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**CHAPTER 25
SECTION 7**

**USE OF EXEMPTIONS IN RESPECT OF SECURITY
MATTERS AND NATIONAL SECURITY**

1. INTRODUCTION

The exemptions contained under sections 23 and 24 of the Freedom of Information Act 2000 (“the Act”) are extremely closely linked and should always be considered together by staff.

The section 23 exemption is applicable to **information received from or related to a number of bodies specifically listed in the Act who deal with security matters**. It is an absolute exemption and does not require staff to conduct a public interest balancing test.

The section 24 exemption is applicable to information the non-disclosure of which is **necessary to safeguard national security**. This is a qualified exemption which means that even if the information requested falls under the scope of this exemption, staff must also consider whether the public interest might nonetheless be served by making disclosure.

The Security Bodies may often wish to protect even the fact that there is or is not information held; this is commonly known as the *‘neither confirm nor deny’* policy and its use is explained in detail in relation to these exemptions. When engaging a neither confirm nor deny response to an applicant, it will always be necessary to use these two exemptions together. In other circumstances where only an exemption from the duty to communicate is being used, the two exemptions are mutually exclusive and cannot be used together. Further guidance on the relationship between each exemption is provided at point 4.

It is important that staff in IND who deal with requests for information relating to Security Bodies or national security issues read the advice provided here on both exemptions before assessing whether to withhold information on the grounds of either of these exemptions. Given the complexity of the relationship between these exemptions and the fact that their application turns on the information access rights created by the Act, staff should consult Section 5 of this IDI Chapter in conjunction with this guidance.

Where a request is received by an IND Directorate that does not deal with security cases on a regular basis, this should be faxed immediately to the IND Central FOI Team for further advice. Similarly, if staff are unsure whether a request may impact on the issue of the UK’s national security interests the request should also be referred to the IND Central FOI Team. A short covering note should be provided from the IND Directorate and member of staff concerned entitled ***‘Further information required on possible security request’***.

Where IND Directorates have consulted with the security and intelligence agencies and seek to apply either or both of these exemptions together, this must be authorised at Grade 7/Assistant Director level or above, and the IND Central FOI Team must also approve their use. The IND Central FOI Team will also assist IND Directorates in drafting all final responses which intend to use either of these exemptions because of their potential complexity and sensitivity.

IND Directorates can arrange for this to take place by calling or emailing (on POISE) the following individuals:

2. EXEMPTING INFORMATION SUPPLIED BY, OR RELATED TO, BODIES DEALING WITH SECURITY MATTERS

2.1 Background

The exemption under section 23 of the Act applies to information supplied by, or relating to bodies (referred to as the “Security Bodies”) dealing with national security matters. It is an absolute exemption which means that there is no requirement in the Act to assess the prejudice that could be caused by disclosure, nor any requirement to consider the public interest in withholding or disclosing information.

As the Security Bodies are not designated ‘public authorities’ for the purposes of the Act, they are not under any duty themselves to disclose information. It is only information supplied by them to Government Departments or information which relates to them and is held by Government Departments, which is addressed by this exemption.

While there is no right of access under the Act to information supplied by or relating to the Security Bodies it may still be possible to disclose information, quite separately from the Act, if disclosure is officially authorised or has already been placed into the public domain by the Government.

2.2 Security Bodies covered by this exemption

The application of this exemption turns on whether information “relates to” the Security Bodies. The exemption under section 23 defines the Security Bodies as:

- (a) the Security Service (also known as MI5),
- (b) the Secret Intelligence Service (also known as MI6),
- (c) the government Communications Headquarters (also known as GCHQ) This includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the government Communications Headquarters in carrying out its functions,
- (d) the Special Forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,
- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,
- (k) the National Criminal Intelligence Service, and
- (l) the Service Authority for the National Criminal intelligence Service.

The exemption is capable of covering a broad range of issues- either of a policy, operational or administrative nature. In relation to any particular item of information, it will be a matter of fact as to whether it is covered by this exemption or not. Each request that potentially involves sensitive information, has a national security element

or relates, even indirectly, to the Security Bodies, will need to be considered on a case by case basis to ensure that a correct response is made.

Staff should also give particular consideration to cases where no specific information from or relating to a security body is held, but that absence could in itself amount to information falling within this exemption.

2.3 **Scope of the exemption**

For information to come within the scope of this exemption it does not need to have been supplied directly to IND or the wider Home Office by one of the Security Bodies.

It can be applied where information originated with a Security Body but was supplied indirectly to IND. If it is possible to trace a discrete piece of information back through each transmission to its original source as one of the Security Bodies, then this would be sufficient to apply the exemption. This is irrespective of how many hands it has passed through, and even if its wording has changed along the way.

It is important to remember that where the information requested in a document only partly derives from, or relates to, the Security Bodies and falls to be exempt under section 23, the remainder of the information will be subject to disclosure under the Act unless it falls to be withheld under other exemptions.

2.4 **Applying the exemption and using a neither confirm nor deny response**

In certain cases where this exemption is engaged and information relating to the work of the Security Bodies is held in IND, it will be necessary to use a neither confirm nor deny (NCND) response to applicants, and claim an exemption from the duty to confirm under section 23(5) of the Act.

It is also important to note that where IND **does not** hold information, directly or indirectly about the work of a Security Body or a related matter, it may still be necessary for staff to rely upon the exemption under section 23(5) of the Act in order to neither to confirm nor deny the existence of information.

The following factors must always be taken into account when considering NCND in these cases:

- whether the information requested could reasonably have come from or be related to a Security Body;
- whether the information is about the kind of matter in which the Department would be reasonably expected to have an interest; and
- whether, at the time of the request, the subject matter is of such sensitivity that the department would not want to reveal either information or a lack of information on the matter.

For example, an information request is made to the Foreign and Commonwealth Office asking for information on terrorist threats to a particular UK interest overseas. No information from the Security Bodies 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 Bodies 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, claiming the section 23(5) exemption in these circumstances is likely to be justified. But when considering use of NCND, staff should always assess the need to exempt information on national security grounds (section 24 (5) of the Act) in combination with section 23 (5). Point 4 has further details of how and when these exemptions should be applied together.

A decision about using the section 23(5) exemption from the duty to confirm must always be considered carefully by staff and only after prior consultation has taken place with relevant contacts in the Security Bodies and the IND Central FOI Team.

Whenever staff use a NCND reply they will also need to comply with the duty under section 17(1) of the Act to state in their response to indicate which exemption it is relying upon. Under the Act, staff are also obliged to state why the exemption applies, although this may not be required if to do so would reveal exempt information. In most cases where staff use NCND in this area it will be highly unlikely that the response will be able to explain to the applicant why the exemption applies without revealing the very information which is being withheld by use of the exemption. Where this occurs section 17 (4) can be engaged and further advice on this part of the Act can be found in Section 5 of this IDI Chapter.

2.5 **Confirming that information is held but exempting its disclosure**

There will be some information requests where NCND does not need to be maintained. For example, where a request concerns an area of activity where it is known that one or more of the Security Bodies are involved there will be no need to maintain NCND. Equally, there may be cases where information is shortly to be put into the public domain which would make an NCND stance unnecessary. But staff may still consider that information needs exempting from the duty to communicate as it relates to the work of Security Bodies. In such case the exemption under section 23(1) of the Act should be applied.

2.6 **Duration of the exemption**

The exemption here applies to all records, regardless of their age, including historical records, except that for historical records held by the National Archives or the Public Record Office of Northern Ireland. It ceases to be an absolute exemption after 30 years. The sensitivity of information withheld under this exemption may diminish with the passage of time once the record in which the information is contained has become an historical record. Each instance should be judged on a case by case basis, with staff consulting the Security Bodies as appropriate.

3. **NATIONAL SECURITY EXEMPTION**

3.1 **Background**

The exemption under section 24 of the Act applies to information **which may be withheld for the purpose of safeguarding national security**. This is a qualified exemption, which means that after deciding whether the information requested should be withheld under this section, staff must also consider whether the public interest might nonetheless be served by making disclosure.

There is no definition of the term '*national security*' within the Act and so the use of the section 24 exemption is complex and case by case consideration by staff will always be necessary. There will also be a particular need for staff to consider applying this exemption together with section 23 when a NCND response needs to be engaged to an applicant in order to safeguard national security.

It should be noted, however, 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.

It should also be borne in mind that the test for reliance on this exemption is that non-disclosure should be required for the purpose of safeguarding national security. That means that staff must demonstrate the need to withhold the information requested, and if steps could be taken to allow information to be disclosed while safeguarding national security in some other way, those steps will also need to be considered.

3.2 **Scope of this exemption**

The term "National Security" is not defined in the Act and has never been defined in UK legislation. Both domestic and European courts have considered that the assessment of the threat to national security is essentially a matter for the executive. Additionally, when considering safeguarding national security the courts have accepted that it is proper to take what is called a **precautionary approach**. This means that it is necessary not only to consider circumstances where actual harm has or will occur to national security through disclosure of information, but also to consider preventing and avoiding the risk of harm occurring.

Often it is easier to decide that particular information is a matter of national security rather than defining categories of information in advance.

The kinds of information which might relate to national security matters are:

- the security of the nation which 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; and
- 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 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.

3.3 **Key considerations when seeking to apply this exemption**

The test to be applied by staff when considering whether the national security exemption should be engaged under section 24 is if it is required for **the purpose of safeguarding national security**. To apply 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.

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 point being that a piece of information cannot be divorced from its context and looked at in isolation. In justifying such an approach, staff must be quite clear that specific harmful effects of disclosure are reasonably to be expected, including whether there are real and substantial grounds for the expectation.

When applying the exemption, staff must clearly record the justification for the decision even if this is not disclosed in the response to the applicant. As this will be examined in the event that the refusal to provide the information sought is challenged.

3.4 **The public interest balancing test**

Where it is determined that this exemption is required to safeguard national security there will still be a separate and distinct need for staff to consider any further competing public interests in order to decide if the public interest balancing test is satisfied. IND must be seen to have considered first, whether the information needs to be withheld for the purposes of safeguarding national security and secondly, if so, whether in all the circumstances of the case, is it in the public interest to maintain the exemption. This will be the case even where a NCND response is being engaged under this exemption together with section 23 (see point 4 for more details).

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 by staff on its individual merits on a case by case basis.

This process must be gone through whenever a section 24 exemption is claimed, whether or not a Ministerial certificate is used. Point 5 has further information about the use of Ministerial certificates under these exemptions.

3.5 **Applying the exemption and using a neither confirm nor deny response**

In a number of cases where this exemption is engaged it will be necessary for IND staff to use a neither confirm nor deny (NCND) response to applicants regarding the existence of the information sought, and claim an exemption from the duty to confirm under section 24(2) of the Act.

It is also important to note that where IND **does not** hold information, directly or indirectly about a national security matter, it may still be appropriate for staff to rely upon the exemption under section 24(2) of the Act in order neither to confirm nor deny the existence of information. This is because to confirm that no information is held could itself endanger national security.

When considering use of the NCND exemption staff should always assess the need to combine this with section 23 of the Act. Point 4 below provides staff with details of how and when these exemptions should be applied together.

Whenever staff use a NCND reply they will also need to comply with the duty under section 17(1) of the Act to state in their response to what specific exemption they are relying upon and indicate which exemption it is relying upon. Under the Act, staff are also be obliged to state why the exemption applies and explain the public interest balancing test, although this may not be required if to do so would reveal exempt information. In most cases where staff use NCND in this area it will be highly unlikely that the response will be able to explain to the applicant why the exemption applies without revealing the very information which is being withheld by use of the exemption. Where this occurs section 17 (4) can be engaged and further advice on this part of the Act can be found in Section 5 of this IDI Chapter.

3.6 Confirming that information is held but exempting its disclosure

Where it is decided that there is no need to maintain NCND, staff may still consider that information needs protecting from disclosure to an applicant for reasons of national security and so information is exempted in respect of the duty to communicate. The exemption under section 24(1) of the Act should be applied in such cases.

3.7 Duration of the exemption

The national security exemption applies to all records, regardless of their age, including historical records. It is possible that the sensitivity of information may diminish with the passage of time once the records in which the information is contained has become an historical record. Each instance should be judged on a case by case basis by staff.

4. APPLYING BOTH EXEMPTIONS TOGETHER

There is considerable overlap between the types of information covered by the Security Bodies exemption in section 23 and the national security exemption in section 24.

Where an NCND response to the applicant is required in order to prevent confirmation or denial of an interest by the Security Bodies it will be necessary to consider claiming the exemption to the duty to confirm under both section 23(5) and section 24(2). This consideration will be necessary as merely claiming an exemption under section 23(5) would, of itself, risk confirming an interest.

This is because section 17 of the Act states that if an exemption is being applied a public authority must specify in their response to an applicant what exemption is being relied upon. In order to protect NCND where Security Body material is relevant these exemptions should be invoked together in a response. Use of a NCND response under section 23 (5) and 24 (2) together may be the only way that the non-

committal response that NCND requires, in order to work, can be maintained.

Further, so that it cannot readily be inferred that the use of the two exemptions together is itself an indicator of the relevance of Security Body activity, it is important that where section 24 is relied on, reciprocal consideration is given to the justification for relying on section 23.

As referred to above, NCND may also be undermined not only by confirming that there is information held but also by confirming that there is not – this would imply that the Security Bodies do not have an interest in the particular subject. This may justify the use of the section 23(5) or both the section 23(5) and 24(2) exemptions in order to neither confirm nor deny.

Where an exemption to the duty to confirm under section 23(5) and/or section 24(2) is claimed there is no need to go on to consider the duty to communicate.

Where the duty to confirm is complied with but an exemption is applied to the **duty to communicate** the exemptions under Sections 23(1) and 24(1) are mutually exclusive and section 24(1) cannot be claimed to the extent that section 23(1) applies to the information. This means that when applying an exemption from the duty to communicate it must be due to the fact that it relates to Security Bodies **or** due to the need to safeguarding national security: but it cannot be on both grounds. Staff will appreciate that, where it is necessary to maintain NCND, the exemptions to the duty to communicate are not suitable.

5. MINISTERIAL CERTIFICATES

Each of these exemptions provides that a Minister may sign a certificate. Section 23 only allows Ministerial certificates to be signed in relation to specific information which certifies that the information to which it applies was directly or indirectly supplied by, or relates to, any of the specified Security Bodies. The certificate cannot be prepared and signed in expectation of a request for information.

Section 24 provides for a Ministerial certificate to be signed in support of a decision to claim an exemption from disclosure under the terms of section 24. The purpose of a certificate is to enable a Minister to confirm that the exemption is, or at any time was, required for the purpose of safeguarding national security. The Act provides for two types of certificate under section 24 rather than just the one type of certificate under section 23. A certificate may either identify information to which it applies by means of a general description and/or to be expressed to have prospective effect. Alternatively, an ad hoc certificate can be drafted to cover specific information in response to a particular request.

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). All staff in IND should consult the IND Central FOI Team when considering whether to draw up this certificate for approval and advice.

It is not necessary to have a certificate in order to rely on the exemptions but it will strengthen the position of the department in any legal proceedings, and determine the forum for hearing an appeal. When a Ministerial certificate has been served, any appeal is heard by the Information Tribunal rather than by the Commissioner. See

Section 3 of this IDI Chapter for further details on appeal rights for applicants under the Act.

IND staff should not usually consider serving a certificate on the applicant until he or she has exhausted the internal review process and has indicated that he or she will be applying to the Commissioner. To serve the certificate when answering an initial request may be premature and involve unnecessary work, but staff may nevertheless want to consider preparing work for the drafting of a certificate for Ministerial approval at this stage in case it becomes necessary to utilise it later.

6. RELATIONSHIP WITH OTHER EXEMPTIONS

In addition to the link with the section 24 exemption relating to national security (explained in detail at point 4), there is nothing to prevent the use of other exemptions if a section 24 and/or a section 23 exemption is relied upon in relation to the same information. Given the potential for overlap between exemptions, staff should be aware of the existence of other exemptions at the same time as relying on either section 23 or section 24. For example, if a department considers that an exemption is required for the purpose of safeguarding national security, it may also be appropriate to claim an exemption under section 26 (defence), section 27 (international relations) and section 29 (the economy).