occur in the knowledge that those applications and correspondence could potentially be disclosed; in consequence of that they would be drafted/recorded/communicated differently."

13. The Commissioner has had regard to the nature of the information requested, which is very specific, relating as it does to the consent of the Attorney General to prosecute in a particular set of proceedings. The Commissioner is satisfied that it is more probable than not that disclosure would inhibit submissions for consent to prosecute made to the Attorney General, and submissions made by legal advisers, in the ways that that the AGO has described. He considers that this would undermine the process by which consent to prosecute is sought and given, and he therefore considers that the higher bar of "would" prejudice the administration of justice is met.

14. The Commissioner also notes that the criminal case to which the request relates is currently awaiting retrial. He considers that placing the withheld information in the public domain before the trial would, in effect, interfere with the defendant's right to a fair trial.
15. Taking all the above into account, the Commissioner is satisfied that section 31(1)(c) of FOIA is engaged.
16. When considering whether the public interest favours maintaining the exemption or disclosing the withheld information, the Commissioner has taken account of the public interest in accountability in law enforcement, and the role that transparency plays in encouraging public confidence in public authorities that are tasked with upholding the law. He is also aware of the personal interest that the complainant's client has in the matter.
17. However, appropriate weight must be afforded to protecting the administration of justice, which is what the exemption at section 31(1)(c) is designed to address. The Commissioner notes the AGO's statement that prejudice to the administration of justice "would" result from the disclosure of the withheld information. He considers that this strengthens the case for maintaining the exemption.
18. The Commissioner considers that any reduction in the number of requests for the Attorney General's consent to prosecute, purely because of concerns that highly sensitive evidential information might be disclosable under FOIA, would clearly undermine the administration of justice. Similarly, any reduction in the frankness and candour of the submissions made to the Attorney General risks, as an outcome, poorer decision-making in regard to whether or not to prosecute. The Attorney General requires access to detailed, comprehensive and candid advice, in order to make well-informed decisions in respect of very serious matters.
19. The Commissioner considers the public interest in ensuring the prosecution process is effective, efficient and supported by adequate evidence and advice to be a compelling argument in favour of maintaining the exemption. While he acknowledges that the public interest in openness and transparency would be served if the information was disclosed, on balance, he finds the public interest in protecting the Attorney General's access to full, candid and uninhibited assessments of the legal position in relation to serious criminal matters to be the stronger argument.
20. Consequently, he is satisfied that, in this case, the public interest favours maintaining the exemption. It follows that his decision is that the AGO was entitled to rely on section 31(1)(c) of FOIA to refuse points (2), (4) and (5) of the request.

21. In light of this decision, the Commissioner has not gone on to consider the AGO's application of section 42 of FOIA. However, the Commissioner notes that he recently upheld the application of section 42 when considering a similar request for information to the AGO<sup>3</sup>.

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<sup>3</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4019661/ic-99498-d3x8.pdf>

## **Right of appeal**

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22. 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)

23. 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.
24. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Samantha Bracegirdle**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**