



Ministry of
JUSTICE

Freedom of information guidance

Exemptions guidance

Section 23: Information supplied
by, or relating to, bodies dealing
with security matters.

March 2012

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Introduction

The Security and Intelligence Agencies are not 'public authorities' for the purposes of the Act, therefore they are not under any duty themselves to disclose information under the Freedom of Information Act. It is only information supplied by them to public authorities, or information that relates to them and is held by public authorities, which needs to be, and is, addressed by section 23.

The section 23 exemption applies to information received from or related to the bodies listed at section 23(3) of the Freedom of Information Act. This includes the Security Service, the Secret Intelligence Service, Government Communications Headquarters and the Serious Organised Crime Agency.

Where section 23 is being considered the National Security Liaison Group should **always** be consulted via the following contact details: NSLGIinbox@cabinet-office.x.gsi.gov.uk

The exemptions under sections 23 and 24 are extremely closely linked. Section 24 covers information which is required to be withheld for the purpose of safeguarding national security. 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 fact that a public authority does not hold information supplied by one of the Security Bodies can itself be information relating to those bodies. If information falls within the exemption in section 23, it will very often be important to consider whether it is necessary to rely on the exclusion of the duty to confirm or deny whether the information is held. A non-committal response can be useful as it will not disclose information as to whether a Security and Intelligence Agency is or is not involved in a certain area of work.

Section 23 is **not** subject to the public interest test.

It is possible to invoke a ministerial certification procedure when relying on this exemption.

This guidance should be read together with the guidance on section 24 when contemplating withholding information on grounds related to national security. Annexes A, B and C to the guidance on section 24 are equally relevant to this guidance.

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

Public interest test

Section 23 is an absolute exemption for records under 30 years old. This means that there is no requirement in the Act to assess whether there is any public interest in disclosure. However, historical records (over 30 years) are subject to the public interest test – see ‘**duration of the exemption**’ on page 4).

Neither confirm nor deny

Section 23(5) provides an exemption from the duty at section 1(1)(a) to confirm or deny whether the information requested is held. The ability to ‘neither confirm nor deny’ that information is held is important, because confirming that information is not held and thus that there is, or has been, no SIA involvement in an issue can be as sensitive as confirming that there is or has been such involvement. Such information is itself information about a SIA and is exempt under section 23.

Where a department relies on neither confirm nor deny under section 23(5) the duty at section 1(1)(b) to communicate the information sought does not arise, therefore section 23(1), which gives an exemption from the duty to communicate, should not be relied upon, i.e. when section 23(5) is used, section 23(1) is not used for the same information.

Consultation

Consultation is crucial to decisions about the handling of requests which may involve sensitive information. **It will always be necessary to contact the National Security Liaison Group via: NSLGIinbox@cabinet-office.x.gsi.gov.uk who can consult the relevant Security and Intelligence Agency in deciding whether to use section 23.**

Duration of the exemption

The section 23 exemption applies to all records, regardless of their age, including historical records. However, where historical records to which section 23 applies have been transferred to the National Archives, or the Public Record Office of Northern Ireland, section 23 ceases to be an absolute exemption and is subject to a public interest test. Information may still be sensitive and warrant the use of section 23 but each request should be judged on a case by case basis, consulting as appropriate.

Use of section 23(5) and 24(2) exemptions together

In practice it is very rare that a neither confirm nor deny response will cite just section 23, as this will confirm that the question of whether or not information is held relates to one of the section 23 bodies. Therefore, to avoid releasing information about one of these bodies which has not already been released, it will be necessary to rely upon neither confirm nor deny under both section 23 and section 24. By using both exemptions it obscures the fact that a section 23 body may or may not have been involved. This is permissible in contrast to the application of section 23(1) and section 24(1) to withhold information that the duty under section 1(1)(b) applies to, where the exemptions are mutually exclusive, although there are instances where they may appear together to withhold different information. The ability to use section 23(5) and section 24(2) together in respect of the same information is important in order to maintain the principle that information about section 23 bodies is exempt. The use of section 24(2) requires full consideration of the public interest in disclosure (for more information see the detailed exemptions guidance on section 24).

The Information Tribunal agreed with this approach in the case of *Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045).

Other information requests will not require a neither confirm nor deny response in respect of whether information is held. For example, where a request concerns an area of activity where it is known that one or more of the Security and Intelligence Agencies are involved usually there will be no need to give a neither confirm nor deny response.

Use of section 23(5) (and section 24(2)) exemption where no information is held

The use of neither confirm nor deny may be undermined not only by confirming that there is information held (i.e. implying that the Security and Intelligence Agencies have an interest in the subject) but also by confirming that no information is held (i.e. implying that the Security and Intelligence Agencies do not have an interest). Thus, to protect from disclosure the fact that no information is held the use of section 23(5) alone or section 23(5) and section 24(2) together may be justified. The decision must always be considered carefully. The following factors must always be taken into account:

- whether the information requested could reasonably be expected to have come from or be related to a Security and Intelligence Agency
- whether the information is about the kind of matter in which the Security and Intelligence Agency would be reasonably expected to have an interest
- whether, at the time of the request, the subject matter is of such sensitivity that the department would not want to reveal either that it held or that it did not hold information on the matter

For example, an information request is made to the Foreign and Commonwealth Office for information on terrorist threats to a particular UK interest overseas. No information from Security and Intelligence Agencies is held by the Foreign and Commonwealth Office relating specifically to that UK interest as there is no threat at present. Confirmation that no information from the Security and Intelligence Agencies is held might assist terrorist groups in their activities. They could infer that the UK interest was not seen as under threat and therefore assume that it will be an easier target. Their operational plans could then be altered to target that UK interest in the future. Considering each of the factors above, a neither confirm nor deny response in reliance on the section 23(5) exemption in these circumstances is likely to be justified. It may also be appropriate in this situation to claim the section 24(2) exemption.

This is not an easy analysis to make and there may be reasons why a neither confirm nor deny response needs to be given that officials are not aware of. Again this is why any requests relating to section 23 should have input from the National Security Liaison Group and from the appropriate Security and Intelligence Agency.

Contact details are: NSLGIinbox@cabinet-office.x.gsi.gov.uk

Refusing information – section 17

If information has been identified as falling under section 23(1) a response should not be issued until agreement has been given by the National Security Liaison Group and the relevant Security and Intelligence Agency. Particular care should be taken in drafting a neither confirm nor deny response.

Where a public authority relies upon section 23(1), or upon 23(5) to give an neither confirm nor deny response, it will need to comply with the duty under section 17(1) to state that it is relying upon an exemption and indicate which exemption that is. If a response is given citing section 23(1), it will not be necessary to comply with section 17(1)(c) (authorities are obliged to state why the exemption applies if that is not apparent). This is because if the information falls under section 23(1) then it is clear what the information relates to and why it is exempt.

If section 24(2) is also claimed alongside section 23(5) in a neither confirm nor deny response, the section 17 notice will need to deal with both exemptions and in relation to the section 24(2) exemption, consider the public interest for and against confirming or denying that information is held. There may be occasions where communicating the public interest argument to the applicant would in itself reveal exempt information. In these cases section 17(4) can be relied upon to limit the detail provided in communicating the public interest, but only to the extent required to protect the exempt information. You would be expected to provide the full reasons to the Information Commissioner in confidence if your refusal is appealed to him.

Ministerial certificates

Section 23(2) provides that a certificate may be signed by a Minister, certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the specified Security and Intelligence Agencies. The Act says that a certificate will 'be conclusive evidence of that fact' but this can be challenged under section 60 on judicial review principles.

Section 23 only allows Ministerial certificates to be signed in relation to specific information. The certificate cannot be general and prospective; in other words it cannot be prepared and signed in expectation of a request for information (unlike certificates issued under the section 24 national security exemption).

A Ministerial certificate requires the signature of a Minister of the Crown (who for these purposes are Cabinet Ministers, the Attorney General and the Advocate General).

It is not necessary to have a certificate in order to rely on the section 23 exemption, however, in certain circumstances one may need to be issued,

usually when the reliance upon the exemption is challenged (see below). 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 23 and/or 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 of the guidance on section 24 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 23 should be discussed with the ICO in the first instance. **Again the views of the National Security Liaison Group and the relevant Security and Intelligence Agency must be sought before a certificate is issued. Contact details are:**
NSLGIinbox@cabinet-office.x.gsi.gov.uk

The Act does not require that a certificate be signed by any particular minister. It is also possible for one ministerial certificate to cover round robin cases. Where the information is sought from more than one department, it will be important to undertake interdepartmental consultation at an early stage. It will be necessary to agree if a certificate is actually required and if so which Minister should sign it.

Where a section 24(2) exemption has been claimed in conjunction with the section 23(5) exemption a certificate in relation to each exemption can be used in respect of the same information (see guidance on Ministerial certificates under section 24).

Relationship with other exemptions

There is nothing to prevent the use of other exemptions if a section 23 and/or a section 24 exemption is relied upon in relation to the same information. While section 23(1) and section 24(1) cannot be cited for the same information (except in the context of a neither confirm nor deny response) it is possible to use them in the same response cumulatively, i.e. if they apply to different information. Given the potential for overlap between exemptions, departments should consider other exemptions properly. Exemptions likely to be considered alongside section 23 include: section 26 (defence), section 27 (international relations) and section 31 (law enforcement). There may also be occasions when other exemptions are used to withhold information, but it may also be appropriate to use neither confirm nor deny under sections 23 and 24 to hide the fact that there may or may not be any further information. Again if this is a potential way forward the National Security Liaison Group and the relevant Security and Intelligence Agency must be consulted.