



MOD FOI/EIR Compliance Notes

FOI Exemptions

CN22: Section 26 (Defence of the British Islands and Colonies / Armed Forces Capability and Security)

Document history

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What this is about:

This note provides an overview on exemption section 26 of the Freedom of Information Act (FOI) Act – information which, if disclosed, would prejudice **defence** or the capability, effectiveness or security of relevant forces. This note provides an outline of MOD compliance points to consider when engaging section 26 and other exemptions to consider. There are also MOD Casework Examples to help you see past cases where the Department engaged section 26.

Detail:

- **Section 26(1)(a)** covers information that would prejudice or would be likely to prejudice the defence of the British Islands or of any colony.
- **Section 26(1)(b)** covers information that would prejudice or would be likely to prejudice the capability, effectiveness or security of any relevant forces.

A colony is defined as any part of HM dominions outside of the British Isles, which is not a commonwealth country.

Relevant forces include the armed forces of the Crown, and armed forces working alongside UK forces – both formally (such as other NATO troops) and informally (such as Northern Alliance forces before the fall of the Taliban)

Capability, effectiveness and security are taken to mean anything which could put the physical safety of troops at risk or impair their ability to carry out their duties.

This exemption is **qualified** and therefore subject to public interest testing.

MOD compliance points:

The FOI Act does not define “would prejudice” or “would be likely to prejudice”. However, case law suggests that “prejudice” should be taken to mean actual “harm” or “damage”; and “likely to prejudice” to mean “a very significant chance of harm or damage”.

The defence of the British Islands and colonies is not limited to activities within British territories, and may also apply to activities overseas to prevent attacks being launched against them. This could include activities in Afghanistan and elsewhere combating international terrorism.

This exemption applies to a wider range of information than that directly concerning the armed forces. Planning and support activities may also be included, such as:

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- Future defence policy and strategy
- Planned co-operation or collaborations with the armed forces of other states
- Plans and measures for the maintenance of essential supplies and services
- Development, production, technical specification and performance of equipment
- However, in each case the specific harm of release must be proven through a public interest test.

Checks should be made to see what information is already in the public domain. If information has already been disclosed this may reduce the prejudice of release, or in some circumstances increase it if combining this information would reveal greater levels of detail. It is important to consider **how** the information came to be in the public domain – defence may be prejudiced by officially disclosing information previously only the subject of speculation.

The level of harm which release could cause may be dependant upon the age of the information being considered, and whether it relates of ongoing operations or ones which have been completed.

- Other exemptions to consider:
- If you are dealing with information relating to Special Forces, this is subject to an absolute exemption under **Section 23, (Information relating to security bodies.)**
- Where information relates to forces from other states working alongside UK forces, **Section 27, (Prejudice the international relations)** may need to be considered to protect relations with that state.
- Some information covered by this exemption may also require the application of **Section 24, (Safeguarding national security)** or may be more correctly withheld under this exemption. It is not always the case that information which could prejudice defence would also harm national security, since a potential future weakening of national security would not be sufficient grounds to engage section 24.

MOD Casework Examples:

- **Defence Board Report on Future Deterrent** – Information regarding the UK Nuclear Submarine fleet was withheld under section 26 as it could prejudice forces engaged in the defence of the British Islands, but section 24 was not engaged since release would not directly threaten national security.
- **Spending Review Model MOD Budget cuts** – elements of this information concerning potential future cuts to the MOD budget were withheld since they could prejudice the defence of the British Islands. Likewise, section 24 was not engaged since release would not directly harm national security.

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

http://www.ico.gov.uk/for_organisations/guidance_index/freedom_of_information_and_environmental_information.aspx