

How sections 23 and 24 interact

Freedom of Information Act

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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 promote good practice.

4. This guidance explains to public authorities how sections 23 and 24 relate to one another and when they can be used together to protect national security and the work of the security bodies. It forms part of a suite of complementary guidance along with [Security bodies \(section 23\)](#) and [Safeguarding national security \(section 24\)](#) guidance which should be read together.

Overview

- The neither confirm nor deny (NCND) provisions of sections 23(5) and 24(2) are **not** mutually exclusive; they can be applied to the same request.
- But where they are applied to the same request each one must be applied on its own merits.
- However, if confirmation or denial would reveal information about a security body and therefore engages section 23(5), this may also undermine national security and so engage section 24(2).
- If it is obvious that the information is held public authorities are encouraged to confirm this is the case and then rely on the exemptions from the duty to communicate the information.
- Sections 23(1) and 24(1) **are** mutually exclusive. Section 24(1) can only be applied to information that does not fall within section 23(1). This means that they cannot be applied to the same information. But the Commissioner will accept them being cited in the alternative.
 - Citing the exemptions 'in the alternative' means that although only one exemption is actually engaged the other is also cited so as to disguise which exemption in fact applies. This may be necessary in instances where citing one of the exemptions would in itself be harmful.
- Where a public authority confirms some information is held, it can still NCND that additional information is held.

What FOIA says

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).

(5) The duty to 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).

Section 24 states;

(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purposes of safeguarding national security.

(2) The duty to confirm or deny does not arise if, or to the extent that, exemption from 1(1)(a) is required for the purposes of safeguarding national security.

Introduction

5. There is often significant overlap between the matters protected by sections 23 and 24; the work of the security bodies is to protect national security and revealing information about their work or involvement in particular issues may well undermine national security. Sections 23(1) and 24(1) provide exemptions from the duty to communicate and are mutually exclusive in that public authorities can only apply section 24(1) to information that hasn't been supplied by, or relates to, a security body. As a consequence citing either exemption can itself reveal something about the nature of the information being withheld. For example if a public authority withheld information using section 23(1) it would be clear that the withheld information did relate to a security body, whereas the use of section 24(1), on its own, would mean that the information did not relate to a security body. This problem is considered in some detail later on. But it has lead public authorities to apply the exemptions from the duty to confirm or deny whether information is held, provided by

sections 23(5) and 24(2), in order to avoid having to use sections 23(1) or 24(1), even when it is clear that the information is held.

6. The exemptions from the duty to confirm whether information is held are known as the neither confirm nor deny (NCND) provisions. The NCND provisions provided by sections 23(5) and 24(2) are **not** mutually exclusive. However an early Tribunal decision found that they were. This raised the same problem that the mutual exclusivity of sections 23(1) and 24(1) raises.
7. As a result there has been a lack of clarity in how the NCND provisions should be applied. This guidance will first look at the correct application of sections 23(5) and 24(2). It will then consider the issues raised by the mutual exclusivity of sections 23(1) and 24(1).
8. There will be situations where not all the information requested falls within sections 23 and 24 and therefore public authorities will either disclose that material, or withhold it under other exemptions. This guidance will conclude by looking at the issues raised by partial disclosure or partial confirmation that information is held.

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

9. Unlike the exemptions from the duty to communicate information, the exceptions from the duty to confirm or deny whether information is held in sections 23(5) and 24(2) are not mutually exclusive. This means that public authorities can apply both to the same request. The First Tier Tribunal confirmed this position in [*The All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and the Foreign and Commonwealth Office \(EA/2011/0049-0051 3 May 2012\)*](#) - see paragraph 109.

Applying sections 23(5) and 24(2) to the same request

10. Section 1(1)(a) requires a public authority to confirm whether or not it holds the requested information. If section 23(5) is engaged there is no need for a public authority to go on to consider the application of section 24(2) in order to remove

the obligation to confirm or deny. It could rely solely on section 23(5).

11. Where a public authority considers that reliance on one exemption provides sufficient protection, the Commissioner would encourage it to do so.
12. However the Commissioner recognises that some public authorities are concerned that inferences would be drawn if they were to rely on only one exemption. For example if a public authority only relied on section 23(5) there is a risk that people would infer that security bodies were in fact involved. There may be no obvious grounds for drawing such a conclusion, but the risk remains that those hostile to UK interests could perceive the use of one exemption on its own as revealing something particular about the activities of the security bodies. This risk has been compounded by the initial confusion over whether sections 23(5) and 24(2) were mutually exclusive.
13. As a consequence some public authorities consider it prudent to apply both NCND provisions. Because the exemptions are not mutually exclusive this does not present a problem. But where a public authority cites both exemptions, FOIA requires each to actually be engaged. In other words, each exemption must be applied independently, on its own merits. It is not correct to engage one exemption and then attempt to apply the other on the grounds that something would be revealed by relying on just one alone. Each exemption must be engaged separately, based on what would be revealed by confirming or denying whether the requested information is held.

Example

A request is made to the Home Office for information into whether a named organisation has been investigated for links with terrorism.

The most obvious starting point would be to consider the application of section 23(5) and ask the question 'Would confirming or denying that the information was held disclose information relating to a security body?'

An investigation of this type is very likely to involve a security body such as MI5. Therefore denying that the information is held would

be the equivalent of a categorical statement that MI5 had not investigated that organisation. This is information relating to a security body and so section 23(5) is engaged.

The next step is to apply section 24(2) and ask the question 'Would confirming or denying whether the information is held undermine national security?' Confirmation would alert the organisation that it was under investigation and provide it with the opportunity to cover its tracks. This would engage section 24(2) on its own merits as the exemption is required for the purpose of safeguarding national security.

14. The example above demonstrates that both exemptions are engaged in their own right because of what confirmation or denial would reveal. Remember that section 24(2) is qualified, so the public interest test must be applied.
15. In many situations where the request is in the territory¹ of national security both exemptions will apply in their own right. This is because confirming or denying that the requested information is held in these circumstances will itself disclose information about a security body. For further information, read our detailed guidance [Security bodies \(section 23\)](#).
16. When applying s24(2) it is appropriate to consider whether confirming or denying would reveal information about the involvement or non-involvement of a security body, which in turn could undermine national security. If it does then section 24(2) is engaged. Section 24(2) would still have been engaged on its own merits, independently of section 23(5), albeit for the same reason. This approach is demonstrated by revisiting the previous example.

Example

As before a denial that information on the investigation was held would itself disclose information on a security body such as MI5. The Home Office could NCND using section 23(5).

When considering the application of section 24(2), it is legitimate for the Home Office to consider whether disclosing if a security body

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.

had investigated the particular organisation would undermine national security. The onus would be on the public authority to justify its application of section 24(2), but revealing whether a potential terrorist threat has been investigated by the security bodies would be likely to undermine national security.

Again the public interest test must be applied to section 24(2).

17. Although in many situations where the request is in the territory of national security both exemptions will apply in their own right, there will be some requests where only one of the two exemptions is engaged.

Example

The Home Office receives a request for the address of Government Communications Headquarters (GCHQ), a body listed in section 23(3). Technically releasing a statement that the Home Office holds the address of GCHQ is the disclosure of information relating to a s23 body and therefore the exemption provided by section 23(5) is engaged.

However the address of GCHQ is available from a government website and there is a general presumption that the Home Office will be aware of GCHQ's address. Therefore there will be no threat to national security if the Home Office confirms it holds the address. There are no grounds for applying section 24(2).

18. This may seem a rather extreme example, however it serves to demonstrate that there will be occasions when only section 23(5) will apply.

The Commissioner's approach to complaints about the application of the NCND provisions

19. When the Commissioner receives a complaint about a public authority's use of sections 23(5) and 24(2) he will consider the application of each exemption separately, in line with the approach set out in [Security bodies \(section 23\)](#) and [Safeguarding national security \(section 24\)](#). The Commissioner reserves his right to be informed whether the

information is held and if so to have access to it. However he anticipates that in the majority of cases he will be able to determine the application of NCND provisions without knowing whether the information is held.

20. The Commissioner recognises the concerns that some public authorities have about using either of these exemptions on their own because of the inferences that might be drawn about the involvement or non-involvement of a security body. Where this is an issue, the Commissioner will reach a decision on each exemption separately, but will carefully consider how his decision is articulated in any decision notice to avoid inferences being inappropriately drawn.

Sections 23(1) and 24(1)

21. Although many requests that raise national security concerns could be responded to using the NCND provisions, there will be situations when it is obvious that the information is held. This may be as a result of official statements to that effect. In these situations the use of NCND would serve little purpose. In these cases the Commissioner would encourage public authorities to confirm that the information is held.
22. When it is obvious that the information is held, but not obvious whether its contents relates to a security body, this in itself may be worthy of protection. The dilemma for the public authority is that relying on either section 23(1) or section 24(1), alone, would reveal whether the requested information relates to a security body.
23. In these circumstances the public authority should not attempt to apply the NCND provisions in order to avoid citing an exemption from the duty to communicate the actual information. Even though relying on just one of the exemptions from the duty to communicate information would itself reveal something of the nature of the information, this is not a basis for engaging sections 23(5) or 24(2). As discussed above, the only basis for applying sections 23(5), or 24(2), or both, is what would be revealed by confirmation or denial that the information is held.
24. When it is obvious the information is held and therefore the public authority sees no value in refusing to confirm or deny, or if the NCND provisions can't be engaged on the facts of the

case, the public authority will be faced with the problem of applying either section 23(1) or section 24(1). The Commissioner has developed an approach to deal with this situation, which is set out below.

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

25. Sections 23(1) and 24(1) are mutually exclusive. This means they cannot be applied to the same request.

Section 23(1) allows information to be withheld if it relates to one of the named security bodies.

Section 24(1) states that;

Information which does not fall within s23(1) is exempt information if exemption from section 1(1)(b) is required for the purposes of safeguarding national security.

26. The fact that section 24(1) can only be applied to information that is not protected by section 23(1) can present a problem, if a public authority does not want to reveal whether a section 23 security body is involved in an issue. If it could only cite section 24(1) in its refusal notice, this would disclose that no section 23 body was involved. Conversely, if only section 23(1) was cited, this would clearly reveal the involvement of a security body. To overcome this problem the Commissioner will allow public authorities to cite both exemptions '**in the alternative**' when necessary. This means that although only one of the two exemptions can actually be engaged, the public authority may refer to both exemptions in its refusal notice.

Example

In this hypothetical example, the government announce that a terrorist suspect, Mr X, has been apprehended but very few details are released. This prompts an FOI request to the Home Office for information on the circumstances of the arrest.

It may well be that the arrest was the result of a well executed, intelligence led, security operation. However it is equally plausible that the local police made the arrest following a report that

someone had been acting suspiciously and the significance of the arrest was only realised later.

It is clear, because of the Government's announcement, that the public authority would hold information on the circumstances of the arrest, but it may not want to reveal whether a security body was involved. If the Home Office was unable to cite sections 23(1) and s24(1) in the alternative, it would be faced with having to identify the actual exemption being relied on. If it relied on section 23(1), it would reveal the involvement of a security body, or if it relied on section 24(1) then this would reveal the security bodies were not involved.

27. Previously, where public authorities have been concerned that being able to rely only on either section 23(1) or section 24(1) would reveal the involvement or not of a security body, they have tried to avoid the problem by applying the NCND provisions of the two exemptions. This is the case despite the fact that confirming the information is held would not reveal anything which needed to be protected. The perceived problem is that if the public authority confirms the information is held, it would then have to rely on just one exemption to withhold it. The Commissioner is satisfied that allowing public authorities to cite sections 23(1) and 24(1) in the alternative is the pragmatic solution to the problem. There are benefits to the applicant in that they at least receive confirmation that the information is held. In addition the public authority is not placed in the odd position of refusing to confirm whether information is held where it obviously is and so avoids looking unnecessarily obstructive.

Refusal notices

28. When a public authority cites sections 23(1) and 24(1) in the alternative, consideration needs to be given to the contents of the refusal notice. Technically section 17(1) requires public authorities to specify the exemption they are relying on. However, it is important in these circumstances that the refusal notice effectively disguises which provision actually applies. Therefore, the Commissioner will accept a refusal notice which cites both exemptions, stating that they are being cited in the alternative and then explaining why each one **could** apply. As section 24 is qualified, the refusal notice would also have to explain the application of the public interest test to that provision.

Example

The previous example of a request to the Home Office for information on the circumstances of the arrest of terrorist suspect Mr X. In these situations the use of any NCND provision would serve little purpose. In such cases the Commissioner would encourage public authorities to confirm that the information is held.

The refusal notice should explain that the public authority is withholding the information and that in the circumstances of this case it is not appropriate to provide any information that would undermine national security or reveal the extent of any involvement of the security bodies in the arrest of Mr X. It is therefore applying sections 23(1) and 24(1) in the alternative, which means only one of the two exemptions is actually engaged but it is not appropriate to say which one.

The level of detail that can be provided when explaining why each exemption **could** apply will depend very much on the circumstances. In some cases it will be very apparent how each exemption could apply. In the previous example, it would be possible to explain that section 23(1) applies to information that relates to one of the listed security bodies, and so if one of those bodies had been involved in the arrest, providing the requested information would inevitably disclose information relating to one of those bodies. If this were the case, the information would be exempt under section 23(1).

The refusal notice would state that it was possible that no section 23 security body was involved in the arrest. But that disclosing the information could reveal what aspects of Mr X's behaviour attracted the attention of police. This would prejudice national security and in such circumstances the information could be withheld in order to safeguard national security.

The refusal notice should also explain why the public interest favoured maintaining section 24(1). An argument in favour of disclosure would be that releasing the information could serve to reassure the public about the police's ability to respond to such incidents. The public interest in maintaining the exemption could include the importance of not providing terrorists with any information they could glean intelligence from.

29. In cases where it proves more difficult to explain why the exemptions apply or, in the case of section 24, why the public interest favours maintaining the exemption, it may be appropriate to consider the application of s17(4). This subsection disapplies the obligation to provide such explanations where to do so would itself involve the disclosure of exempt information.

Considering the public interest in maintaining section 24(1)

30. Where sections 23(1) and 24(1) have been applied in the alternative, the consequences of applying the public interest test to section 24(1) also need to be considered. Could the public interest test overturn the application of section 24(1) and so prevent the use of the two exemptions in the alternative?
31. Where sections 23(1) and 24(1) have been applied in the alternative, only one of them will actually be engaged.
32. There are two situations where the exemptions will be cited in the alternative. Firstly, the information does not relate to a section 23 security body, but the public authority considers that section 24(1) is engaged and that the public interest favours maintaining the exemption. In this case, the public authority will be satisfied that the public interest favours maintaining the exemption by the time it considers the need to cite the two exemptions in the alternative.
33. The second scenario is where the requested information engages section 23(1). In these cases the application of section 24(1) and the public interest test is only conjectural. It makes sense that in this scenario the hypothetical public interest test in respect of section 24(1) will always favour maintaining the exemption.

The Commissioner's approach to complaints about the application of section 23(1) and section 24(1)

34. If a complaint was made to the Commissioner, the public authority would need to explain to him which exemption it was actually relying on. He would then investigate the application of that exemption in line with the approaches set out in the guidance [Security bodies \(section 23\)](#) and [Safeguarding national security \(section 24\)](#). In the majority of

cases this means that he will need access to the information. However, in some section 23(1) cases and, exceptionally, some section 24(1) cases, he may be able to make a decision based on submissions and confidential discussions alone.

35. The Commissioner can find that either the exemption was not engaged or, in the case of section 24(1), that the public interest did not favour maintaining the exemption.
36. However the Commissioner is very aware of the importance of protecting national security and where section 24(1) is engaged he would not decide lightly that the balance of the public interest test favoured disclosure.
37. Public authorities should also remember that when section 23(1) is cited the Commissioner could find that the information does not relate to a section 23 security body.
38. Where the Commissioner finds in favour of the public authority, the decision notice will not allude to which exemption has actually been applied. It will simply say that the Commissioner is satisfied that one of the two exemptions cited is engaged and that, if the exemption is section 24(1), the public interest favours withholding the information.
39. Any decision notice, upholding a complaint, would simply say that the Commissioner is not satisfied that either of the two exemptions is engaged or that, in the case of section 24(1) being engaged, the public interest favours disclosure.
40. In either scenario, the decision notice would not reveal which exemption the public authority is actually relying on.

When a public authority confirms it holds some information captured by a request but NCNDs whether any other information is held

Confirmation that at least some information is held

41. A public authority may confirm it holds at least some of the requested information but may still wish to conceal whether or not it holds additional information that either relates to a national security body or could undermine national security. In such a scenario the public authority could respond to a

request by confirming some information was held and then either disclosing that information or withholding it under appropriate exemptions. It could also refuse to confirm or deny whether any **additional** information is held using either sections 23(5), or 24(2), or both.

Example

In this hypothetical example, it is public knowledge that the Royal Navy patrols the Indian Ocean and the coast around Somalia to prevent piracy. It is standard procedure for ships to keep patrol logs. A request is received for the logs of a number of ships involved in this work.

It is clear that the MOD holds information falling within the scope of the request. Some information can be released. Other information is exempt under sections 26 and 27, the exemptions relating to defence and international relations. The MOD refuses to confirm or deny whether any additional information is held.

Its responds by stating, "We confirm that information falling within the request is held. Of the information we confirm is held, some is disclosed, the remainder is exempt under sections 26 and 27. We refuse to confirm or deny whether any other information is held."

42. In this case the NCND provisions have been applied to information that may be held, in addition to that already accounted for, by either being disclosed or withheld under other exemptions. This approach would be correct.

Where information, potentially exempt under sections 23(1) and 24(1), is withheld under other exemptions

43. There can be situations when although the requested information could relate to national security matters the public authority confirms the information is held but withholds it under other exemptions. The public authority may be concerned that because it has not used sections 23(1) and 24(1) to withhold the information, people will assume that the information does not relate to national security issues or a security body. In these cases, a public authority could explain to the applicant that nothing can be inferred from its response

about whether the withheld information would or would not also be exempt under either of these sections.

Example

As in the previous example, a request is received for the patrol logs of ships patrolling the coast off Somalia. But on this occasion the MoD has grounds for withholding all the information requested under sections 26 and 27.

In addition, it could explain that nothing can be inferred from the fact that sections 23(1) or 24(1) have not been cited, as to whether the contents of the withheld information relate to a security body or could undermine national security.

44. There is nothing within FOIA which would prohibit a public authority from giving this additional explanation. However it is only something that has been provided over and above the public authority's obligations under FOIA and in the above example the public authority has only applied sections 26 and 27. These are the only provisions that the Commissioner would consider if he received a complaint.
45. All the additional explanation does, in effect, is remind the applicant what is, or is not, safe to infer by the public authority not citing sections 23(1) or 24(1) and relying on other exemptions instead. If this is all the public authority wishes to achieve, the Commissioner has no objection. But a public authority should consider whether raising the application of sections 23(1) and 24(1) does more harm than good by alerting the applicant to the possibility that those sections may be relevant to the request.

Attempting to use sections 23(5) and 24(2) to disguise the content of the information

46. What a public authority cannot do is attempt to use the NCND provisions of sections 23(5) and 24(2) to refuse to confirm or deny whether the withheld information is also exempt under sections 23(1) or 24(1).

Example

Using the same example of the request for patrol logs, the public authority could **not** respond as follows;

'The information is exempt under sections 26 and 27 and furthermore we are applying sections 23(5) and 24(2) to refuse to confirm or deny whether the information is also exempt under either sections 23(1) or 24(1).'

47. Sections 23(5) and 24(2) remove the obligation to confirm or deny whether the requested information is held. They have nothing to do with refusing to confirm or deny which exemptions have been applied to the withheld information.

More information

48. 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.
49. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
50. If you need any more information about this or any other aspect of the freedom of information, please contact us: see our website, www.ico.org.uk.