



Ministry of
JUSTICE

Freedom of information guidance

Exemptions guidance

Section 26: Defence

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Introduction

Section 26 applies to information whose disclosure would be likely to prejudice:

- the defence of the British Islands or any colony
- the capability, effectiveness or security of the Armed Forces of the Crown or any forces cooperating with them

In order to understand what information falls within the scope of the defence exemption it is necessary to clarify the meaning of some of the key terms used above. They are listed in Annex A.

In order to determine whether section 26 applies it will be necessary to establish how exactly defence matters would be prejudiced by disclosure of the information.

It will often be necessary to consult the Ministry of Defence in order to evaluate how and to what extent defence matters would be prejudiced by disclosure.

Section 26 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.

What information may be covered by this exemption?

The object of this exemption is to prevent prejudice being caused to any of the matters mentioned in section 26(1) by disclosure of information, where in all the circumstances of the case that would be contrary to the public interest. This exemption is not about the description of particular information, but the effects of its disclosure. In every case, it is a question of assessing the risk of prejudice that disclosure may cause, regardless of the content of the information, its classification or its source.

Having said that, the majority of information, disclosure of which has a potential to cause prejudice to defence, is likely to be easily identifiable. Only a limited number of departments and agencies will regularly hold such information.

Examples could include disclosure of information relating to:

- defence policy and strategy, military planning and defence intelligence
- the size, shape, organisation, logistics, order of battle, state of readiness and training of the Armed Forces of the Crown
- the actual or prospective deployment of those forces in the UK or overseas, including their operational orders, tactics and rules of engagement
- the weapons (including nuclear), stores, transport or other equipment of those forces and the invention, development, production, technical specification and performance of such equipment and research relating to it
- plans and measures for the maintenance of essential supplies and services that are or would be needed in time of conflict
- plans for future military capabilities
- plans or options for the defence or reinforcement of a colony or another country
- analysis of the capability, state of readiness, performance of individual or combined units, their equipment or support structures
- arrangements for co-operation, collaboration, consultation or integration with the Armed Forces of other countries, whether on a bilateral basis or as part of a defence alliance or other international force
- general capability

This is not an exhaustive list of examples. Nor is it suggested that information on one of the topics listed above will necessarily be exempt, as this will depend on the effects of disclosure.

Prejudice to defence matters

The range of disclosures which could prejudice UK defence matters is potentially broad. At any time of tension or conflict, it would clearly be contrary to UK interests to disclose information that could assist a potential enemy. While this concern may not be so obvious or immediate in peace time, the confirmation of certain defence plans, policies, organisational or support matters could nonetheless allow a potential adversary (including a terrorist group) to gain an advantage that would be contrary to the UK's defence interest. This could undermine the defence arrangements for the UK or any overseas territory, or have an adverse impact on the capability, effectiveness or security of military or other personnel fulfilling a defence role.

If you are considering using the section 26 exemption in relation to a particular request it is important that your primary consideration is how exactly the defence matters mentioned in section 26(1) would be prejudiced, or would be likely to be prejudiced. The risk that a prejudicial outcome would occur has to be more than fanciful, but need not be probable. The public authority, when deciding whether the information in question is exempt under section 26, must assess the kind of harm that may result from disclosure and the risk of that harm materialising.

General factors to take into account when deciding whether disclosure would have a prejudicial effect on defence include:

Security classifications

The fact that a document carries a security classification does not mean that the exemption applies to all, or any, of the information contained in it, though it may be an indication that use of the exemption should be considered. The purpose of a security classification is to indicate the highest classification applicable to the contents of a document (or part of a document) at the time it was created. The protective marking of a document may relate to matters other than defence (for example national security or international relations), or it may no longer be warranted due to the passage of time or events. You should consider each request on its merits and therefore assess the specific information that has been requested and any prejudice associated with its disclosure at that time to establish whether use of the exemption is appropriate.

The source of information

Other freedom of information exemptions are likely to be relevant to some information that falls within the scope of the defence exemption:

- Some defence information will have originated from the Special Forces or one of the other security bodies named in section 23 of the Freedom of Information Act. It may therefore be appropriate to cite the section 23 exemption which is not dependent upon potential prejudice or the public interest test.
- The word 'defence' will often be an indication that information needs to be safeguarded for reasons of national security. 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 claiming the exemption would prevent. The exemptions under sections 23 and 24 are extremely closely linked. In certain circumstances it will be necessary to use the two exemptions together; in others the two exemptions are mutually exclusive and cannot be used together. Further details are contained in the guidance on sections 23 and 24.
- Defence information may be confidential information received from another state, in which case it may be more appropriate to consider the exemptions at section 27 (but not section 41 (information provided in confidence) as such confidences owed to foreign countries under international law are rarely actionable in domestic courts). In some cases, release of information that relates to defence may not run the risk of harming the defence of the British Islands or any colony, but it may prejudice the UK's relations with another State or any of the other matters in section 27(1)(a)-(d), and so fall within the scope of section 27(1).
- Section 41 (information provided in confidence) is, however, relevant to protect information obtained in confidence where the confidence is actionable in the domestic courts.
- The exemption relating to commercial interests (section 43) may also be relevant to defence, particularly defence procurement information.
- The freedom of information exemption relating to health and safety (section 38) could also be relevant to defence. This exemption

should be considered if disclosure of information would or would be likely to endanger the physical or mental health of any individual, such as personnel on operations.

Other information already in the public domain

Individual requests for information must be considered on their merits but you should take account of what is already in the public domain (either in the UK or overseas) when assessing prejudice to defence matters. The fact that information has already been published may reduce or negate any potential prejudice (and section 21 may be relevant in this context). However in some circumstances it could give rise to prejudice that would not otherwise have existed – because, taken together with the information requested, it could disclose a composite of information which is more sensitive than its individual parts taken separately. You may need to consider how the information came to be in the public domain as defence matters might be prejudiced by officially disclosing, and therefore confirming, information which has previously only been the subject of an unauthorised or unattributable report or speculation.

Timing

The sensitivity of information will often be dependent on the timing of a request and the age of the information. For example, while information about a specific operation might prejudice operational effectiveness if it were to be made public at the planning stage, the concern about disclosing some or all of the information may diminish or disappear after the operation has taken place.

Neither confirm nor deny

Section 26(3) exempts departments from the duty to confirm or deny holding the information if this would be likely in itself to prejudice the considerations mentioned in 26(1). If the exemption from the duty to confirm or deny whether the information is held is claimed, it is not necessary to go on to claim exemption from the duty to provide the information. However, it is necessary to consider the balance of public interest for and against confirming that the information is or is not held.

Public interest test

Section 26 is not an absolute exemption. Before withholding information covered by this section, you must assess, in all the circumstances of the case, whether the public interest in having the information disclosed outweighs the public interest that would be protected by non-disclosure.

The public interest in avoiding prejudice to defence and the Armed Forces is strong and, in most cases, will tend to outweigh the public interest in disclosing such information. However, where the risk of prejudice has been assessed as minimal, or where the harm that is likely to result is of a trivial nature, or where the public interest in disclosure is itself particularly strong, this may tip the public interest balance in favour of disclosure.

There is widespread interest in defence policy and the activities of the Armed Forces, and it is appropriate for the public to understand how and why key decisions are taken in these areas. The public interest will therefore be strong in relation to the disclosure of information that will inform debate and improve public understanding. Examples might include the disclosure of information relating to concerns on matters such as:

- national security
- the safety of military personnel or loss of life
- risks to the safety of civilians
- the use of land or environmental impact of military activity (section 39 may also be relevant here)

- the factual and analytical basis used to develop defence policies
- procurement
- the use of public funds

On the other hand, the public interest is highly likely to weigh against the disclosure of information which could undermine the conduct of a specific military operation or have an adverse impact on security or safety. In addition, the disclosure of information in the face of an objection from an allied country, or in breach of a clear undertaking to preserve confidentiality, may well prejudice the UK's defence relations by restricting exchanges of information or by jeopardizing military cooperation.

In every case (and notwithstanding the weight of the public interest in maintaining the exemption in respect of information likely to prejudice the section 26 matters) the public authority in receipt of the request will need to analyse the risk of damage to the public interest, be able to articulate what it is and how it is best served by withholding the information in question.

Other statutes and policies

Departments and agencies that deal with sensitive information of this nature are likely to have specific clearance procedures that have to be followed when dealing with requests. You must comply with any such procedures. For example, you still must follow instructions for downgrading information agreed for release that was previously marked with a security classification. Section 44 of the Act preserves existing statutory prohibitions on disclosure, and it should be noted that the unauthorised and unlawful disclosure of information could, in some cases, be a criminal offence.

Consultation

The majority of requests for information about defence matters are likely to be directed to the Ministry of Defence. However, some other government departments and public authorities will also hold information relating to defence matters (for instance emergency planning), or information whose disclosure might have an impact on defence (for example information about levels of tension between other states; or information about the procurement or capabilities of defence equipment). It is good practice to consult Ministry of Defence officials about the impact of any disclosure to which section 26 has potential application. This will be particularly appropriate if the information originated from the Ministry of Defence; if it is unclear whether the information has previously been disclosed; or if the same or similar information may also be held by the Ministry of Defence or other public authorities.

This consultation is within the spirit of the Code(s) of Practice issued under section 45 of the Freedom of Information Act. However, final responsibility for deciding how to respond will rest with the public authority that received the request.

Duration of the exemption

Section 26 applies to all recorded information, including that in records over 30 years old.

Annex A: Definition of terms

Defence: is achieved by maintaining the ability to use military force in support of legitimate political objectives, in particular the protection of the UK, overseas territories and national interests. Defence can therefore include self-defence, as well as measures taken in conjunction with other countries or under the auspices of an international organisation. Such measures may include steps for the detection, prevention and suppression of aggressive activities of any foreign state or party against the UK, overseas territories and national interests, and may include counter terrorist and resilience measures.

The British Islands: is defined in Schedule 1 to 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 Island
- South Georgia and South Sandwich Islands
- Sovereign Base Areas on Cyprus (regarded as a colony under the terms of the Cyprus Act 1960)

- St Helena and Dependencies (Ascension Island and Tristan da Cunha)
- Turk and Caicos Islands

Capability: Capability involves having the necessary skills to operate in a particular situation. In relation to defence it is derived from having trained manpower, serviceable equipment, the supporting systems and information needed to deploy to and conduct operations that meet the policy objectives set by government.

Effectiveness: Effectiveness relates to the successful use of defence capability. This requires a readiness to undertake operations in a structured way that is appropriate to the situation, in conjunction with government departments and, where appropriate, other states and international organisations.

Security: Security is achieved through the protection of personnel from attack, both at a collective and at an individual level, and from the threat of compromise to the confidentiality, integrity and/or availability of defence assets.

Relevant Forces: This has two components:

1. 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. This includes the Special Forces¹ and any unit or part of a unit of the Armed Forces which is for the time being required by the Secretary of State to assist the Government Communications Headquarters (GCHQ) in the exercise of its functions. However, it should be noted that the Special Forces and such units are not part of the Armed Forces when that term is defined as a public authority for the purpose of compliance with the Act (Schedule 1, Paragraph 6). Additionally, information which was directly or indirectly supplied by or relates to any of the Special Forces or a unit or part of a unit assisting GCHQ is exempt information under section 23 of the Act.
2. Forces co-operating with the Armed Forces of the Crown would include any member or part of any foreign armed force involved in

¹ 'The Special Forces' means 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. (Freedom of Information Act 2000, section 84)

collective defence arrangements with the UK (for example under the auspices of NATO or under a UN mandate), and any forces that are cooperating on a specific military operation or exercise (e.g. under the auspices of the EU or a UN peace keeping mission). The application of section 23 will therefore depend on the prevailing circumstances. If forces are acting in cooperation with the Armed Forces of the Crown at any particular time this will, however, be a matter of fact. The key consideration will be whether the disclosure of information relating to that co-operation would or would be likely to affect the capability, effectiveness or security of the foreign force.

