



Freedom of Information Act Awareness Guidance No 21

The Duty to Confirm or Deny

The Information Commissioner's Office (ICO) has produced this guidance as part of a series of good practice guidance designed to aid understanding and application of the Freedom of Information Act 2000. The aim is to introduce some of the key concepts in the Act and to suggest the approaches that may be taken in response to information requests.

The guidance will be developed over time in the light of practical experience.

Here we look at what is meant by the duty to confirm or deny.

A) GENERAL OVERVIEW

In this section of the Guidance we give a general overview of the meaning of the provision and the different circumstances under which the duty to confirm or deny may arise. In Section B, we look at some practical examples.

a) What is the duty to confirm or deny?

Section 1 of the Freedom of Information Act 2000 provides two distinct but related rights of access to information which impose corresponding duties on public authorities. These are:

- the duty to inform the applicant whether or not information is held by the authority, and, if so,
- the duty to communicate that information to the applicant.

The Act refers to the first duty as "the duty to confirm or deny". Although, the second of these duties is the one with which most applicants will be concerned, both have equal weight and, when information is exempt but subject to the public interest test, the test is applied to each independently.

The thinking behind the separate provisions is quite straightforward. If information has been requested but is not held, it will normally be reasonable to inform the applicant of this fact. However, there may be some exceptional cases where it would not even be right to confirm or deny that information requested was held. For instance, in the areas of policing, it would not make sense to allow criminals to discover if they were under suspicion and, if so, to discover the extent of those suspicions. Further examples are given in Section B - Considering the duty to confirm or deny in practice.

b) The duty to confirm or deny in relation to non-exempt information

There are two possibilities to consider:

- No information is held but, if it were held, it would not be exempt. In this case the public authority must inform the applicant that it does not hold the information requested. At the same time it should assist the applicant by directing the applicant to any public authority which may hold the information requested.
- Information is released. In these cases, the fact that information is communicated obviously indicates that it is held and no separate statement to this effect need be made.

c) The duty to confirm or deny where a request may be refused on procedural grounds

The Act provides two types of ground for the refusal of requests. Procedural grounds relate to issues such as fees, the “appropriate limit” or cost ceiling, and provisions relating to requests which are vexatious or repetitious. The second ground for refusal is reliance upon an exemption, dealt with in sub-section d).

So far as procedural grounds are concerned, there are three cases to consider:

- The request is judged to be vexatious or repeated (section 14). In these cases, neither the duty to confirm or deny nor to communicate the information arise, although the public authority must still give a refusal notice. (Further advice on Vexatious requests is given in Awareness Guidance 22.)
- An extensive search, exceeding the appropriate limit set out in the [Freedom of Information and Data Protection Appropriate Limit and Fees Regulations 2004](#) (24 hours or more for public authorities listed in Part I of Schedule 1; 18 hours or more for all other public authorities) is needed to determine whether the requested information is held. Once the appropriate limit is exceeded, an authority is relieved of the duty to confirm or deny providing the cost of ascertaining this element alone would exceed the appropriate limit ([Mr P Quinn v The Information Commissioner](#)). An authority may choose to search beyond the appropriate limit but is not obliged to do so. Good records management and adherence to the [Section 46 Records Management Code of Practice](#) (Lord Chancellor's Code of Practice on the Management of Records), should reduce the likelihood of such a circumstance arising.
- Where the cost of complying with the duty to communicate information exceeds the limit it may still be possible to comply with the duty to confirm or deny within the limit.

d) The duty to confirm or deny in relation to exempt information

There are three general cases, as follows.

(i) Limited exemptions

There are two exemptions which only apply to the duty to communicate information. Under these exemptions it is always necessary to comply with the duty to confirm or deny. The exemptions in question are:

- Section 21. This creates an exemption for information accessible to the applicant by other means. Here, it is reasonable to expect that the public authority will inform an applicant that it holds the information, in order to give the applicant an opportunity to access it by another route. This is compatible with the duty to provide advice and assistance under section 16.
- Section 43(1). This creates an exemption for information which constitutes a trade secret. The Act assumes that no harm can arise from an applicant knowing that the information they want is held but cannot be revealed because it is a trade secret.

(ii) The absolute exemptions

With the exception of section 21, where the information requested is subject to an absolute exemption neither the duty to confirm or deny nor to communicate the information to the applicant arise. However not all the absolute exemptions have the same effect.

For instance, section 41 provides an absolute exemption for information provided in confidence. If to confirm or deny the holding of that information would itself constitute an actionable breach of confidence, then the duty to confirm or deny does not arise. In many cases, however it may be possible to confirm or deny the holding of information without breaching a duty of confidence.

By contrast, s.32 provides an exemption relating to court records. In that case the duty to confirm or deny never arises.

Public authorities relying upon absolute exemptions must consider whether, in a particular case, the effect of an exemption is in fact to relieve it of the duty to confirm or deny.

(iii) The qualified exemptions

In all other cases, that is, where the information requested is subject to a qualified exemption, the public interest test must be applied.

If a public authority does not hold the requested information and the applicable exemption is prejudice-based, it should first consider whether denying that it

holds the information would have any of the prejudicial effects stated in the section, and then apply the public interest test. (For further advice on the Prejudice Test, see Awareness Guidance No 20.)

If a public authority does not hold the requested information and the exemption being considered is class based, a public authority needs to consider whether it would apply **if** the information **were** held.

When a public authority holds the requested information, two public interest tests must be separately applied – to the disclosure of the information itself and to the fact that information is held – and it should not be assumed that the outcome in each test will be the same.

B) CONSIDERING THE DUTY TO CONFIRM OR DENY IN PRACTICE

a) Confirming that exempt information is held

It may often be the case that a public authority will withhold information because it is exempt but still confirm to the applicant that they hold it. Examples of this are as follows:

- A public auditor may reasonably withhold a draft audit report until all parties have had the opportunity to comment on it and a final version has been published, claiming exemption from the duty to communicate information under sections 22 (information intended for future publication) and 33 (prejudice to audit functions). In terms of audit functions, it is firstly highly improbable that simply disclosing the fact that the authority has in its possession such a report could reasonably be said to prejudice those functions. Even if it could, however, it is unlikely that the public interest in not confirming the fact would be greater than the public interest in confirming it.
- After a final governmental policy line has been decided and made public, first drafts of policy papers may still be withheld on the grounds that they are exempt under section 35, (formulation of government policy etc.) It is probable, however, that it will be in the public interest to confirm that deliberation took place and that information relating to it exists, on the grounds that it is in the public interest to know that policy issues are considered and discussed.

b) Refusing to confirm or deny that information is held

There will, of course, be other cases where it is right to neither communicate nor to confirm or deny, both in cases where information actually is and is not held. For example:

- A police force may hold information regarding particular properties they have under surveillance, which would be exempt under section 30 (investigations

and proceedings conducted by public authorities). It would not be in the public interest to confirm or deny the fact that any given property was under surveillance because releasing that fact alone would detrimentally affect the purpose of the operation. This would apply whether or not the property about which the information was requested was in actual fact under surveillance. This is because if a police force only upheld its duty to confirm or deny where it was not keeping properties under surveillance an applicant could reasonably assume that where the police force refused to confirm or deny, the property named in the request was under surveillance. It is likely that these considerations will outweigh the factors in favour of confirming or denying.

- If, during wartime, a request were made to a government department for information regarding a particular battle plan or specific weapons carried by British troops, merely confirming that this information were held would be likely to prejudice the capability, effectiveness or security of the relevant forces (section 26) and the public interest test would weigh against doing so.

c) Implications of the wording of the request

The wording of the request for information will affect whether or not a public authority will confirm or deny it holds that information. In many cases the more specific the request, the lower the likelihood of the duty arising.

For instance, a hospital may receive a number of requests for information about medical records which it holds.

- The first request may be for information about general clinical outcomes, the incidence of particular medical conditions within its catchment area and so forth. In responding to the request, the hospital would be likely to communicate the high level information requested, in the process confirming that it held medical records relating to its patients.
- The same hospital may have treated a prominent individual who had been involved in, say a road traffic accident and receive a request for information about this. Although the full details of the treatment might not be disclosed, it is likely that some information would be released, again implying that information of the sort requested was held. The hospital would explain why it was not releasing the more detailed information, in effect confirming that it was held.
- A third request might be received about any information which the hospital held about, say, the heart condition of the same individual. In that case it is unlikely that the hospital would release any information from the medical record. It is also likely that it would decline to confirm or deny holding information about the patient's heart condition unless this was information which was already in the public domain.

d) Responding to the applicant

When a public authority refuses either to disclose requested information or confirm or deny that that information is held, it must issue a refusal notice stating the fact of refusal, the exemption used and why the exemption applies.

A public authority should be clear in its refusal notice that where the public interest test applies, it has applied it in relation to each duty individually.

It may be useful for a public authority to prepare a standard response for use in cases where the duty to confirm or deny will rarely arise, explaining the policy in general. For example:

When information regarding police investigations is requested, it can always reasonably be claimed that it is in the public interest for the police to be able to carry out their work effectively, and applying the duty to confirm or deny may be opposed to that interest in some cases (such as that discussed in the example earlier). It would therefore be appropriate for a police force to issue a response to this effect.

More information

If you need any more information about this or any other aspect of freedom of information, please contact us.

Phone: 08456 30 60 60
01625 54 57 45

E-mail: please use the online enquiry form on our website

Website: www.ico.gov.uk