

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

### **Decision notice**

**Date:** 29 October 2018

**Public Authority:** HM Crown Prosecution Service Inspectorate

**Address:** One Kemble Street

London

WC2B 4TS

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

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1. The complainant has requested information relating to a report published by HM Crown Prosecution Service Inspectorate ("HMCPISI"). HMCPISI disclosed some information and withheld the remainder, citing the exemption at section 33 (audit functions) of the FOIA.
2. The Commissioner's decision is that HMCPISI was entitled to rely on section 33 to withhold the information. She requires no steps.

### **Background**

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3. HMCPISI inspects the work carried out by the Crown Prosecution Service ("CPS") and other prosecuting agencies. The purpose of its work is to enhance the quality of justice and make an assessment of prosecution services that enables, or leads to, improvement in their efficiency, effectiveness and fairness.
4. Under the Criminal Procedure and Investigations Act 1996 and its accompanying Code of Practice, in criminal cases police and prosecutors have a duty to disclose to the defence any material that might assist the defence's case or undermine the prosecution's case.
5. In July 2017, HMPCSI (with the participation of HM Inspectorate of Constabulary, Fire and Rescue Services ("HMICFRS")) published an

inspection report, *"Making it Fair: The Disclosure of Unused Material in Volume Crown Court Cases<sup>1</sup>"*. The report analysed in detail the disclosure process, from start to finish. HMICFRS was responsible for reporting on the processes followed by police forces, and it conducted interviews, surveys and focus groups with police officers and police staff. HMCPSI followed the same procedure in respect of the CPS. The resultant report identified a number of issues which it said were contributing to widespread failures with regard to disclosure by both police and prosecutors.

## Request and response

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6. On 18 January 2018, the complainant wrote to HMCPSI and requested information in the following terms (for brevity, only those parts of the request in respect of which the complainant wishes to challenge HMCPSI's response are reproduced):

*"Please note that much of the information relates to HMCPSI's joint report with HM Inspectorate of Constabulary, Making it fair: The disclosure of unused material in volume Crown Court cases (18 July 2017) (henceforth 'the report')."*

*The information requested is as follows:*

*1. Available transcripts or notes from the "police focus groups" referred to at paragraph 4.6 of the report, with any personal data (such as names of the participants) redacted;*

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*5. The names of the police forces who reported "that they have previously engaged experts who have provided training which was subsequently shown to be wrong" (paragraph 10.4) and the text of these reports;*

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*8. Copies of earlier drafts of the report including any tracked changes and comments."*

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<sup>1</sup> <https://www.justiceinspectorates.gov.uk/cjji/inspections/making-it-fair-the-disclosure-of-unused-material-in-volume-crown-court-cases/>

7. HMCPSI did not receive the request, and only became aware of it when the complainant sent a chaser on 12 February 2018. It responded to the request on 16 March 2018.
8. For part 1 of the request, it confirmed that it held information and disclosed some of it to the complainant, but made redactions for information which was exempt under sections 33(2) (audit functions), 40(2) (personal information) and 41(1) (information provided in confidence) of the FOIA.
9. For part 5, it confirmed that it held information but advised that it was exempt from disclosure under section 33(2) of the FOIA.
10. For part 8, it confirmed that it held information but that it needed further time to consider the public interest arguments for and against disclosing the draft reports. Subsequently, on 22 March 2018, HMCPSI informed the complainant that section 33(2) applied in respect of the draft reports. It said the public interest favoured maintaining the exemption in respect of the earlier drafts of the report, but favoured disclosure in respect of later drafts, which it disclosed.
11. HMCPSI also offered to meet with the complainant to discuss the report.
12. The complainant requested an internal review on 23 March 2018. With regard to the disclosure made in response to part 1 of the request, he challenged the decision to redact text in the sentence "*Impromptu focus group [REDACTED] 18/02/17*" at the top of page 25 of the document *2018-03-12 CCA FOI request – item 1 Police focus groups.pdf*. He believed the redaction identified a particular police force and he wanted to know which one.
13. He also challenged the decision to refuse part 5, under section 33(2) and the decision to maintain the exemption at section 33(2) to withhold the earlier drafts of the report, requested at part 8.
14. HMCPSI provided the outcome of the internal review on 10 May 2018.
15. For part 1 of the request, it maintained that section 33(2) had been applied correctly to the redaction identified by the complainant.
16. For part 5, it upheld the application of section 33(2) to withhold the information.
17. For part 8, it upheld the application of section 33(2) to withhold the earlier drafts of the report.

## Scope of the case

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18. The complainant contacted the Commissioner on 29 May 2018 to complain about the way his request for information had been handled. He challenged HMCPsi's decision to maintain the exemption at section 33(2) in respect of parts 1 (for the specified redaction only), 5 and 8 of the request. He believed that for each part, the public interest favoured disclosure. Additionally, for part 5, he also queried why HMCPsi could not at least disclose the text of the allegations that had been made in the focus groups that incorrect training had been delivered, without disclosing the identity of the police force involved.
19. The analysis below considers the application of section 33(2) to withhold information in respect of parts 1, 5 and 8 of the request. The Commissioner has had sight of the withheld information.

## Reasons for decision

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### Extent of information held

20. With regard to part 5, and the complainant's belief that the text of allegations about incorrect training could be disclosed without identifying the police force involved, HMCPsi has explained to the Commissioner that it does not hold such information. It said:

*"By way of background the information gathered during focus groups are only part of the evidence gathered in an inspection. As such the notes of these meetings are only intended to be used internally to inform judgements as part of the inspection process. Depending on the inspector's preference these notes may be directly typed during the meeting or they may take a brief hand written note and type them up after. Any handwritten notes would be destroyed soon after the note is typed up. For this focus group we have found no handwritten notes so assume they were either typed into the laptop directly or destroyed once typed up as is the normal practice."*

21. The Commissioner is satisfied from the information that HMCPsi has provided to her about how the inspection reports are compiled, that, on the balance of probabilities, it does not hold the text of the reports referred to in part 5 of the request.
22. HMCPsi considers that all of the requested information it does hold engages section 33(1)(b) of the FOIA, by virtue of section 33(2).

### **Section 33 – audit functions**

23. Section 33(1)(b) states that the exemption applies to any public authority which has functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.
24. Section 33(2) of the FOIA provides that information is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).
25. When considering the application of the exemption, it is important first to establish whether HMCPsi has the audit functions specified in section 33(1).
26. The Commissioner's guidance on section 33<sup>2</sup> notes that the term "economy, efficiency and effectiveness" is not clearly defined. She considers that it would encompass information about inspections of the use of resources such as staff and premises, as well as the standard of services provided by the authority under inspection.
27. The Commissioner has had regard to HMCPsi's purpose and functions, as set out in paragraph 3, above. HMCPsi said that the withheld information in this case pertains to an inspection carried out on the disclosure of unused material in volume Crown Court cases. The inspection report was jointly authored with HMICFRS, with their respective responsibilities as set out in paragraph 4.
28. From the information it has provided, the Commissioner is satisfied that HMCPsi has the audit functions specified in section 33(1)(b) of the FOIA. Furthermore, from the detailed description HMCPsi provided as to the purpose and outcome of the inspection report, she is also satisfied that the inspection report at the heart of the request was compiled in pursuance of those functions, in that it was an examination of the economy, efficiency and effectiveness of the disclosure process.

#### *Likelihood of prejudice*

29. The Commissioner's next step is to consider whether disclosure of the information in this case would, or would be likely to, have a prejudicial effect on the functions performed by HMCPsi.

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<sup>2</sup> <https://ico.org.uk/media/1210/public-audit-functions-s33-foi-guidance.pdf>

30. In her guidance, the Commissioner explains that prejudice in the context of section 33 may take different forms. One possibility is that disclosure might affect the behaviour of the organisation being audited. Alternatively, a public authority might argue that disclosure would, or would be likely to, discourage cooperation with the auditor in the future thus prejudicing the audit function.

31. In addressing the question of prejudice in some detail, HMCPSI responded in respect of parts 1 and 5 (identities of police forces) and part 8 (copies of earlier drafts of the inspection report) of the request separately.

*Parts 1 and 5 (identities of police forces)*

32. HMCPSI said that disclosing the withheld information for parts 1 and 5 of the request would impact on the willingness of future focus groups, and other interviewees, to disclose important information which could not be obtained by other means. It said that such information would not be shared with it if the sources knew, or feared, that there was a risk of them being identified, and this would impact on the level of operational detail it would be able to gather through the inspection process. HMCPSI assessed the likelihood of prejudice to its functions in relation to section 33(1)(b) as being that prejudice *would* occur.

33. HMCPSI explained that much of the operational information which informs its assessments is gathered from focus groups and surveys. Staff are invited to participate on the basis that they will not be identified and thus may speak openly. This is a very important part of its inspection methodology and therefore of its overall audit functions under section 33(1)(b) of the FOIA. Through focus groups and surveys, inspectors get to engage with operational staff who experience how the criminal justice system works in practice, including its shortcomings. HMCPSI explained that while it has powers to compel the bodies it inspects to cooperate with its investigations, it cannot compel individual staff members to attend focus groups or to complete surveys, nor can they be compelled to be candid in sharing their views.

34. HMCPSI said that the information in this inspection report provided candid, operational insights that could not have been gathered by any other means than meeting with operational staff in an environment that was understood to be confidential. It cited another investigation where information came to light in a focus group which resulted in direct changes being made to operational processes as an example of the benefits of obtaining information in a truly confidential environment. HMCPSI said it is vital that assurances of confidentiality are not undermined, so as to preserve the integrity and flow of information obtained via these methods.

35. HMCPPI said that focus groups are often attended by junior members of staff of the bodies being inspected. If, in this case, it were to disclose the identities of the police forces, there is a significant risk that the individuals who participated could be identified by their managers, and that certain comments might be attributable to particular individuals. If, in future, participants thought that they might be capable of being identified in this way, it is likely that they would be less willing to share sensitive information with the Inspectorate.
36. Similarly, HMCPPI said that where senior stakeholders such as judges or senior police officers are being interviewed or surveyed, any perception that they may be identified and their comments attributed to them, would be likely to lead to them being more guarded in what they said. This effect would reduce the quality, insight and value of its inspection reports, and perhaps the most serious failings would not come to light because those interviewed would be less inclined to share sensitive information with inspectors.
37. HMCPPI also argued that the disclosure of the withheld information in this case would be likely to adversely affect the co-operation it receives from other criminal justice inspectorates, when engaged with them in joint inspections. This could undermine the quality and value of inspection reports, which would again impact on HMCPPI's ability to carry out its functions in line with 33(1)(b). HMCPPI assessed the likelihood of prejudice occurring to its functions as a result of this as being that prejudice *would be likely* to occur.
38. It explained that this was a joint inspection with HMICFRS, and that HMICFRS had been responsible for gathering information from police forces. HMCPPI said that such joint inspections are very important as they enable a process to be scrutinised from start to finish. Without HMICFRS's participation in this inspection, the final inspection report's focus would have been restricted to the CPS's part in the disclosure process, and it would not have been able to examine the decisions the police make with regard to disclosure, thus giving a 'cradle to grave' overview.
39. Currently, co-operation between the criminal justice inspectorates when conducting joint inspections is good, and information is freely shared. However, HMCPPI envisaged that disclosing the withheld information would be likely to prejudice the functions of HMICFRS in much the same way that it had described for itself. It envisaged that other criminal justice inspectorates with which it collaborates on joint inspections would be likely to be more circumspect about sharing 'their' information, so as to restrict the possibility of third party access to it. This would be likely to damage the quality of joint inspections and thus, HMCPPI's functions in carrying out joint inspections for the benefit of the criminal justice system.

*Part 8 (early drafts of investigation report)*

40. HMCPSI explained in its internal review that there are 49 draft versions of the final investigation report. It withheld 35 of the draft reports, made at an early stage in the process.
41. HMCPSI envisaged that disclosure of early drafts of the investigation report would have a chilling effect on the content of future reports, with inspectors being more circumspect in their assessments, resulting in less rigorous and robust reports being published. HMCPSI assessed the likelihood of prejudice to its functions in relation to section 33(1)(b) as being that prejudice *would* occur.
42. It explained that inspection reports develop from a preliminary document (made up of sections written by the different inspectors who form each inspection team), through a period of assessment by the team, to a version upon which the whole team is agreed. This version then goes forward for internal quality assurance.
43. The inspection team is made up of a number of inspectors who are allocated people to interview, courts/offices to visit and focus groups to organise. Once the field work is completed, each inspector will draft their findings and judgements. The team will then review and challenge each other's findings, before an internal reviewer challenges the work as a whole. This process is an important part of honing the final view to be expressed in the report and means that the first draft of an investigation report can look very different from later versions, once the checking and challenging process has concluded.
44. Disclosing the earlier drafts of the report would include disclosure of information that may subsequently have been proved incorrect or found to be unsupported by evidence when challenged by the team. HMCPSI considered there was a significant danger that, taken out of context, comments made in early drafts of the report which do not survive the review process would not only be misleading for the public, but could cause unwarranted damage to the organisation being inspected. Simply because a comment or allegation is made and recorded does not mean that it is necessarily either accurate or true. It may be based on a misunderstanding or it might arise from a grievance. It is the responsibility of the inspector to weigh what is said in focus groups against other information and data the inspector has access to, and to then reach an informed view of the position in the final inspection report.
45. HMCPSI believed that the prospect of such information being disclosed would result in future draft reports being written in a more circumspect way, with findings only committed to paper if the author is certain that they are correct.



*Likelihood of prejudice - the Commissioner's view*

46. The Commissioner considers that HMCPSP's audit function will be at its most effective where honest and candid views are received from the organisations it inspects. She accepts that individuals may be less willing to be candid during the inspection process if they perceive there to be a risk that they may be capable of being identified by third parties, in connection with the information they provide. Having looked at the information withheld in respect of parts 1 and 5 of the request, she considers that it may be possible for the police forces involved to identify the staff who attended the focus groups, and thus to identify who had made certain comments. Crucially, she also considers that even if this is not possible, the perception amongst focus group attendees may nevertheless be that it is, and this alone may affect how candid they feel they can be in future. The Commissioner therefore agrees with HMCPSP's assessment that if assurances of confidentiality are undermined, this would prejudice the functions at section 33(1)(b).
47. With regard to its arguments that the disclosure of early draft reports would have a chilling effect, impacting on the quality and value of future investigation reports by virtue of more circumspect reporting methods, the Commissioner considers that the early drafts provide a private space for inspectors to present key points for debate and challenge. Despite this, the Commissioner recognises that civil servants are expected to be robust and impartial in the execution of their duties, and that they should not be easily deterred from expressing their views or findings by the possibility of any future disclosure.
48. However, she also considers that it is very important for the investigative process, and thus for the proper exercise of HMCPSP's functions, that inspectors should be able to hold confidential, frank discussions so as to facilitate the making of appropriate and well evidenced decisions, capable of being justified and robustly defended. It is important for officials to be able to freely justify and maintain their thought processes when making decisions on investigation outcomes and recommendations, without fear of the routes leading to those decisions later being disclosed into the public domain. The Commissioner accepts that the loss of that private space would therefore have an impact on the quality and detail of the analysis recorded.
49. The Commissioner also considers the argument that organisations could be damaged by the disclosure of unverified (and thus potentially incorrect or untrue) information in early drafts to carry particular weight. The Commissioner considers it reasonable to believe that the disclosure of information which has been eliminated from the final report would lead inspectors to be more cautious in their drafting of reports, which would undoubtedly impact on the quality and value of the final report.

The Commissioner agrees with HMCPsi's assessment that the level of prejudice is the higher threshold of "would" prejudice.

50. Having taken account of all of the above, the Commissioner is satisfied that disclosure of the redacted information for parts 1 and 5, and the early drafts of the reports, would have a prejudicial effect on the functions performed by HMCPsi, and thus that section 33(1)(b) by virtue of section 33(2) is engaged.
51. The Commissioner's next step is to consider the public interest test.

*Public interest arguments in favour of disclosure*

52. The complainant has a professional interest in the operation of the criminal justice system. He explained that failure to act in accordance with the duty to disclose unused material to the defence can jeopardise a defendant's right to a fair trial, result in wrongful convictions and lead to trials collapsing.
53. He argued that the findings of the investigation report suggest that prosecutors are routinely failing to disclose material that should be made available to the defence, and that the focus group notes that he had obtained under the FOIA implied that officers from particular forces may have been deliberately trained to do this, or had received deficient training in this regard.
54. He argued that it was in the public interest that the identities of these police forces be revealed, so that they may be held publicly accountable and to allow anyone who believes their conviction may be unsafe as a result of incorrect disclosure procedures having been followed, to challenge it.
55. HMCPsi agreed that the most serious potential effect of a disclosure failure is a miscarriage of justice, although it said that a far more common outcome is the adverse impact on the day to day efficiency of the criminal justice system, due to abandoned trials and unnecessary adjournments.
56. HMCPsi considered that disclosure would serve the public interest in transparency and accountability in relation to alleged errors by a public authority (ie that police may have been trained incorrectly in disclosure procedures). It would facilitate the public to challenge the conduct of criminal proceedings initiated by that force. This would be particularly significant in terms of possible victims of miscarriages of justice and victims of crime knowing that officers who dealt with their case may have been trained to withhold evidence from the defence incorrectly.
57. HMCPsi also considered that disclosure would further public understanding of the inspection process. It said that disclosure of early

draft reports would be likely to increase public understanding of why the inspection process went on to reach the conclusions and recommendations that it did.

*Public interest arguments in favour of maintaining the exemption*

58. HMCPSI said that there is a definite public interest in the effective appraisal of criminal justice bodies through inspection. The disclosure of any information which would be likely to decrease the effectiveness of its inspection function is clearly not in the public interest.
59. It argued that there is a clear public interest in identifying shortcomings and weaknesses in the criminal justice system, so as to minimise the likelihood of miscarriages of justice and to reduce the financial burden caused by inefficiently conducted trials. It also considers that disclosure of the information would have an adverse impact on the quality and frankness of volunteered information, and would result in more circumspect inspection reports. This will reduce the quality and value of inspections, and the learning points which come from them, which would not be in the public interest.

*The balance of the public interest*

60. The Commissioner accepts that arguments in favour of disclosing the withheld information carry some weight. Information as to the police forces which allegedly received incorrect disclosure training (and thus, which might have made incorrect disclosure decisions as a result) would be of particular interest to someone wanting to investigate whether they might have been the victim of a miscarriage of justice. On that point, the Commissioner notes that the identities of the seven police forces who participated in the inspection report is disclosed at a footnote to paragraph 2.11 of the report, thereby offering a route by which discrete enquiries to this effect might be pursued with each force.
61. The Commissioner considers that, in this case, there are stronger public interest arguments in favour of maintaining the exemption, and that the public interest in ensuring that conditions exist in which top level reforms to a service as a whole can be identified and put in place, outweighs the public interest in examining the procedures used in individual cases. She has accepted in paragraph 49 that the early drafts of the report contain information which the bodies under inspection would regard as sensitive, and possibly unfair, and that they would have no reasonable expectation would be disclosed. The Commissioner considers it is reasonable to believe that this will adversely impact the relationship between HMCPSI and inspected bodies and their staff, potentially impacting on the quality of the information obtained and documented in future. She also accepts it would have a chilling effect on the content of future reports. It is clearly not in the public interest that

HMCPPI's ability to investigate is impeded or the value and insight of its inspections, diluted.

62. Just as the public will expect a publicly-funded body to be transparent and accountable, there will also be occasions when a public authority will need room to carry out its functions. The Commissioner considers that the nature of HMCPPI's role means that it may sometimes need space away from external scrutiny in order to operate effectively. An individual considering passing on confidential information on a voluntary basis will want some reassurance that sensitive information received by the public authority can be kept secure and without any risk of them being identified. The Commissioner accepted that disclosure would be likely to deter participants from volunteering information on a confidential basis in the future.
63. It is important that the public can and does have trust in the ability of HMCPPI to carry out fair and thorough inspections of criminal justice bodies. While disclosure would allow for public scrutiny of the process in this case, it would also undermine the trust of the people on which it relies to gather a true and candid picture during the inspection process. The Commissioner considers that damage to this trust would be very serious, and that it would negatively impact on the quality and value of subsequent investigations. This is an important point when assessing the public interest, as the value of the information to the public is not of a sufficient level to justify disclosure, in the face of the prejudice the Commissioner has accepted would arise.
64. Taking all of these arguments into account in this case the Commissioner has determined that the public interest in disclosure is outweighed by the public interest in favour of maintaining the exemption and that HMCPPI was entitled to withhold the information in this case.
65. The Commissioner has taken this view as she does accept that HMCPPI should be transparent in providing information on criminal justice system performance issues, but it must do so in a balanced way so as not to interfere with its inspection process or the carrying out of its functions. The real possibility of disclosure adversely impacting on the quality and value of HMCPPI's future inspection processes outweighs what value there might be in the information requested being disclosed.

## Right of appeal

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66. 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: 0300 1234504  
Fax: 0870 739 5836  
Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

67. 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.

68. 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**