

Security bodies (section 23)

Freedom of Information Act

Contents

What FOIA says	2
Exemption from the duty to communicate	3
Section 23(1) Information supplied by or relating to security bodies	3
Relates to	4
Sections 23(1) and 24(1) are mutually exclusive	4
Neither confirm nor deny – exemption from the duty to confirm that the information is held	4
Section 23(5)	4
When it is necessary to provide consistent responses	6
'In the territory of national security'	7
Balance of probabilities	8
Sections 23(5) and 24(2) are not mutually exclusive	9
Commissioner's approach to complaints	9
Ministerial certificates	10
Public interest test and section 23	10
The public interest and historical records	10
Interaction with other exemptions	11
More information	12

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 to fully understand their obligations and promote good practice.

4. This particular guidance forms part of a suite of complementary guidance along with '[Section 24](#)' and '[How sections 23 and 24 interact](#)' which should be read together.
5. This guidance explains to public authorities how the exemption in section 23 works to protect information that relates to a security body.

Overview

- Section 23 of FOIA provides an exemption for information that was provided by, or relates to, a security body. The term 'relates to' is interpreted broadly.
- The section lists those bodies covered by the exemption.
- It also provides an exemption from the duty to confirm whether information is held where such a confirmation or denial would itself disclose information relating to a security body.
 - This extends to information that is not already recorded.
 - Where the request is in the 'territory of national security', a denial that the information was held would reveal the security bodies were not aware of any such risk. This is sufficient to engage section 23(5).
- Section 23(5) can be used to provide consistent responses to a series of requests where inconsistent answers would itself reveal information relating to a security body.

What FOIA says

6. Section 23 states;

(1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

(3) Lists the security bodies which include the Security Service, the Secret Intelligence Service and other similar bodies.

(5) The duty confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3).

Exemption from the duty to communicate

Section 23(1) Information supplied by or relating to security bodies

7. To engage section 23(1), the requested information simply has to have been supplied directly or indirectly by one of the named security bodies, or relate to one of those bodies. As it is a class based exemption there is no need for the disclosure to prejudice the work of those bodies in anyway. For the purpose of this guidance the exemption will be referred to as protecting "information relating to the security bodies".
8. The security bodies are listed in subsection 3. The list of security bodies can be amended. For example the Serious Organised Crime and Police Act 2005 created the Serious Organised Crime Agency (SOCA) and they were added to the list. There are currently proposals to replace SOCA with the National Crime Agency, so further amendments are anticipated.
9. The exemption captures information supplied directly by a security body and information originating from a security body that is provided by a third party. In this way the exemption can protect intelligence as it is disseminated through different channels.

Relates to

10. The exemption is also engaged where information “relates to” a security body. The term “relates to” is interpreted widely and includes any information concerning or linked to the activities of a security body. However there will be a point when the connection between the requested information and a security body is too remote to engage the exemption.

Sections 23(1) and 24(1) are mutually exclusive

11. Section 24(1) can only be applied to information that does not fall within section 23(1). This means it cannot be applied to the same information, but it can be cited in the alternative. This is explained in our detailed guidance [How sections 23 and 24 interact](#).

Neither confirm nor deny – exemption from the duty to confirm that the information is held

Section 23(5)

12. Section 1(1)(a) of the Act requires a public authority to confirm whether it holds the information that has been requested. Section 23(5) provides an exemption from this duty. This allows the public authority to neither confirm nor deny that it holds the information. This is commonly referred to as NCND.
13. When considering the application of NCND provisions a public authority is not restricted to only considering the consequences of the actual response that it would be required to provide under s1(1)(a). For example, if it does hold the information the public authority is not limited to only considering what would be revealed by confirming that this is the case. It can also consider what would be revealed if it had to deny the information was held. It is sufficient to demonstrate that either a hypothetical confirmation or a hypothetical denial would engage the exemption.
14. It is not necessary to show that both potential responses would engage the exemption.

Security bodies (section 23)

20130226

Version: 2.0

15. As with section 23(1), the term “relates to” is interpreted widely. This, together with the fact the exemption extends to information “not already recorded”, means that it has the potential to be applied to a wide range of situations.

Example

In this hypothetical case the Home Office holds information on the investigations conducted by MI5.

The Home Office is asked for information on MI5’s investigation into a particular individual, Mr X. If MI5 is investigating Mr X, the Home Office will hold information and confirmation that the information is held would reveal this. The fact that MI5 is investigating Mr X is clearly information relating to a security body and so section 23(5) is engaged.

If Mr X is not being investigated, no information will be held. Denying the information was held will in effect reveal that MI5 is not currently interested in that individual. Disclosing the fact that MI5 are not interested in Mr X is itself information relating to a security body.

16. In the above example either a confirmation or denial would reveal information relating to a national security body. However there may be some situations where one of the possible responses would not disclose information relating to a security body. This will include situations where, if the information is held, it could have originated from a number of sources and not necessarily a security body.

Example

This is loosely based on the circumstances of the [*Norman Baker v Information Commissioner Additional Party Cabinet Office and National Council of Civil Liberties \(EA/2006/0045 04 January 2007\)*](#), but it should be noted that in the Baker case the public authority and Information Tribunal took a different approach to that discussed here.

The Home Office receives a request for information on whether permission has ever been granted to tap the phones of a particular company in the defence industry. It is in the public domain that a range of different agencies can be given authority to tap phones. Some of those bodies are listed as security bodies

Security bodies (section 23)

20130226

Version: 2.0

in section 23(3) but others such as the police and HM Revenue and Customs are not. Therefore confirmation that the company's phone had been tapped would not necessarily disclose anything about the activities of a security body.

However, if the Home Office denied that it held any information this would reveal that no security body had tapped the phones of the company. This would be information relating to a security body and so section 23(5) would be engaged.

When it is necessary to provide consistent responses

17. The NCND provisions can also be used to avoid risks caused by providing inconsistent responses to a series of similar requests. This is illustrated in the example below.

Example

Consider the Home Office receives a series of requests for information on allegations that a particular organisation has links with terrorism. If the organisation has not come to the attention of the Home Office at the time of the request then the Home Office may feel able to respond by saying that no information is held.

The same request is then repeated on an annual basis over the next few years.

By year four the Home Office has initiated an investigation and holds a report prepared by MI5. It is no longer able to respond by saying no information is held. However, if it suddenly changes its response and refuses to confirm or deny that the requested information is held this shift in position would clearly signal that the body has been investigated since the previous request.

The Home Office could avoid this problem by consistently refusing to confirm or deny that any information was held from the initial request. If the Home Office denied the information was held this would itself reveal that there had been no MI5 investigation.

18. It should be noted that the need for consistency is restricted to these circumstances, where there is a risk of establishing a

Security bodies (section 23)

20130226

Version: 2.0

pattern that if deviated from would signal a change in the activities of the security bodies. It will not be appropriate to automatically provide NCND responses to any request that touches on issues of national security or the work of the security bodies. The public authority will need to be able to explain its grounds for applying section 23(5) in its refusal notice and, if necessary, to justify its use of section 23(5) to the Commissioner. The Commissioner will expect the public authority to explain what series of requests it may receive and why there is a need to respond to those requests in a consistent manner.

'In the territory of national security'¹

19. Although a public authority can apply section 23(5) to a wide range of requests there are limits to its use. The request has to be 'in the territory of national security'. This means there has to be a realistic possibility that a security body would be involved in the issue the request relates to. There also has to be a realistic possibility that if a security body was involved the public authority the request is addressed to would hold information relating to its involvement.
20. Therefore, a request to the Cabinet Office for any information on an alleged plot to assassinate a leading politician would engage section 23(5). It would not, however, be appropriate for a parish council to use section 23(5) to refuse to confirm or deny that it held information on the alleged plot. This is because even if there was such a plot, there is no reason why a parish council would hold any information about it. Therefore the parish council could confirm that it did not hold the requested information without disclosing any information about what the security bodies did or did not know.
21. Similarly, if the Cabinet Office received a request for information about a meeting, primarily on competition within the retail sector, between the Prime Minister and representatives of the major supermarkets it could not reasonably apply section 23(5). There is no reason to suspect the security bodies would have an interest in such a meeting

¹ This is a phrase used by the ICO. It does not appear in the legislation and has not been routinely used by the Tribunal or by public authorities.

and so revealing whether or not the information was held would say nothing about the activities of the security bodies.

Balance of probabilities

22. Section 23(5) provides that a public authority can neither confirm nor deny that information is held, if this would disclose information relating to a security body. The term "would" is interpreted as meaning "more likely than not". This was established in the following example:

Example

In [Commissioner of Police of the Metropolis v Information Commissioner \(EA/2010/0008 23 May 2010\)](#) the Metropolitan Police received a request about how a plot to carry out terrorists attacks had been foiled using information obtained by the US from terrorists held overseas. The request was made following President Bush's public statement that information obtained in this way had been used to stop such attacks. The Commissioner found that the information, if held, could have been provided to the police through a number of routes and so found that section 23(5) was not engaged because confirmation or denial would not necessarily say anything about the activities of the security bodies.

However at the First-tier Tribunal the police produced evidence that if the information was held it would have most likely been passed by the United States' CIA to our security bodies, who would then have informed the police. Therefore confirmation that the information was held would equate to an admission that the security bodies also held the information.

The First-tier Tribunal found that the test of whether a disclosure 'would' relate to a security body was the normal civil standard of proof, known as the balance of probabilities. This means that if it is more likely than not that the information relates to a security body then the exemption is engaged.

Sections 23(5) and 24(2) are not mutually exclusive

23. This means they can both be applied to the same request but they should not be cited in the alternative. This is explained in our detailed guidance [How sections 23 and 24 interact](#).

Commissioner's approach to complaints

24. When investigating complaints about the application of section 23(1), the Commissioner will need to be satisfied that the information was in fact supplied by a security body or relates to such a body, if he is to find in favour of the public authority. In certain circumstances the Commissioner is prepared to accept a written assurance from the public authority that this is the case. This only applies where it initially appears plausible that the information would engage the exemption. The written assurance acts as confirmation that this is the case. The assurance must be provided by someone who because of their seniority and responsibilities has regular access to information relating to the security bodies and who understands the relationship between the public authority and those bodies. Furthermore, they must also have seen the disputed information.
25. Where it is less clear that the withheld information would have been supplied by or relates to a security body, it will not be appropriate to accept assurances of this nature from the public authority as sufficient evidence on its own. The Commissioner will need to discuss the matter with the public authority in order to gain a better understanding of their grounds for applying the exemption. In some cases it will be necessary to see the information in order to understand its nature and provenance. In any event, the Commissioner reserves the right to require sight of the information and will serve an information notice to do this, if necessary.
26. In respect of complaints about the use of section 23(5), the Commissioner will generally be able to determine whether the NCND provisions apply without knowing whether the information is actually held. However in exceptional cases the Commissioner may need to know whether the information is held and may require access to it.

Ministerial certificates

27. Section 23 contains a provision for a Minister of the Crown to issue a certificate stating the exemption is engaged.
28. In respect of section 23, section 23(2) provides that the Minister can issue a certificate confirming that the information it relates to was directly or indirectly supplied by, or relates to a security body. The certificate may apply to either the actual information requested, or to the information that would be disclosed by confirming or denying that the requested information was held. In other words the certificate can serve to demonstrate that either section 23(1) or section 23(5) is engaged.
29. A certificate issued under section 23(2) is conclusive proof that the information is covered by the relevant exemption.

Public interest test and section 23

30. Generally, section 23 is an absolute exemption, however the public interest test does apply to section 23(1) when applied to some historical records. This is set out in section 64(2).

The public interest and historical records

31. Section 23(1) is subject to the public interest test where it is applied to information in a historical record held by The National Archives or the Public Records Office Northern Ireland. Originally, a historical record was one over 30 years old, or if forming part of a file, the last entry on that file must be over 30 years old. However this has now been amended to 20 years by the Constitutional Reform and Governance Act 2010. This reduction is being phased in gradually over 10 years. In effect, from the end of 2013 the time limit is 29 years. It will reduce by another year every year until it reaches 20 years at the end of 2022.

32. Section 23(1) will still be engaged simply on the basis that the information was supplied by or relates to a security body. However the exemption could only be maintained where the public interest in doing so is greater than the public interest in disclosure. Therefore where disclosing the information would not cause any harm the public interest will favour disclosure.
33. The public interest considerations will be similar to those for section 24.

Interaction with other exemptions

34. There are a range of other exemptions which may also be relevant when section 23 is engaged depending on the circumstances. The most obvious of these is section 24. In an age of international terrorism, the work of the security bodies and others engaged on issues of national security will often involve co-operation with other states. Therefore, disclosing the information captured by some requests may also prejudice international relations and therefore section 27.
35. Clearly there are links between the security bodies, national security and the defence of the UK and so some requests will have the potential to engage section 26.
36. Where there is an increased risk of a terrorist attack the information may be protected by section 38 which provides an exemption for disclosures that could endanger someone's physical or mental health. Where the disclosure could assist terrorists targeting a specific individual, there may be grounds for considering the application of section 40 which protects the personal data from inappropriate disclosure.
37. 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.

More information

38. This guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, First-tier Tribunals and courts.
39. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
40. If you need any more information about this or any other aspect of freedom of information or data protection, please [contact us: see our website www.ico.org.uk](http://www.ico.org.uk).