

## When to refuse to confirm or deny information is held

### Freedom of Information Act

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The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.

An overview of the main provisions of the Act can be found in the [Guide to Freedom of Information](#). This is part of a series of guidance, which goes into more detail than the Guide to FOIA to help public authorities to fully understand their obligations and to promote good practice.

This guidance explains when a public authority can respond to a freedom of information request by refusing to confirm or deny that information is held to avoid disclosing exempt information. This is often called a 'neither confirm nor deny' (NCND) response.

## Overview

In certain circumstances, even confirming or denying that requested information is held can reveal information that falls under an exemption. A public authority may be able to use an exemption to refuse to confirm whether or not it holds information, if either confirming or denying would reveal exempt information in itself.

A neither confirm nor deny response is more likely to be needed for very specific requests than for more general or wide ranging requests.

It can be important to use a neither confirm nor deny response consistently, every time a certain type of information is requested, regardless of whether the information is actually held or not. For this reason public authorities need to be alert to the possibility of receiving future requests for the same type of information when handling very specific or detailed requests.

## Why use a 'neither confirm nor deny' response

Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is known as 'the duty to confirm or deny'. In most cases, a public authority will be able to comply with its duty to confirm or deny under section 1(1)(a) – in other words, it will be able to respond to a request by at least informing the requester whether or not it holds the information. In most cases where information is held, a public authority will go on to consider whether information should be provided under section 1(1)(b), or whether it is subject to an exemption in Part II of the Act.

However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose sensitive or potentially damaging information that falls under an exemption. In these circumstances, the Act allows a public authority to respond by refusing to confirm or deny whether it holds the

requested information. This is called a 'neither confirm nor deny' (NCND) response.

A public authority can only refuse to confirm or deny whether it holds the information, if this would in itself reveal information that falls under an exemption. Public authorities should take decisions to neither confirm nor deny whether information is held in a similar manner to decisions to refuse to disclose information. A public authority must be certain that an exemption in the Act applies in respect of the confirmation/denial, and where an exemption is qualified by the public interest test, that the public interest favours neither confirming nor denying that the information is held.

For many requests that public authorities receive, their decision to use a neither confirm nor deny response won't be affected by whether they do or don't in fact hold the information. The starting point and main focus in most cases will be theoretical considerations about the consequences of confirming or denying that a particular type of information is held. The decision to neither confirm nor deny is separate from a decision not to disclose information and needs to be taken entirely on its own merits.

## What FOIA says

All but one of the exemptions (section 21) in Part II of FOIA include a specific provision which removes the duty to comply with section 1(1)(a) if confirming or denying information is held would reveal information that the exemption protects. If there is no duty to comply with 1(1)(a), a public authority does not have to go on to consider any exemptions from 1(1)(b) in relation to any information that may be held.

When and how public authorities can use a neither confirm nor deny response differs according to the exemption being claimed, but neither confirm nor deny provisions usually cross reference an equivalent section 1(1)(b) provision. Public authorities should be able to explain which comparative 1(1)(b) provision is relevant and why the exclusion from the duty to confirm or deny is needed.

Public authorities won't need to claim an exclusion from the duty to confirm or deny whether information is held as often as they use the equivalent exemptions under section 1(1)(b). This is because, in

most cases, confirming that information is held will not reveal anything prejudicial or sensitive.

## **The public interest test**

Section 2(1) of the Act provides that:

'Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

- (a) the provision confers absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,

section 1(1)(a) does not apply.'

Essentially, for qualified exemptions (those subject to the public interest test), the public interest has to weigh in favour of neither confirming nor denying that information is held. For more advice, see our more detailed guidance on the [Public Interest Test](#).

## **Prejudice based exemptions**

When responding to a request by refusing to confirm or deny under a prejudice based exemption, a public authority should demonstrate what prejudice (relevant to the particular interest that the exemption relates to) would, or would be likely to, arise from complying with s1(1)(a). Public authorities are not required to consider what prejudice would, or would be likely to arise from complying with section 1(1)(b) (providing the information). They will however need to explain which limb of the comparative section 1(1)(b) provision is relevant to the exclusion from the duty to

confirm or deny. For more advice on the prejudice based exemptions, see our more detailed guidance on [the Prejudice Test](#).

Section 26(1) provides that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- (a) the defence of the British Islands or of any colony, or
- (b) the capability, effectiveness or security of any relevant forces'

....

Section 26(3) provides that

'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).'

### **Example**

If, during wartime, a request were made to a government department for information regarding a particular battle plan then, merely confirming or denying that this information was held would reveal whether such a battle plan did or did not exist. If knowing that fact would assist an enemy and therefore prejudice the capability, effectiveness or security of relevant forces such as the armed forces, then the exclusion from the duty to confirm or deny whether this information was held could be validly claimed. In this situation, the nature of the information would probably mean that the public interest test would weigh in favour of neither confirming nor denying.

See the guidance on [Section 26: defence](#) for more detail on applying this exemption.

## Class based exemptions

The exclusion from the duty to confirm or deny under class based exemptions (those that protect specific types or categories of information) varies according to the section being claimed. The provisions that remove the duty to comply with section 1(1)(a) under a class based exemption may apply in three circumstances:

- **Whenever the information is exempt, or would be if it were held**

### Example

Section 30(3) provides that the duty to confirm or deny does not arise in relation to information which is exempt information by virtue of subsection 30(1) or (2) (or would be if it were held by the public authority).

A request for information which is or would be exempt information under section 30 (information held for the purposes of criminal investigations) would engage the exclusion from the duty to confirm or deny.

For example, a police force may hold information regarding particular properties they have under surveillance – it is likely that if a request were made for information about the surveillance of a certain property, this information would be exempt under section 30 (investigations and proceedings conducted by public authorities). A public authority could therefore refuse to confirm or deny whether it holds information about a property under surveillance.

Furthermore, this would apply even if information was requested about a property not under surveillance. 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. Section 30 is a qualified exemption (ie it is subject to the public interest test). The arguments used to engage the exclusion from the duty to confirm or deny would also be strong arguments in favour of maintaining the exclusion when it comes to the public interest test.

See the guidance on [Section 30: investigations and proceedings](#) for more detail on applying this exemption.

- **If confirmation /denial would disclose exempt information**

**Example**

Section 42 (legal professional privilege) only permits the authority to refuse to confirm or deny whether information is held if this would itself reveal information (including unrecorded information) which is subject to legal professional privilege.

If a public authority received a request for “any legal advice you have received about XYZ Ltd”, it would have to confirm whether or not it held such advice. A public authority could only refuse to confirm or deny if the request required them to reveal something about the content of the advice that would be covered by legal professional privilege. A neither confirm nor deny response could be given if a request was made for “any legal advice you have received which confirms that XYZ Ltd was acting illegally”. Confirming that such information was held would reveal that the public authority had advice that said XYZ Ltd was acting illegally.

- **When it is based on the same test as in the exemption**

**Example**

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, it will be possible to confirm or deny the holding of information without breaching a duty of confidence.

## Practical considerations when using a neither confirm nor deny response

When applying a neither confirm nor deny provision under any exemption, a public authority is not restricted to only considering the consequences of the actual response that it would be required to provide under s1(1)(a). For example, if it does hold the information, the public authority isn't limited to only considering what would be revealed by confirming it has the information - it can also consider the consequences if it had to deny the information were held.

It is sufficient to demonstrate that either a hypothetical confirmation **or** denial would engage the exemption. In other words, it is not necessary to show that both confirming and denying information is held would engage the exemption from complying with section 1(1)(a).

### **Example**

The Financial Services Agency (FSA) receives a request:

"Please provide any information on complaints about inadequate cash reserves within Bank X last year".

The FSA can provide a neither confirm nor deny response under section 43(3) by virtue of s43(2), on the basis that to confirm that complaints had been made against Bank X would prejudice Bank X's commercial interests, even though denying it received any such complaints would have no effect. It does not matter whether the FSA actually hold the information.

### **The wording of the request**

The exact wording of the request for information is an important consideration when deciding whether a public authority should confirm or deny if it holds the requested information. The more specific the request, the more likely it is that a public authority will need to give a neither confirm nor deny response.



**Example:**

The Financial Services Authority receives a request:

“Please send me a copy of all the complaints about banks made to you in the last six months.’

In this situation, it is unlikely that a NCND response will be needed. This is because the wording of the request is broad and confirming or denying whether some information falling within this wide category of information is held is unlikely to reveal anything that is damaging.

## **Information in the public domain**

In some cases, it may be already known or obvious that information must be held, and in those circumstances confirming that information is held may not cause any harm (although, technically, it may still be possible to neither confirm nor deny if a relevant exclusion applies). When considering what a confirmation or denial would reveal, a public authority isn't limited to considering what the public may learn from such a response; if it can demonstrate that a confirmation or denial would be revealing to someone with more specialist knowledge, this is enough to engage the exclusion to confirm or deny.

## **Using the neither confirm nor deny response consistently**

There are situations where a public authority will need to use the neither confirm nor deny response consistently over a series of separate requests, regardless of whether it holds the requested information. This is to prevent refusing to confirm or deny being taken as an indication of whether information is held. Before complying with section 1(1)(a), public authorities should consider both whether any harm would arise from confirming that information is held **and** whether harm would arise from stating that no information is held. Otherwise, if the same (or same type of)

requests were made on several occasions, a changing response could reveal whether information was held.

**Example:**

A public authority receives a request for information about any prisoners who are under surveillance. The public authority judges that it would not be harmful to confirm that they hold information about this topic. However, if they did *not* hold such information, then revealing this could be harmful as it would confirm to prisoners that they were not under surveillance. Therefore, whether or not information is held, the authority should refuse to confirm or deny.

If the public authority doesn't take this consistent approach then the occasions when it provides a neither confirm nor deny response may unintentionally imply whether or not information is held. For example,

- Request 1: public authority confirms information is held;
- Request 2: public authority confirms information is held;
- Request 3: public authority states that it can neither confirm or deny that the information is held (the information is in fact not held);
- Request 4: public authority confirms information is held.

Although the public authority hasn't actually denied that information is held for request 3, the different response could be interpreted as indicating that this is the case.

This does **not** mean that public authorities should use a neither confirm nor deny response in a blanket fashion. For example, a particular public authority should not provide a neither confirm nor deny response to all requests for all records because some of their records contain sensitive information. They should base their decision on the circumstances of the particular case, with regard to the nature of the information requested and with appropriate consideration given to the public interest test.

**Using a neither confirm nor deny response to avoid identifying the type of information held**

In some limited circumstances, while a public authority could technically use an NCND provision, it may feel that no harm would

be caused if it responded to a request by confirming that information is held, but it may wish to refuse to provide any further detail on the type of information that is held. While this situation is unlikely to arise very often, the ICO accepts that a public authority could use an NCND provision to refuse to confirm any detail about the information it holds.

### **Example**

In the ICO decision notice [FS50225088](#), the Ministry of Justice claimed s42(1) and section 35(3) in relation to a request for legal advice on the interpretation of the 1949 Marriage Act in relation to the marriage of Prince Charles and Camilla Parker-Bowles. While the Ministry of Justice confirmed that it held information relevant to the request and that it was exempt under s42(1), it also cited section 35(3) by virtue of section 35(1)(c) in order to refuse to confirm or deny whether the information held was advice provided by law officers. As the exemption provided by section 35(3) was engaged, the Commissioner found that the public authority had complied with the Act. Whilst this might seem unusual, it allowed the public authority to maintain a consistent approach in its use of the NCND provision to not disclose whether law officers' advice has been sought on a subject, should the public interest favour this approach.

### **Using a neither confirm nor deny response without first establishing whether the information is held**

As stated above the main focus in NCND cases will usually be theoretical considerations about the consequences of disclosure. For prejudice based exemptions, public authorities will often have sufficient knowledge of the context of the request and the issues involved to fully consider the consequences of confirming or denying without first establishing whether the requested information is in fact held and without reviewing its content. For class based exemptions however, public authorities may find it will assist them to review any information that is actually held in order to establish for certain whether it falls within the scope of the exemption claimed.

Public authorities should however bear in mind that in either scenario the ICO might ask for confirmation of whether the information is in fact held, and may even require a copy of it in certain cases, if it considers that this would assist in the ICO investigation.

## Providing a neither confirm nor deny response to an 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 balanced the arguments in favour of maintaining the exemption (ie in favour of giving a neither confirm nor deny response) with the factors in favour of informing the applicant whether it holds the information.

A neither confirm nor deny response needs to be worded carefully to avoid revealing exempt information.

## Other considerations

You might also want to consider the more detailed guidance in respect of the exemptions that are referenced above.

This guidance relates only to FOIA. If the information is environmental, public authorities will instead need to refer to the position under the EIR in our [Guidance Index](#).

However we have separate guidance: [Neither confirm nor deny in relation to personal data](#) which covers both section 40(5) of FOIA and regulation 13(5) of the EIR.

## More information

This guidance has been developed drawing on ICO experience. Because of this, it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to

time in line with new decisions of the Information Commissioner, Tribunals and courts.

It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

If you need any more information about this or any other aspect of freedom of information or data protection, please [Contact us: see our website www.ico.gov.uk](#).