



Ministry of
JUSTICE

**Freedom of information
guidance**
Exemptions guidance
Section 24: National security

14 May 2008

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Introduction

The section 24 exemption applies to information that must not to be disclosed in order to safeguard national security.

The exemptions under sections 23 and 24 are extremely closely linked. The section 23 exemption is applicable to information supplied by or related to the bodies listed at section 23(3) of the Act, the Security and Intelligence Agencies. In certain circumstances it will be necessary to use the two exemptions together. In other circumstances the two exemptions are mutually exclusive and cannot be used together.

The test to be applied when considering whether to claim a section 24 exemption is not whether the information relates to national security but **whether the exemption is required for the purpose of safeguarding national security**. That is, to claim the exemption it must be possible to identify an undesirable effect on national security, or the risk of such an undesirable effect, that would occur if the information were released.

When considering whether non-disclosure of a particular piece of information is required in order to safeguard national security, it is important to consider whether its release, could, if put together with other available information, cause damage ('the mosaic effect'). In justifying such an approach, decision-makers must be clear about what specific harmful effects are reasonably to be expected.

When applying the exemption, you must clearly record the justification for the decision. In the event that the refusal to provide the information sought is challenged, the Information Commissioner or the Information Tribunal will carefully examine this justification. It is not necessary to obtain a signed ministerial certificate to claim the exemption (see discussion of '**ministerial certificates**' below on page 7), but careful consideration should also be given to how a case would be made to a minister were a certificate needed later.

Section 24 is subject to the public interest test.

In some circumstances it may be appropriate to neither confirm nor deny whether the requested information is held.

When seeking to use section 24, or a neither confirm nor deny response under sections 23 and 24, the Clearing House must be consulted. The Clearing House will then contact the relevant Security and Intelligence Agency.

This chapter should be read together with the chapter on section 23 when contemplating withholding information on grounds related to national security.

For guidance on the inter-relationship between the Freedom of Information Act and the Official Secrets Act 1989 see the chapter on the section 44 exemption concerning prohibitions on disclosure.

What information may be covered by this exemption?

The term 'National Security' is not defined in UK legislation and both domestic and European courts have considered that the assessment of the threat to national security is essentially a matter for the Executive. In addition, when considering safeguarding national security the courts have accepted that it is proper to take a precautionary approach¹. It is possible to infer certain statements about the meaning of the term from case law and statutes². It is important not only to consider circumstances where actual harm has or will occur to national security, but also to consider preventing harm occurring and avoiding the risk of harm occurring.

Taken together, the case law and the statements about national security form the basis for identifying the kind of information that falls into this category. For example that:

- The security of the nation includes its well-being and the protection of its defence and foreign policy interests, as well as its survival.
- The nation does not refer only to the territory of the UK, but includes its citizens, wherever they may be, or its assets wherever they may be, as well as the UK's system of government.
- There are a number of matters which UK law expressly recognises as constituting potential threats to, or otherwise being relevant to, the safety or well-being of the nation, including terrorism, espionage, subversion, the pursuit of the government's defence and foreign policies, and the economic well-being of the United Kingdom. But these matters are not exhaustive: the government would regard a

¹ The House of Lord's Judgment in the appeal of Shafiq Ur Rehman against deportation, Secretary of State for the Home Department (11 October 2001 [2001] UKHL47).

² E.g. Security Service Act 1989, Intelligence Services Act 1994, Radioactive Substances Act 1993, Water Industry Act 1991, Control of Pollution Act 1974, Offshore Safety Act 1992, Town and Country Planning Act 1990.

wide range of other matters as being capable of constituting a threat to the safety or well being of the nation. Examples include the proliferation of weapons of mass destruction and the protection of the Critical National Infrastructure, such as the water supply or national grid, from actions intended to cause catastrophic damage. However, these examples are not exhaustive and each piece of information should be considered individually.

It should be noted that national security is not the same as the interests of the government of the day. Official information that would be embarrassing or inconvenient to the government if made public is not of itself a matter of national security.

Neither confirm nor deny

Section 24(1) provides for an exemption from the duty to communicate information to a person making a request (section 1(1)(b)) where that information is not already exempt under section 23(1). Section 24(2) provides an exemption to the duty to confirm or deny whether the information requested exists (section 1(1)(a)). **Section 24 is not an absolute exemption and a public interest test must be carried out.**

If a public authority considers that information needs protecting from disclosure for reasons of national security, but it is appropriate to confirm or deny whether the requested information is held, then the exemption under section 24(1) will apply. Where it is appropriate for a department to neither confirm nor deny that it holds requested information it will rely on section 24(2). Where a department relies on section 24(2) it is not necessary to rely on section 24(1) in respect of the duty to communicate if the information is held.

As with section 23(5), it is possible for a department to rely upon the exemption at section 24(2) even if it does not hold the information sought. In many cases it may well be necessary to rely on section 24(2) where it would endanger national security to confirm that a department holds no information.

The use of the exemption at section 24 (either in the alternative to section 23, or possibly in conjunction with section 23 to allow a neither confirm nor deny response where no information is held) is complex. Case-by-case consideration will be necessary. **When seeking to use Section 24 or a neither confirm nor deny response under sections 23 and 24 the Clearing House must be consulted as well as the relevant Security and Intelligence Agency.**

Public interest test

Section 24 is a qualified exemption, which means that after deciding whether the information requested should be withheld for the purpose of safeguarding national security, the public authority must also consider whether the public interest might nonetheless be served by making disclosure.

In deciding whether information is exempt information for the purposes of section 24, a public authority must consider two things:

- whether the exemption from the duty to confirm or deny whether the requested information is held is required for the purpose of safeguarding national security
- if a public authority confirms that it holds the requested information whether the public interest in disclosing the information outweighs the public interest in withholding it

There is obviously a very strong public interest in safeguarding national security. If non-disclosure is required to safeguard national security it is likely to be only in exceptional circumstances that consideration of other public interest factors will result in disclosure. The balance of the public interest in disclosure will depend in part on the nature and likelihood of the potential risk to national security, as well as the nature of the countervailing public interest considerations in making the information available. Each request for information will need to be judged on a case-by-case basis.

If a public authority is seeking to use Section 24 the Clearing House must be consulted. Additionally, if the information requested originated from another public authority the originator of the information must be consulted.

Duration of the exemption

The section 24 exemption applies to all records, regardless of their age, including historical records. It is possible that the sensitivity of section 24 information may diminish with the passage of time once the records in which the information is contained has become an historical record. However, each request for an historical record or for information on such a record should be judged on a case-by-case basis, consulting as appropriate.

Refusing information – section 17

Where the exemption from the duty to confirm or deny whether the requested information is held is claimed, the department is required to reply to the applicant in accordance with section 17(1) of the Act. It must state in a notice that it is relying upon an exemption and which exemption it is relying on. Unless it is not otherwise apparent, a department must also state why the exemption applies unless section 17(4) applies. Section 17(4) provides that a department is not obliged to provide such a statement if that statement would involve the disclosure of information that would itself be exempt information. It should only be used when a public interest argument cannot be articulated without revealing exempt information. You would be expected to provide the full reasons to the Information Commissioner in confidence if your refusal is appealed to him.

Dual reliance on sections 23 and 24 in neither confirm nor deny cases

The Act allows section 24(2) to be used in conjunction with the section 23(5) to support a neither confirm nor deny response as to whether the requested information is held. The use of both exemptions in this way will be appropriate where the fact of whether or not the requested information is held requires exemption for the purposes of safeguarding national security and where the information requested could reasonably have been supplied by or relates to a SIA if it were held. The Information Tribunal agreed with this approach in the case of *Baker v The Information Commissioner and the Cabinet Office* (EA/2006/0045).

The Act does not however allow reliance on section 24(1) to justify non-disclosure of the information where that information falls within section 23(1). This mutual exclusivity only arises where a department is claiming the exemption from the duty to communicate the information sought.

Even so, section 23(1) and section 24(1) can both be relied on in response to a request for information, so long as this is in relation to different pieces of information in the document. Under this 'cumulative' reliance on both sections, section 23(1) will apply to protect information that is from or relates to an SIA and section 24(1) will apply to protect other information in the

document (from other sources) which it is necessary to withhold in order to safeguard national security.

It is also important to note that where the request covers a range of information, and section 24 only applies to part of that information, the remainder of the information not protected from disclosure by any other exemptions must be disclosed.

Ministerial certificates

Section 24 provides that a ministerial certificate may be signed in support of a decision to claim an exemption from disclosure under the terms of section 24. A ministerial certificate constitutes conclusive evidence that the exemption is, or at any time was, required for the purpose of safeguarding national security.

A ministerial certificate requires the signature of a Minister of the Crown (specified in section 25(3) of the Act as a member of Cabinet, the Attorney General or the Advocate General for Scotland or for Northern Ireland).

It is not necessary to have a certificate in order to rely on the section 24 exemption however in certain circumstances one may need to be issued, usually when the reliance upon the exemption is challenged. It will serve to strengthen the position of the department in the event of any such challenge. When a ministerial certificate has been issued under section 24, section 60 provides a right of appeal against such certificates. Appeals would be heard by the National Security Appeals Panel (part of the Information Tribunal). See Annex A for further information. Officials may wish to consider how a ministerial certificate would be justified should it be required.

In practice, a certificate is most relevant when formal enforcement action becomes a possibility and as such public authorities are unlikely to consider a certificate until a challenge reaches the Commissioner. To issue the certificate when first answering a request may be premature and involve unnecessary work, but a department may nevertheless want to consider the drafting of a certificate at this stage where it considers that it may become necessary to use it at a later stage. It is expected that only in exceptional circumstances will a certificate be needed, as any challenges to the appropriate use of section 24 should be discussed with the ICO in the first instance. **Again the views of the Clearing House and the relevant SIA must be sought before a certificate is issued.**

The Act provides for two types of certificate under section 24. It may either identify information to which it applies by means of a general description and/or be expressed to have prospective effect i.e. a certificate could be issued that would cover a future operation. Alternatively, an ad hoc certificate can be drafted to cover specific information in response to a particular request.

If a ministerial certificate is used in support of the claimed exemption it will be conclusive evidence that the exemption is required for the purposes of safeguarding national security. It does not certify that the public interest in disclosure test has been assessed. **Using a ministerial certificate does not make section 24 an absolute exemption; the public interest test must still be undertaken before deciding whether or not to withhold the requested information** (see ‘the public interest test’ above for consideration of the public interest in relation to section 24).

Where a certificate is general and prospective, the assessment of whether the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information must be carried out anew each time the certificate is relied upon. This is to ensure that the certificate covers that information sought and to satisfy the requirement that the public interest be assessed on a case-by-case basis. There will also be a need to keep any general and prospective certificates under review because the information that it applies to may vary over time.

The Act does not require a certificate issued under section 24 to be signed by any particular minister. It can be signed by any member of Cabinet, the Attorney General or the Advocate General for Scotland or for Northern Ireland, as mentioned above. It is also possible for one ministerial certificate to cover round robin cases. Where the information that a certificate applies to potentially crosses departmental boundaries, it will be important to undertake interdepartmental consultation at an early stage.

Relationship with other exemptions

See the guidance on the section 23 exemption.

Annex A: Appeals where a ministerial certificate has been issued

Where a certificate under section 23(2) or 24(3) has been issued, section 60 of the Act provides that either the Commissioner, or any applicant whose request for information is affected by the certificate, may appeal to the Tribunal against the certificate. The Tribunal will consist of a panel specially constituted to consider such appeals (the National Security Appeals Panel). Once the Tribunal has made a determination under section 60, there is no further appeal mechanism in the Act although the Tribunal's determination could be challenged by way of judicial review.

Appeals against section 23 certificates

Where the appeal is against a certificate served under section 23, the Tribunal will consider whether the certificate is accurate or not (i.e. whether the information was in fact directly or indirectly supplied by or relates to one of the Security and Intelligence Agencies). If it finds the certificate to be inaccurate, the Tribunal may allow the appeal and quash the certificate.

Appeals against section 24 certificates

Where a minister issues a certificate under section 24, it may be challenged on two separate grounds by means of an appeal to the Tribunal. First, the issue may be whether the certificate is correct, i.e. whether the minister had reasonable grounds for claiming that the information does require exemption on national security grounds. In that case, the Tribunal's powers under section 60 are limited. The Tribunal can only review the certificate using judicial review principles. Second, the appellant may claim that the information requested falls outside the scope of the certificate (in those cases where it identifies a general category of information as subject to the exemption). In that case, the Tribunal can decide the issue one way or the other without being constrained by judicial review principles (see section 60(4) and (5)).

In either case, in relation to a general and prospective certificate, if the Tribunal gives an unfavourable decision and decides to quash the certificate, the minister may issue a fresh certificate specifically relating to the particular information for which the department is claiming the exemption. However, where an 'information-specific' certificate has been quashed it will be much harder for the department to obtain a fresh certificate since the one that has been quashed should already have been tailored to the specific information, leaving little room for further refinement.

On appeal against the section 24 certificate, the Tribunal can only consider the applicability of the exemption and NOT the public interest arguments. Any challenge to the public interest arguments will therefore need to be made by the claimant by way of separate application to the Commissioner.

Where an application is made to challenge the assessment of the public interest in disclosure the two appeals could run in parallel. However, the Tribunal may dispose of the issues immediately if the certificate is quashed. In practice, it is therefore likely that the application to the Commissioner would be adjourned pending the outcome of the appeal to the Tribunal.

If the application to the Commissioner does proceed, the Commissioner may seek access to the information which he needs in order to assess whether the exemption applies (in the absence of a certificate) and whether the public interest in disclosure had been properly assessed. The Commissioner can serve an Information Notice on the Public Authority under section 51 to force the public authority to provide necessary information.

Where the Commissioner issues a Decision Notice (section 50) or Enforcement Notice (Section 52), both of these have effect subject to the veto in Section 53. Section 53 provides an exception to the duty to comply with a Decision Notice or an Enforcement Notice that is based on a qualified exemption. It allows a Minister to sign a certificate stating that he/she has on reasonable grounds formed the opinion that there has been no failure on the part of the Public Authority to comply with the Act. However, a section 53 certificate can only be used where the relevant Notice relates to information which is exempt from the section 1 duties (the duty to confirm whether or not the information is held and the duty to communicate it, where it is exempt by virtue of a qualified exemption). The certificate must also be laid before both Houses of Parliament and in any event it is amenable to judicial review.

Alternatively, the Public Authority could appeal to the normally constituted Tribunal against either form of notice under section 57. At this stage this Tribunal would be able to consider the assessment of the public interest as part of its determination if relevant.

Annex B: Application to commissioner where no ministerial certificate issued

A ministerial certificate can be obtained at any time, even after an applicant has exhausted the internal review procedure and applied to the Information Commissioner. A certificate will ensure that the case is heard by the specially constituted panel of the Tribunal. If for any reason a ministerial certificate is not deemed appropriate, the second stage of the appeal process would be as follows (the applicant is, from this stage on, referred to as the appellant).

When the Commissioner receives a request for a decision from an appellant, he will need to make a decision on whether the particular exemption has been correctly applied.

Where an exemption under section 23 has been claimed, the Commissioner will need to consider whether the information falls within the scope of the exemption. It will be largely a matter of fact whether or not the information was directly or indirectly supplied by, or relates to, one of the Security and Intelligence Agencies. However, a matter of legal interpretation can arise, for example where the information has gone through several hands or as to whether the connection between the information and the Security and Intelligence Agency is sufficiently close that the information can be said to 'relate to' the Security and Intelligence Agency.

Where an exemption under section 24 is claimed, the Commissioner will consider both whether the exemption is required for the purpose of safeguarding national security and whether the public interest in disclosure has been properly assessed.

The Commissioner will usually require further information in order to make a decision. He would request it from the department. He also has the power to serve on the department a notice known as an 'Information Notice' to require the department to comply. In particular he may want a copy of the information itself to enable him to judge whether it properly falls under the ambit of the exemption, or (in a case where the national security exemption has been relied upon) if the public interest in disclosure had been properly assessed. The Commissioner's powers of inspection and seizure under a warrant do not apply to information that is exempt under 23(1) or 24 (1). In line with the Memorandum of Understanding between the Ministry of Justice and the ICO departments are not committed to providing the withheld information to the ICO, but will consider any request to do so, on a case-by-case basis. If the ICO do request sight of the withheld information, **departments must engage the Clearing House before responding.** The

department can appeal against the Information Notice under section 57(2). Such an appeal would be on the grounds that the Commissioner had gone too far in respect of the information being sought. The Tribunal would then determine this particular issue and remit the matter back to the Commissioner who would then reconsider as necessary, and then proceed to decide whether or not to issue a Decision Notice (section 50) or an Enforcement Notice (section 52).

Alternatively, if a department failed to comply with an Information Notice, the Commissioner could make a decision on the basis of the information he already had, and issue a Decision Notice or Enforcement Notice. He could also certify to the High Court that the department had failed to comply with the Information Notice; the High Court would hear evidence and argument and then deal with this as a contempt of court under section 54.

Once the Commissioner has reached a decision he will issue a Decision Notice. If he has found in favour of the appellant, this notice will stipulate the action that the department must take, including the time period for action.

The Commissioner may subsequently issue an Enforcement Notice if the department fails to act in accordance with the Decision Notice. Failure to comply with an enforcement notice can also be treated as contempt of court. Under section 57 of the Act, the department will have a right of appeal to the Tribunal against any Information, Decision or Enforcement Notice.

Annex C: The need for and use of ‘neither confirm nor deny’

When answering a freedom of information request, officials will need to consider whether it is appropriate to ‘neither confirm nor deny’ that they hold the requested information.

It has been a longstanding policy of successive governments to use a non-committal reply to questions in cases where either a positive or negative response would be harmful to national security or would confirm or deny a Security and Intelligence Agency interest. This is the neither confirm nor deny principle.

In the context of the Freedom of Information Act, a positive or negative response to a freedom of information request may inform the applicant whether the Security and Intelligence Agencies do or do not have an interest in a particular individual, organisation, area of information or subject.

In the freedom of information context (where requests will be for information, not personal data which is covered by the Data Protection Act 1998) it is likely that neither confirm nor deny will be needed to prevent Security and Intelligence Agencies interests or national security issues from being exposed, which a confirmation or denial of whether or not information is held can do. Parliament's acceptance of this is reflected in the Freedom of Information Act. The fact that the Security and Intelligence Agencies are specifically excluded from the ambit of the Freedom of Information Act (they are not ‘public authorities’ for freedom of information purposes) and also that information directly or indirectly supplied by them or relating to them is excluded from the Freedom of Information Act (section 23) underlines the importance of this. The Information Tribunal agreed with the use of neither confirm nor deny in the case of *Baker v The Information Commissioner and the Cabinet Office* (EA/2006/0045).

