



Ministry of Defence

MOD FOI/EIR Compliance Notes FOI

Exemptions

CN21: Section 23 — bodies dealing with Security Matters and Section 24 — National Security

Document history

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1	CIO-3-19-1-3	September 2012	September 2013

What this is about:

This note provides an overview of section 23 (information supplied by, or relating to security matters) and section 24 (information which must be withheld in order to safeguard national security). This note provides an outline of MOD compliance points to consider if engaging section 23/section 24, and how to use 'neither confirm nor deny' when engaging section 23/section 24.

Detail:

Section 23

Bodies dealing with Security Matters

- Section 23(1) is applicable to any information supplied by, or relating to, any of the named bodies dealing with security matters listed such as Special Forces or the intelligence agencies (i.e. Security Service or GCHQ).
- The exemption is **absolute** and therefore **not** subject to a PIT.

MOD compliance points:

- Remember that for information to come within scope of section 23, it does not have to have been supplied directly to MOD by one of the security bodies. The exemption also applies where information originated with a security body but was supplied indirectly, having been first passed through another department.
- Although the identification of information supplied by or relating to security bodies may be straightforward in the majority of cases, this may become less clear when it is used by recipients (i.e. where a department draws on information provided by a security body to produce its own reports or documents). Classification and caveats are a good indicator.
- Because subsection 3 of the exemption lists the specific security bodies to which this exemption can be applied there is often a danger in the exemption's direct application as this, in itself, may constitute some information of a kind if it has not previously been made public officially [REDACTED]
- The MOD considers that the maintenance of confidentiality is vital to the capability and effectiveness of all section 23 bodies. [REDACTED]
The more common application of s23 is therefore in combination with section 24 in particular in the section 23/section 24 NCND formula – see below.
- Section 23 applies to all recorded information regardless of its age, including historical

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records, except for historical records held by The National Archives, whereby section 23 ceases to be an absolute exemption after 30 years. If, however, records remain sensitive and MOD retains such information in closed parts of files under the Public Records Act or withhold the file altogether in the Department beyond the 30 year point, the absolute provision continues until such time that it is deemed otherwise.

- **All potential use of the section 23 exemption must, in the first instance, be discussed and agreed with CIO-SPP-IR-Ops-Sy (Tel: [REDACTED] or [REDACTED]).**

Use of Security Certificates

- **A certificate is not required to claim this exemption but may be required should the information request go to appeal.** (Note: Across Government as a whole their use is extremely rare and to date MOD has never used one).
- Section 23(2) of the Act provides that a certificate can be signed by a Minister of the Crown (i.e. Cabinet Ministers, the Attorney General and Advocate General) certifying that the information to which it applies was directly or indirectly supplied by, or relates, to any of the specified bodies listed under this exemption is "conclusive evidence" that the information is of the type in question.

Section 24 National Security

- Section 24 applies to information that not does fall within the category of section 23 but that needs to be withheld from release 'for the purpose of safeguarding national security'.
- The Act does not specify what is meant by the term 'safeguarding national security'. A case-by-case consideration is necessary of what information should be withheld by this exemption.
- The exemption is **qualified** and therefore subject to a PIT. It is a 'class-based' exemption without the requirement to set the level of prejudice release of the information would cause.

MOD compliance points:

- The section 24 exemption should not be applied to any information relating to national security per se but to information required for the purpose of safeguarding national security. This means 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 would result from disclosure.
- The kind of information that the National Security exemption covers could be:
 - The security of the nation, including 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 relevant to, the safety of 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 UK. But these matters are

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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 Critical National Infrastructure, such as 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.

- **All potential use of the section 24 exemption must, in the first instance, be discussed and agreed with CIO-SPP-IR-Ops-Sy who is available on MB ext [REDACTED]**

Use of the section 23(5)/section 24(2) NCND formula

- There is considerable overlap between the information covered by section 23 and that covered by section 24.
- The use of section 23(5) and section 24(2) together is possible under the Act (in contrast to section 23(1) and section 24(1) which are mutually exclusive) where exemption from the duty to confirm or deny the existence of information is required.
- The formula has the advantage of avoiding reliance on one or other exemption which alone would reveal sensitive information in the sense that it would reveal whether or a section 23 body was (or would be) involved in a particular matter.
- Its use may be the only way that a non-committal response to an information request on a sensitive matter can be achieved for the purposes of maintaining a consistent position across more than one Government department.
- It's a common misconception that NCND is used to disguise the fact that a Department has information which it does not want to disclose. Whilst this can be the case, the NCND principle is broader in that it also affords the ability to avoid having to disclose that information does not exist, which could be equally harmful.

MOD compliance points:

- Use of the section 23(5)/section 24(2) formula is necessary where the nature of section 23 inevitably discloses that a security body is involved (or that absence of a security body is significant if section 24(2) is used on its own). The use of section 23 and section 24 together is the only way that the 'non-committal' response that NCND requires in order to work can be maintained.
- **in applying the section 23(5)/section 24(2) NCND formula, the section 24(2) exemption remains qualified and subject to a public interest test except that the 'for' and 'against' factors change from determining where the balance of the public interest would lie in the withholding of actual section 24-type information to a consideration of the public interest 'for' and 'against' confirming or denying that information is held which is a different PIT test from determining whether or not the public interest lies in disclosing substantive section 24 information – see standard PIT wording below.**
- 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 but every effort should be made to provide some comment. Section 17(4) should be used in exception rather than the rule – seek advice from CIO if you think it is appropriate.

- All potential use of the section 23/section 24 formula must be discussed and agreed with CIO-SPP-IR-Ops-Sy who is available on MB ext [REDACTED]

Standard wording for section 23(5)/section 24(2) Public Interest Test

Section 24(2) provides that the duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.

For Release	Against Release	Outcome
<p>The Act makes a presumption towards disclosure wherever possible.</p> <p>In addition to the general obligation of the Act to promote openness and transparency, there is public interest in knowing whether any such information is held as there is significant public interest in knowing whether MOD holds information deriving from security sources about 'X'</p>	<p>Confirming whether such information held could be prejudicial to the safeguarding of national security because</p> <p>Denying whether such information held could be prejudicial to the safeguarding of national security because</p>	<p>To the extent that section 24(2) applies, in all circumstances of the case, the public interest lies in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in confirming whether or not the MOD holds any information of the type specified under this exemption.</p>

Standard wording to use in an FOI response about section 23(5)/section 24(2) NCND

"The MOD neither confirms nor denies whether it holds any information within the scope of your request by virtue of section 23(5) (Information supplied by, or relating to bodies dealing with security matters) and section 24(2) (National Security), which is a qualified exemption. Section 23 is an absolute exemption and does not require a public interest test to be conducted. To the extent that section 24(2) applies, the Ministry of Defence recognises that there is general public interest in transparency and openness in Government. However, if we were to confirm or deny that additional information was or was not held on this subject, could clearly prejudice the Government's ability to maintain national security. We have concluded that safeguarding national security interests is of paramount importance and that in all circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in confirming or denying whether any additional information is held."

For further information – see the ICO's detailed guidance:

http://www.ico.org.uk/for_organisations/guidance_index/freedom_of_information_and_environmental_information