

## Defence (section 26)

### Freedom of Information Act

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## Introduction

1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.
2. An overview of the main provisions of FOIA can be found in [the Guide to freedom of information](#).
3. This is part of a series of guidance, which goes into more detail than the guide, to help public authorities fully understand their obligations and to promote good practice.
4. This guidance explains to public authorities how the exemption provided by section 26 protects information, the disclosure of which might prejudice the defence of the British Islands, or the capability, effectiveness or security of the armed forces or that of any forces co-operating with them.

## Overview

- The exemption in section 26 applies to information, the disclosure of which would, or would be likely to, prejudice defence matters.
- The application of the exemption is not restricted to the Ministry of Defence (MoD). However, it is likely that only a small number of public authorities would regularly hold information which might fall under the section 26 exemption.
- Section 26 provides the public authority with an exemption from the duty to confirm or deny it holds the information but only where this would damage the defence of the British Islands, or the capability, effectiveness, or security of the armed forces.
- Section 26 is a qualified exemption. This means that it can only be relied upon where the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- It applies to all recorded information, including information contained in historical records.

## What FOIA says

### 5. Section 26 states:

26.-(1) Information is exempt information if its disclosure under this Act would or would be likely to prejudice-

- (a) the defence of the British Islands or of any colony, or
- (b) the capability, effectiveness or security of any relevant forces.

(2) In subsection (1)(b) "relevant forces" means—

- (a) the armed forces of the Crown, and
- (b) any forces co-operating with those forces,

or any part of any of those forces.

(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).

## Definition of terms

### 6.

**The British Islands** are defined in Schedule 1 of the Interpretation Act 1978 as meaning the United Kingdom, the Channel Islands and the Isle of Man.

**Colony** is defined in the same Act as meaning any part of Her Majesty's dominions outside the British Islands except for a Commonwealth country, a territory whose external relations is the responsibility of a country other than the UK, and any associated state. The current list of colonies is as follows:

- Anguilla
- Bermuda
- British Antarctic Territory

- British Indian Ocean Territory
- British Virgin Islands
- Cayman Islands
- Falkland Islands
- Gibraltar
- Montserrat
- Pitcairn Group of Islands
- South Georgia and the South Sandwich Islands
- Sovereign Base Areas on Cyprus (regarded as a colony under the terms of the Cyprus Act 1960)
- St Helena and its dependencies (Ascension Island and Tristan da Cunha)
- Turks and Caicos Islands

The term **armed forces of the crown** is not defined although guidance on section 26 prepared by the Ministry of Justice (now archived) says that “the Armed Forces of the Crown means any member or part of the regular or reserve naval, land and air forces of the United Kingdom.”

Special forces<sup>1</sup> are defined in section 84 of FOIA as “those units of the armed forces of the Crown the maintenance of whose capabilities is the responsibility of the Director of Special Forces or which are for the time being subject to the operational command of that Director”.

**Forces co-operating with the armed forces** would include foreign armed forces committed to collective defence arrangements, for example NATO or UN troops, and also those co-operating in more informal alliances such as the alliance in Afghanistan.

The words “**capability, effectiveness and security**” are not defined in FOIA. However information is covered by section 26 if disclosure could put the physical safety of the armed forces

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<sup>1</sup> Special forces are not part of the armed forces for the purposes of FOIA so do not constitute a public authority for these purposes. Information directly or indirectly supplied by or relating to any of the special forces is subject to an absolute exemption under section 23 of FOIA.

at risk, or otherwise impair their ability to carry out their duties.

## Information covered by section 26

7. The following are examples of information which might be covered by the exemption:
  - policy and strategy, planning and intelligence;
  - operational orders, tactics and rules of engagement;
  - general capability and effectiveness, for example the performance of troops or military equipment and weaponry;
  - plans and measures covering:
    - the maintenance of essential supplies and services needed for military operations;
    - military capabilities, current and future, including access to and availability of weaponry; and
    - defence or reinforcement of other countries including any formal or informal arrangements and agreements; and
  - less clearly related information such as details of fuel and other important supplies, and the location of telecommunications equipment and military transport.
8. It is not possible to provide an exhaustive list. A public authority will need to consider the application of the exemption under section 26 on a case by case basis, and consider the effects of disclosure based on the specific facts.
9. In reality only a small number of public authorities will regularly hold information falling under the section 26 exemption, for example fire authorities and those involved in emergency response planning.

### **Example**

Troops are often deployed to provide an emergency fire service during a fire fighters' strike. Information about the deployment and the numbers of troops involved could be exempt under section 26 if such information would be capable

of assisting an enemy or a potential enemy.

## The duty to confirm or deny

10. Section 26(3) exempts a public authority from the duty to confirm or deny whether information is held if to do so would or would be likely to prejudice the interest protected by the exemption.
11. A public authority seeking to rely on section 26(3) must be able to explain how confirming or denying that information of a given description is held could pose a risk to defence matters or the safety of troops.
12. If the disclosure of certain facts would assist an enemy, it would be reasonable for the MoD to neither confirm nor deny that it had it. For example specific military plans, deployments or engagements, or whether certain weapons were involved.

### Example

The appeal case of [Donnie Mackenzie v Information Commissioner, EA/2013/0251](#) (7 July 2014) concerned a request by the appellant for a list of directed energy weapons that the MoD had access to. The MoD refused to confirm or deny whether it held the requested information in reliance of s26(3) FOIA. The Commissioner issued a decision notice upholding the MoD's position.

The First-Tier Tribunal (FTT) accepted that "details of any UK capability in this area would be of considerable interest to any hostile power and would assist that power in devising counter-measures or give it reassurance that no counter measures were necessary. It would remove uncertainty and assist in the planning or execution of any hostile action. This would therefore prejudice the capability effectiveness and security of British forces".

13. Further advice on neither confirm nor deny provisions in FOIA is available in our separate guidance on [when to refuse to confirm or deny information is held](#).

## The prejudice test

14. The exemption is subject to the prejudice test. This means that the authority has to satisfy itself that the prejudice or harm concerns either the defence of the British Islands or any colony, or the capability effectiveness or security of any relevant forces.
15. The term 'would...prejudice' means that it is more likely than not to occur. 'Would be likely to prejudice' is a lower threshold although there must still be a real and significant likelihood of prejudice occurring. The authority must decide the likelihood of prejudice arising on the facts of each case. For more details on this, please see our [guidance on the prejudice test](#).

### **Prejudice to defence**

16. Section 26 defence interests are not restricted to periods of operational activity.
17. There will be a difference between what is required for the defence of a nation in peacetime, during a time of preparation for war, and during actual hostilities.
18. A public authority needs to consider what the defence of the nation may reasonably require at the time of the request, before deciding whether the exemption is engaged.
19. The defence of the nation is not confined to external threats. There is some overlap between the section 26 interests and the national security interests covered by section 24.

### **Prejudice to capability effectiveness or security**

20. The following list, though not exhaustive, gives examples of information that may prejudice the capability, effectiveness, or security of the armed forces if disclosed:
  - the composition of the force and location of ships, units and aircraft;
  - details of military movements;
  - details of casualties;
  - tactics, details of defensive positions, camouflage methods, weapon capabilities or deployments, force protection measures;
  - names or numbers of ships, units or aircraft; and

- names of individual servicemen or prisoners of war.
21. A public authority needs to identify the particular harm or damage that may arise when assessing the likelihood of prejudice.

**Example**

The exemption might be engaged where disclosure of information about the mechanics or reliability of military equipment could enable an enemy to sabotage that equipment or use the knowledge to its advantage.

The exemption would not be engaged if the enemy could not take advantage of the information or could not exploit any weakness in the equipment.

22. Information contained within a document carrying a security classification will not necessarily be exempt from disclosure. The markings and classifications attached to a document take into account a number of issues beyond defence. A public authority will therefore need to consider the specific facts of the case.

## The public interest test

23. There is a clear public interest in the defence of the country and its armed forces. Nevertheless the exemption is not absolute.
24. Section 26 is a qualified exemption. This means that, even if the information requested is exempt from disclosure, the public authority must decide whether the public interest in maintaining the exemption outweighs the public interest in its disclosure.
25. The public interest test provides the public authority with an opportunity to explain the severity of the damage that would be caused so it can be weighed against the public interest in disclosure.

## Arguments in favour of disclosure

26. FOIA does not list the factors that would favour disclosure but the Commissioner has suggested that factors in favour of disclosure include:
- furthering the understanding and participation in the public debate of issues of the day;



- promoting accountability and transparency by public authorities for decisions they take and the way they spend public money;
  - allowing individuals, companies and other bodies to understand decisions made by public authorities which affect their lives; and
  - bringing to light information affecting public health and safety.
27. The public may have more confidence in the authority and be more supportive of key decisions if they understand the rationale behind whether to deploy troops or go to war.
28. The public have a natural concern about the effectiveness of the armed forces, and any risks to the safety of military personnel and civilians.
29. Military action can result in loss of life, and subsequent discussions about the safety of equipment or direction of the operation. Disclosure of this information could support improvements to equipment or planning, and allow individuals to challenge the basis of decisions affecting them personally.
30. Disclosure also supports accountability and transparency in the use of public funds. The general public has a very clear interest in knowing that monies collected, for example through taxation, have been properly and efficiently spent. This might be seen as a strong argument in favour of releasing information about defence matters. However, there may be commercial interests of defence contractors to weigh against disclosure.

### **Arguments in favour of maintaining the exemption**

31. Factors that will carry significant weight in favour of maintaining the exemption include where disclosure of information:
- would or would be likely to compromise a specific military operation;
  - may have an adverse impact on the security or safety of military personnel or civilians, for example by revealing weapons transport routes; and
  - may reveal information received from an ally. That country may object to disclosure or consider it a breach of confidentiality. This could prejudice defence relations by restricting future exchanges of information or by jeopardising military co-operation.

32. The greater the risk to defence matters, or the safety, capability or effectiveness of the armed forces, the less likely it will be that the public interest will require disclosure of the information concerned.

### **Balancing the public interest arguments**

33. Applying the public interest test means weighing the harm that is identified in a particular exemption against the wider public interest that may be served by disclosure. The test must be applied on a case by case basis. Both the content and context of the information will be relevant when considering this test and determining the appropriate weight to be given to the benefits and detrimental effects of disclosure.
34. Certain factors can add weight to the arguments on either side and these will help decide where the balance of public interest lies.
35. The likelihood of prejudice will also be a key factor here. The stronger the likelihood of prejudice to defence, the stronger the public interest in maintaining the exemption.

### **Timing of disclosure**

36. Timing will be very relevant when considering the prejudice issues applicable under section 26. Information concerning the planning of a military action is less likely to cause harm after the military action has stopped.
37. There is also a legitimate public interest in disclosure of information that informs the public about historic events and provides an accurate record of past military operations.
38. However, information could still cause harm after actions have ceased or over time. Troops may continue to use military equipment whose reliability has been questioned in the past. If the information could assist an enemy in the future it is more likely to be covered by the exemption.

#### **Example**

The application of section 26 was considered in the Tribunal decision of [Chris Cole v the Information Commissioner and Ministry of Defence EA/2013/0042 & 43 \(30 October 2013\)](#)

The case involved two requests concerning operational use of the UK's Unmanned Aerial Vehicles (UAVs) - often referred to as drones - in Afghanistan.

The MoD provided some information but refused the rest of the information requested relying on section 26 of FOIA. They claimed that certain information was also exempt under section 27(international relations).

The Commissioner agreed with the MoD that section 26(1)(b) was engaged and that the public interest favoured maintaining the exemption.

The Tribunal upheld that conclusion on appeal, and said that section 26 "involves the life and death of service personnel, not just UK forces but those operating as part of the coalition ISAF forces in Afghanistan." Therefore, the exemption can be applied even if prejudice is not to UK forces.

The Tribunal also said that "appropriate weight needs to be attached to evidence from the executive branch of the government about the prejudice likely to be caused by disclosure of particular information."

The Tribunal emphasised that it had reviewed the evidence presented by the MoD and it did "not consider either of these phrases [risk to life and limb or life and death] to be overdramatising the level of risk that could be caused to the service men and women should the information be released and available to enemy forces in Afghanistan".

The information in this instance would cause "real risk to life of troops in Afghanistan, both now and in the future."

Where the capability, effectiveness and security of the forces is likely to be a matter of life or death, a "very substantial public interest" would be required to outweigh the public interest in maintaining the exemption.

In addition, the Tribunal also explained that, although the information "itself might be historical; it does still have relevance to the continuing campaign."

As a result, the Tribunal considered that there would need to be significant factors in favour of disclosure to outweigh the weighty factor of the public interest in maintaining the exemption (protecting life of forces and civilians in Afghanistan).

## Other information available in the public domain

39. A public authority should consider what, if any, information is in the public domain already. Information which could appear to be harmless might in fact cause prejudice when combined with information already in the public domain.
40. More information and examples can be found in our guidance on [the public interest test](#) and [information already in the public domain](#).

## Interaction with other exemptions

41. A public authority seeking to rely on section 26 should consider whether there is an interaction between section 26 and other exemptions in FOIA.
42. Section 23 and section 24 may interact with the section 26 exemption where defence concerns issues such as national security or matters relating to security bodies.
43. For further information read our detailed guidance on [security bodies](#), [safeguarding national security](#) and [How sections 23 and 24 interact](#).
44. Other exemptions which may be relevant include:
  - section 27 relating to international relations if disclosure might damage relations with an ally; and
  - section 43 relating to commercial interests, for example if disclosure of information would undermine the competitive position of a defence contractor who then decides not to work for the MoD.
45. These examples are not exhaustive. Other exemptions may apply. As always it is the specific circumstances of the case that will dictate the application of exemptions.
46. A public authority should provide the fullest response to the requester that details which exemptions apply to the information requested. It is not appropriate for a public authority to exhaust all of the exemptions in turn with the aim of withholding information.
47. In addition, there is an exemption from the subject access provisions for armed forces in the Data Protection Act 1998. Schedule 7 paragraph 2 says "personal data are exempt from the subject information provisions in any case to the extent to which the application of those provisions would be likely to prejudice the combat effectiveness of any of the armed forces of the Crown."

## Other considerations

48. This guidance relates only to FOIA. If the information is environmental, public authorities will instead need to consider exceptions under the EIR.
49. Additional guidance is available on our guidance pages if you need further information on the public interest test, other FOIA exemptions, or EIR exceptions.

## More information

50. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.
51. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
52. If you need any more information about this or any other aspect of freedom of information, please [contact us](#), or visit our website at [www.ico.org.uk](http://www.ico.org.uk).