

FOI advanced training: Sections 23 and 24



Welcome.

There will be two short breaks.

Any plans for fire drill? If not, assume fire alarm is genuine.

Due to complexity of subject, we will go at swift pace, but..

Please let me know if they need :

- Me to go slower or faster or to speak more loudly.
- The temperature or ventilation to be adjusted

Also:

- Ask any observers what role they wish to play

Introduction

This session covers sections 23 and 24 together:

- they both deal with aspects of national security
- they are related and interact
- BUT there are differences.....



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- Go through the papers they will have in front of them: session schedule, objectives and print out of FOIA s23 and s24.
- We will issue more handouts as the session progresses.
- Training session covers main points of sections 23 and 24
- Session includes examples – some I shall use to illustrate points, others for discussion. Ask: do **observers** wish to participate in exercises?

Manage expectations of delegates:

- Although this course is described as “Advanced”, it is advanced in the sense that it builds on the Introductory session and on the Foundation FOI modules, including those on exemptions and on the PIT. It is not meant to be a “master class” in casework. It is intended to help you to start to make sense of the s23 and s24 exemptions with a view to the casework that will come to you – more of an Introduction to s23 and s24.
- You will need to study the new workbook, which is very detailed; and also our new external guidance.
- Regarding the workbook – we are looking at running some workshops which will provide the opportunity to go through the workbooks – this is in response to feed back that some areas of the office struggle to provide mentors on this subject. (Currently aim to run workshops in November 2012)
- Although this training is designed for all areas of the office there will be some focus on casework aspects. This is because the nature of the subject and the sensitivities of the public authorities holding such information means that we cannot always reveal our internal thinking on how the exemptions are engaged in our DNs.

Simple comparison of sections 23 and 24

Section 23(1)	Section 24(1)
exempts Information supplied by or relating to specified bodies dealing with security matters	exempts Information (that's not covered by s23(1)) in respect of which exemption from disclosure is required In order to safeguard national security

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S23 - Class based & Absolute

Section 23 – focus is on information supplied by or about certain security bodies – see list

S24 - Prejudice based & qualified

Section 24 – focus is wider – on information not covered by s23(1)
- you have to consider whether information should be withheld because exemption is required in order to safeguard national security. Note it's the exemption from disclosure of the information that must be required...

Comparison of sections 23 and 24 continued... NCND

Section 23(5) continued...	Section 24(2) continued...
There is no need for a public authority to confirm or deny whether information is held if doing so would disclose information which was supplied to it (directly or indirectly) by any of those specified bodies or which relates to them.	Where exemption is needed in order to safeguard national security, a public authority does not have to confirm or deny whether information is held.



In s24, note the focus is on the exemption being required in order to safeguard national security... there may be little practical difference but bear this distinction in mind

Section 23(1)

S23(1): exemption is engaged if:

- a specified security body has supplied information to a public authority, either directly or indirectly

OR

- information held by a public authority relates to a specified security body (specified bodies are listed in s23(3))

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We'll start with how s23(1) is engaged.

The key to s23 is the list of security bodies in s23(3). We will look at this shortly; for now, I'll mention the names of some of them: eg MI5, MI6, SAS, GCHQ, SOCA (Serious Organised Crime Agency)... many acronyms!

See later slide and later handout for more details.

S23(1) “relates to” a security body

Information is exempt under s23(1) if it was supplied by or relates to a s23(3) security body; and

“Relates to” has a broad meaning = any information concerning or linked to a security body.

BUT the connection must not be too remote.

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As you’ve seen in the last slide, one of the factors to engage s23(1) is that the requested information must have been supplied by, or relate to, a security body.

This slide looks at the meaning of the term “relates to”.

In practice it will often be obvious whether information “relates to” a security body.

Example: a simple illustration of the point

A newspaper website reports that the police and security services have made a number of arrests.

Miss S makes a request to the police for information on liaison between the police and MI5 leading up to the raid.

MI5 is a security body listed in s23(3). This fact alone is enough to engage s23(1).

S23(1) “relates to” a security body

- A request for information to the Foreign Office about its 2010 schedule of meetings with MI6. The Foreign Office works closely with MI6.
- A request to the Department for Transport about traffic levels on roads to the west of Cheltenham. GCHQ is situated to the west of Cheltenham.

Does the information requested in these examples relate to a security body?

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Continuing to examine the concept of “relates to”: a simple exercise. Delegates to read the slide.

Exercise is for the delegates to discuss as a group with the trainer and suggest answers; this should only take a few minutes.

Answers:

Request to Foreign Office – YES the FCO works closely with MI6 so it is obvious that the information relates to a security body. S23(1) would therefore apply.

Request to Dept for Transport – NO It would be too remote a connection for the DfT to refuse the request on the basis that some roads are near to GCHQ; the information does not specifically relate to GCHQ. S23(1) would not apply.

The Tribunal has said that we should take a “common sense” approach to the meaning of “relates to”.

It is a broad definition ; hard to define where the cut-off would be between information that does or does not relate to a security body; in the end it is a matter of judgement.

Listed security bodies: sections 23(3) and 23(4)

s23(3) lists the security bodies mentioned elsewhere in s23.

s23(3)(m) – added SOCA, now abolished and replaced by NCA

NB Printed copies of FOIA might be out of date, especially for lists like this. Always refer to up to date version, for example on www.legislation.co.uk.

S23(4) refines the definition of GCHQ at s23(3)(c) to include armed forces units assisting GCHQ.



Let's clarify what we mean by "bodies dealing with security matters" in s23.

Give out handout 3.

Ask delegates to refer to s23(3) (on handout 2 containing s23 and s24 which they already have) which lists the security bodies that are covered. Then they should read handout no 3 explaining what each means.

[The Queen's Speech on 9 May 2012 mentioned the abolition of SOCA and the commencement of the new National Crime Agency which is to replace it – keep an eye out for such changes – this emphasizes the need to keep up to speed with such changes].

In practice, the PAs we deal with on this exemption should be in an authoritative position to state whether a body to which info relates (or which supplied the info) is listed in s23(3); so it's unlikely we would miss this. However we must verify the correct position.

Section 23(5): NCND

- PA does not have to confirm **or** deny it holds information if in doing so it would disclose info which was supplied by a security body (directly or indirectly) or relates to a security body. No need to show both apply.
- "Relates to" has the same meaning as for s23(1) – see earlier slides.
- S23(5) exclusion applies even if:
 - the information is not recorded; and
 - the confirmation **or** denial would not reveal anything prejudicial to the work of a security body; and
 - it is public knowledge that a security body is involved.



Confirmation **OR** denial –

We can consider whether either confirming the info is held or denying the information is held would disclose information relating to a security body.

There will be situations where only one of the possible responses would reveal information about a security body.

Eg Assume the Home Office responsible for granting permission to tap phones. Authority can be granted to a number of bodies – police for criminal investigations, HMRC for tax evasion, security bodies for national security work.

Imagine request made for number of companies whose phones had been tapped – That phone tapping could be for any of the three reasons and so if the HO revealed that phones had been tapped this would not necessarily be information relating to a security body.

But saying the information is not held, i.e. no phones were being tapped would absolutely reveal that no security body tapping phones.

Therefore the exemption is engaged on the basis that if the public authority was obliged to deny the information was held this would be information relating to a national security body.

So even if the HO had authorised the tapping of phones i.e. did hold the information it could NCND on the basis that a 'hypothetical' denial would be information relating to a security body, i.e. the public authority is not limited to considering what would be revealed by the actual response that it would be obliged to provide, it can consider what would be revealed by **either potential response**.

We'll come back to this point towards the end but for now we're going to look at some simpler examples....

S23(5) example

So what happens if a PA does confirm it holds information?

Request : please provide me with any Intelligence you hold from MI5 on terrorist plots to target the Olympic Games.

Response A: Yes, we hold the information (this reveals MI5 is indeed investigating terrorist plots of this type); or

Response B: No, we do not hold the information (this reveals that MI5 is not currently investigating terrorist plots of this type and even implies it has no interest in them).

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Click to reveal the request for information, click again to reveal response A (yes we do hold the info), then click again to reveal response B (no we do not hold it)

Section 23(5) Exercise

"Ban All Religion": handout 4



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Ban All Religion – also in workbook. Give out the question (handout 4) . Do not give out the answer (4A) until after the group has discussed the question.

Give out question sheet 4; hand out separate answer sheet 4A after discussions.

This can be done in groups of two to three.

If the Home Office to respond to the requester that it holds the information – what would that reveal?

And to deny it holds the information?

After answering the main questions, ask verbally: What if it is widely known, as a result of media coverage, that MI5 had been investigating the organisation? Answer: irrelevant : s23(5) can apply even if it is public knowledge that a security body is involved.

What if there is no record of whether or not the information is or is not held? Normally FOIA requires a valid request to relate to recorded information. However the Home Office is unlikely to hold a document which states that MI5 is not investigating Ban All Religion. Under s23(5) it can still NCND because the exclusion applies to unrecorded information as well.

At the end of this exercise, explain to the delegates we are moving on to examine the question of when a request is in the

territory of national security.”

S23(5): In the territory of national security

Is it realistic that:

- a security body would be involved in the issue covered by the request?

and that:

- the PA receiving the request would hold such information?

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Looking at the Ban All Religion example – analysing the factors that meant confirmation or denial would reveal something about a security body.

- 1) The request was made to a public authority that had a national security role and a working relationship with security bodies.
- 2) The subject matter was national security/work of the security bodies.

Then Look at slide – to explain that these are the two factors that place a request and any confirmation or denial in the 'Territory of National Security'.

Then compare and contrast the following examples;

- Request to the Home Office for information it holds on a plot to assassinate the Prime Minister.
- Request to Wackenthwaite Parish Council for the same information.

Is it realistic that Wackenthwaite PC would hold such information?

In the territory of:

Consider this scenario:

Request to BIS for minutes of a meeting on competition matters between the Prime Minister and reps from main supermarkets. Is this In the territory of national security?



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BIS = Department for Business, Innovation and Skills.

This and next slide each contain a scenario to illustrate when a request might be in the territory of national security. In this one: no reason to think that the meeting dealt with issues of national security; not in the "territory" of national security, so s23(5) would not apply.

Note to trainer - it's always possible to construct scenarios where such a meeting could involve security body information. For example imagine a more general request for any minutes of meetings between BIS and supermarkets over a given period. If there was a suspected plot to poison certain products over that period, someone from a national security body may have briefed the meeting. So although on the face of it, the request is not in the territory of national security, there may be some scenarios where the a s23(5) response is appropriate. In this second scenario of the more general request, the request may not be in the territory of national security to the lay person, but to more informed individuals – including any terrorists behind the food poisoning plot, the request is in the territory of national security. Don't bring this up unless the point is raised because it's just

overcomplicates things.

In the territory of:

Compare previous slide with this hypothetical scenario:

Following reports in the media of terrorist threats to disrupt the Olympics by targeting public transport and public areas around the Olympic Park, a request is made to the Home Office for information about meetings with the PM, the Home Secretary and major retailers at Westfield Stratford City shopping centre.

Is this in the territory of national security?



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Explain that everyone going to the Olympic Park has to walk through Westfield Stratford City shopping centre.

Although, superficially, the meeting is also with retailers as in the last slide, there are differences in the surrounding circumstances which make this request more likely to be in the territory of national security. Media reports of terrorist threats in area where shops are situated – shops located at transport hub for Olympic Park (have to walk through shopping centre to get to Olympics), proximity to Olympic site and involvement of Home Secretary (security remit) mean the request is in the territory of national security and so s23(5) could apply.

Done 'in the territory of': now mop up of a couple of other issues...

S23(5) The balance of probabilities

S23(5) excludes the duty to confirm or deny "if, or to the extent that, compliance with section 1(1)(a) **would involve the disclosure**"....

This means that it is more likely than not that the information, if held, would have been supplied by, or relates to, a security body.

Commissioner of the Police of the Metropolis v the Information Commissioner, (EA/2010/0008, 23 May 2010)



If there is time (keep timings under review), give out Met Police case , handout 5. Skim through it with group. Talk through the Met Police case – any questions?

"Would" does not mean 100% certainty. Whole point of s23(5) is for a PA to be able to NCND whether it holds information – whether it does actually hold it or not.

If for example in the Met Police case the information was not held, it would be impossible to demonstrate with 100% certainty that it would've been passed to it by a security body.

Key is: if the PA held information, is it more probable than not that it would have been supplied by or relates to a security body?

S23(5) Consistency

Inconsistency in FOI responses given at different times could reveal something about a security body. This is another reason why it's important to consider the consequences of a particular response...

PA can apply s23(5) and NCND to ensure it provides a consistent response to requests

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A request is made to the Home Office for any information on investigations into allegations that a particular organisation has links with terrorism. If the organisation is not under surveillance and the Home Office does not currently consider the organisation to be any threat, it may feel that there is no problem in denying that it holds any information. Similar requests are then made over the following 2 years, each one of which is met with a denial. However if the public authority were to suddenly NCND whether any information was held this would lead to people speculating that the organisation was now being investigated by a security body which could be problematical.

The public authority could have consistently refused to confirm or deny whether any information was held. It could have done so on the basis that to deny any information was held would in effect reveal that the security bodies had no interest in that organisation, such a response is in itself information relating to a security body. This approach would have prevented the public authority establishing a pattern that might then have to be deviated from.

Similarly the series of requests could have asked whether the public authority holds information on Organisation A, Organisation B, Organisation C and so on. Again it could be desirable for the public authority to adopt a response that could be applied

consistently for any organisation i.e. a NCND response using s23(5).

Consistency - example

Compare;

Yr 1: Information about the investigation into organisation X – Not held
Yr 2: Information about the investigation into organisation X – Not held
Yr 3: Information about the investigation into organisation X – Not held
Yr 4: Information about the investigation into organisation X – NCND

Against;

Yr 1: Information about the investigation into organisation X – NCND
Yr 2: Information about the investigation into organisation X – NCND
Yr 3: Information about the investigation into organisation X – NCND
Yr 4: Information about the investigation into organisation X – NCND

Case officer tips: investigating a case

- s23(1) – Plausible ? We'll accept written assurance
 - If less plausible – confidential discussions
 - We reserve right to have access to the information.
- s23(5) - It is less likely that we will need to know whether or not information that is the subject of NCND is actually held.

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S23(1) Plausible? If the information is obviously in the territory of national security then we may accept a written assurance that the information relates to a security body – but that assurance must come from someone who, because of their seniority and role, understands the public authority's relationship with the security bodies and they must have seen the information in question.

If it seems less plausible that the information will have come from, or relate to a security body, a written assurance would not be appropriate. We'd want to discuss the matter in more detail with the public authority so that we could get a full explanation and challenge anything we are unclear about.

In exceptional circumstances we may want access to the information itself.

S23(5) – generally we can determine NCND cases without knowing whether the information is held or without seeing it. But in very exceptional circumstances require the public authority to tell whether it's held and even have access to the information itself.

Re: inspecting the information: towards the end of s24 slides there is a slide listing people in the ICO who have undergone Developed Vetting.

Case officer tips: writing a DN

Case officers must take care as to:

- what a DN reveals; and
- what might be inferred from a DN

Avoid including analysis of our reasoning as to why s23(5) is engaged.

Instead say something like: "The Commissioner has considered whether confirming or denying that the information is held would itself reveal information supplied by or relating to a s23 body. In the circumstances of this case, he is satisfied that it would; section 23(5) is therefore engaged."

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This slide is intended for case officers only.

Our internal thinking would consider what would be revealed by a PA denying it holds information. We might conclude that that denial would reveal something about a security body, hence s23(5) is engaged. The PA would be concerned that this might lead the public to think no information was held, regardless of whether it was or not. We need PAs to have confidence in the way we handle issues of national security, so need to word our DN carefully, as suggested.

S23 summary

- s23(1) exempts information supplied to a PA by a s23(3) security body (directly or indirectly) or which relates to such a body
- s23 has a broad but not unlimited coverage
- s23(5) no duty to NCND if it would disclose information (even if unrecorded) relating to a security body.
- no PIT
- list of s23(3) security bodies is due for amendment; check latest position

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Just put slide up – don't discuss.

Break

10 minutes



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10 mins max

Section 24 overview

Information that undermines national security

- s24(1) applies to information not covered by s23(1)
- s24 exempts information if exemption from s1(1)(b) is required to safeguard national security
- "required" is interpreted as meaning reasonably necessary
- the threat to national security does not need to be direct or immediate
- consider the mosaic effect of information in the hands of motivated people
- no duty to confirm or deny that information is held, if exemption is needed to safeguard national security
- s24 is subject to PIT

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Welcome back.

Do not go through list in detail – ask delegates to read it. It lists what we are going to look at in this next part of the session.

S24 is of course prejudice-based, unlike s23

Also unlike s23 it covers information whose release would undermine national security – in contrast to s23 which relates to listed security bodies.

Section 24(1)

Focus is on the effect of disclosure.

It's not the information that must be required for the purpose of safeguarding national security... but the **exemption** from disclosure.

eg West Yorkshire Fire and Rescue Service FS50308040
Information about details of rescue vehicles held at Rescue Service National Control Centre – exemption from disclosure was required here in order to safeguard national security



S24(1) exemption coverage is framed in terms of protecting information whose disclosure would be damaging – it is the exemption from disclosure that must be needed in order to protect from disclosure, rather than simply the information. This means its coverage is wider than you might expect.

In West Yorkshire WYFRS was in charge of the National Control Centre for major rescue emergencies. Entry to its sites was by means of electronic number plate recognition. The requested information (registration numbers and locations of vehicles) appeared at first sight to be anodyne and harmless. It wasn't important in isolation for national security – it wasn't REQUIRED to safeguard national security – but other factors meant that EXEMPTION FROM DISCLOSING it was needed. This was due to a fear that the details could allow terrorists to clone vehicles and gain access to WYFRS sites.

Compare this to scenarios where actual information needs to be withheld in its own right – eg codes for firing missiles – so more obviously harmful to national security. That information would of course also be protected by s24(1), but it is more evidently so.

S24(1) What does “required” mean?

s24(1)... “if exemption from section 1(1)(b) is required for the purpose of safeguarding national security”

- “required” means “reasonably necessary”

The Tribunal upheld this approach in:
Kalman v the Information Commissioner
[EA/2009/0111], 6 July 2010

Please see explanation in new s24 guidance.



(S1(1)(b) = duty to communicate the requested information.)

Continuing to look closely at the wording of s24(1) : the meaning of “required” to safeguard national security.

It means “reasonably necessary”.

This interpretation has been approved by the Tribunal in Kalman.

Kalman was about a request to DfT for info re directives issued to UK airport operators about passenger security screening.

Fuller explanation in new s24 external guidance – including how this interpretation is based on ECHR decisions...

What is “national security”?



- No formal definition
- House of Lords* has listed observations on its meaning:
 - o Security of UK and its people
 - o Not limited to action by an individual targeted at the UK, system of government or people
 - o Military defence, protection of democracy and the legal & constitutional systems of state
 - o Security of UK may be affected by action against foreign state
 - o Co-operation between UK and other states may promote the UK's national security

*in *Secretary of State for the Home Department v Rehman (AP)* [2001] UKHL47 (non FOI)

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What does the term “national security” itself mean?

There's no definition. I can't tell you precisely what it is in the FOIA context– but I can tell you about helpful observations made on its meaning by the House of Lords (despite fact it was a non FOI case).

In Rehman HL listed the observations set out on the slide. Obviously includes the security of the UK and its people – but also has much wider meanings such as the UK's relationships with other states and the impact of those upon the UK's security. (Rehman was not a FOI case, it concerned whether some one should be deported because they posed a threat to national security.)

In the Baker case (*Baker v the IC* [EA/2006/0045], 4 April 2007), the Information Tribunal commented that it found the Rehman observations helpful (they are stated in full in the s23/24 workbook). (Baker case = Wilson doctrine, re telephone tapping of MPs).

The upshot of all this is that “national security” has a very wide meaning.

What is national security?

Consider what the concept of "national security" encompasses – thinking about it in broad terms.



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Continuing with the meaning of "national security" we'll now do a short exercise as a group, led by trainer, to list a few suggestions verbally as to what might be covered by "national security".

The list might include few examples from list in workbook (recommend that the delegates have a look there after the session for more ideas).

Eg

Espionage

Weapons of mass destruction

Transport systems

National Grid

Location of transmitters and aerials

Upholding democracy (includes Parliament, voting systems (eg delivery of ballot papers) and the Crown inc the sovereign and heirs to the throne as part of constitutional institutions of UK)

“National security” has a wide meaning

For example, in order to protect the UK's national security interests, it could be necessary to protect the interests of other countries – see next slide re: co-operating on international terrorism.

It's important to demonstrate a causal link between disclosure and the UK's national security.



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This could mean that in order ultimately to protect UK interests we have to also protect not only the interests of countries who have been traditional allies of the UK, but also the interests of neutral or hostile countries.

S24(1) Case study: group exercise

- Request to UK government for details of meetings with country Z
- UK is working more closely with country Z on trade but also to reduce terrorist threats emanating from groups in that country, which have threatened UK
- The details of this co-operation are not publicly known
- Z is sensitive about publicising this co-operation – could cause adverse reaction in own citizens and neighbouring states

Could the UK government apply s24(1), and if so, why?

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Total time : 8 mins. max

Split the class into groups of 3-4 and after max of 4 mins for them to discuss it together (give a reminder after 3 minutes) discuss answers as whole group – max 4 mins for this.

DON'T PUT UP NEXT SLIDE UNTIL AFTER THE DISCUSSION -
HIDE NEXT SLIDE WHEN PRINTING SLIDES HANDOUT

S24(1) Case study: group exercise Answers

The UK government could apply s24(1).

Why?

- Z is sensitive about co-operation with UK
- Disclosure could damage our relations with Z – hence undermine our efforts to get Z to clamp down on terrorists
- In turn this could harm UK's national security
- Thus, effect of disclosure on Z could have effect on UK's national security – established causal link between the disclosure of the information (impact on Z) and how it could impact on our national security.



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Hidden slide : ONLY SHOW THIS SLIDE AFTER THE DISCUSSION -
DO NOT PRINT AS PART OF HANDOUT SLIDES (REMEMBER TO
UN-HIDE AFTER PRINTING)

Suggestion: trainer to refer to the original question, and have it
in front of him / her.

Also mention: UK government could also apply s27 and/or s43
(international relations/commercial interests).

To what extent is s24(1) exemption required to protect national security?

- No need for threat to be immediate – Lord Slynn supported this approach in Rehman earlier. Also see WYFRS case.
- But there must be a causal link.

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How much of a threat is needed to engage s24(1)? How close does it need to be?

Lord Slynn commented in Rehman: "I accept that there must be a real possibility of an adverse effect on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate."

Rehman: deportation case – did the person pose a threat to national security? The Crown could not establish any direct links to terrorists, although Mr R was an agitator.

WYFRS case earlier (slide 23): Although there was no immediate threat of attack to WYFRS, Commissioner accepted that in these circumstances s24(1) exemption was required for the purpose of safeguarding national security.

Public domain

- Is identical or similar information already in the public domain? If so, it might well be inappropriate to withhold.
- Is it in the public domain that the PA holds the information? If so, it might well be inappropriate to NCND.

Key question is: what harm would result from either disclosing the information or from confirming or denying it is held? If there's no harm, the exemption is not required to safeguard national security.

BUT..... see next slide....

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This slide looks at how information in the public domain works in favour of disclosure.

Important to consider what information is already in the public domain.

Acknowledging, for instance, that there may be biographies of former spies etc , bringing certain information into public domain – although not “officially “ so, nonetheless it is out there!

But official confirmation may have been lacking until now – would official confirmation undermine national security?

If UK govt was seen to disclose information = allies have less confidence in us.

Next, we are going to look at the need to be aware of the risk arising from the so called “mosaic effect”.

Mosaic effect

But also consider the availability of other information that could be combined with the requested information which could increase risk.

Not just 'information in the 'public domain' – need to consider the motivated intruder.

Examples:

- Location of radio masts obtained piecemeal could give enough info to disable UK comms. network
- Rates and types of malfunction of security scanners at a UK airport – combined with info from other airports to work out security vulnerabilities
- Free diary slots re politicians or members of Royal Family – combine with other known info to work out likelihood of next visit to eg Afghanistan

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In this and the next slide we're looking at how combining publicly available information with newly obtained, requested information could harm national security.

The average person might not have the time, energy, resources or motivation to piece together information from different sources. However a highly motivated terrorist, for example, will be better able to compile a detailed picture using a combination of publicly available info and info gleaned from FOI requests made by anyone.

Also a terrorist may have gained access to information from that is not available to general public, i.e. illegal sources of information.

Mosaic effect

Summers v Metropolitan Police Service FS50368290 and [EA/2011/0186] 24 February 2012

Decision confirms that members of the Royal Family are central to the country's constitutional arrangements and public life, and as such an attack on them is an attack on national security. Decision also makes the point that it is not just definitive information that might increase the risk of attack. If disclosure gave a basis for inferring or even guessing at the level of protection, the disclosure could increase the confidence levels of those who might consider carrying out an attack and therefore make an attack more likely (even if those inferences were not in fact correct).

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Give out handout 8 – delegates to read later at their leisure,

Request = cost of SO14 for yr 2009/2010

SO14 = one element of Protection Command . - Ministers, MPs Public figures , fixated threats

Headline figure for Protection Command had been disclosed in parliament.

Budget for SO14 = 90% manpower by virtue of what they do. (they don't pay for infrastructure/ security hardware – bullet proof cars, CCTV etc)

Engaging the exemption –

Are there people interested in attacking UK?

Are Royals a target? – i.e does the information relate to a target

Risk of attack depends on the confidence of the attackers

Confidence not always based on rational analysis – it is based on terrorists' perception of the risks in attacking the target and the vulnerability of the target.

Confidence would increase if attackers thought they could estimate number of officers involved.

How could attackers estimate number of officers –

By combining information with other information available about police forces, their budgets and manpower.

Also increase confidence by allowing v rough estimates to be made about level of protection provided to Royals compared to other groups that Protection Command are responsible for.

If the confidence of attackers increases – this increases the likelihood of attack – therefore exemption engaged.

Note re public interest – much made of public interest in knowing whether money spent well – but figure on its own wouldn't reveal how that money was spent just overall cost therefore public interest argument raised by appellant would not be met by the requested information. Little argument about whether there's a public interest in knowing how much we spend on Royals.

S24(2): NCND

- s24(2) excludes the duty to confirm or deny when “required for the purpose of safeguarding national security”.
- Only need to show the duty to confirm **or** deny must be excluded, not both.
- The public interest test must be applied: see later.

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We considered the duty to confirm or deny in relation to the implications of disclosing information in the public domain and of the mosaic effect , earlier.

S24(2) NCND case
Baker v the IC [EA/2006/0045] 4 April 2007

Tribunal upheld application of s24(2) by IC and Cabinet Office; no requirement to confirm or deny whether information was held.

Individuals engaged in activities damaging to national security would find a confirmation or denial in response to a request for information about phone tapping to be very helpful to their purposes:

1. For Cabinet Office to state in effect that there had been no phone tapping would reassure them that they could continue as before, without worrying about being intercepted or investigated.
2. To announce that a certain number of phones had been tapped would alert the individuals to avoid using the phone, for example, to evade detection.

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The Tribunal agreed that the Information Commissioner was right to decide that s24(2) also applied and there was no requirement to NCND whether information was held.

The Tribunal's comments in this case refer back to our discussion of the mosaic effect earlier; a motivated individual plotting against the interests of national security might find a confirmation or denial to be very valuable to their activities.

Note to trainer -The points made above neatly explain the rationale behind neither confirming or denying whether information is held under s24(2), which is why we refer to the Baker case here. However there are problems with the Baker case, not least that because the Trib found that s23(5) and 24(2) were mutually exclusive. So Baker is useful in bits but don't give the impression it's the leading authority on these matters.

S24: the public interest test

- s24 is a qualified exemption
- PIT applies to both s24(1) and s24(2)
- Strong and weighty interest in safeguarding national security
- Even a low risk to national security could mean the balance of the public interest favours maintaining the exemption
- But need to consider the extent and the nature of the potential harm

Please also refer to ICO external guidance on PIT.



The reality of the sensitivities of national security mean that there is an inherent, weighty public interest in favour of maintaining the s24 exemption once it's engaged.

That does not mean it will always outweigh the public interest in disclosure, but I concede it is very likely. However PAs do still need to consider arguments in favour of disclosure.

But as we'll see in next example – some risks aren't worth taking....

Kalman v Information Commissioner
[EA/2009/0111] 6 July 2010

- Potential consequences , a terrorist attack on a plane, were so serious that even if the risk of the information being of use in planning such an attack was low, the PI in withholding the information was very strong.
- Nature of the risk to national security can add weight to PI in maintaining the exemption

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As I've just said, the PI in maintaining the exemption is strong.

In Kalman (mentioned earlier) the Tribunal considered a request for information regarding the directives issued to airport operators about the security screening of passengers at UK airports. IC had found s24 engaged in respect of some information. Tribunal upheld this approach. It commented that the nature of the security risk added weight to the PI in withholding the information; consequences of terrorist attack on a plane were so great (eg Lockerbie, 9/11) that even if there was only a very low risk to national security in disclosing the information, ie that it would help terrorists to carry out such an attack, the PI in maintaining the exemption and withholding the information was very strong.

Public interest in disclosure under s24

- Although the public interest in maintaining the national security exemption is strong, it is still important to consider the public interest in disclosure
- Balance between: accepting burdens and inconvenience caused by security requirements
 - against the need to understand and to be reassured that the authorities are protecting our safety for good reason



PI in favour of disclosure: eg in ensuring the measures and procedures are proportionate and effective.

But realistically, the PI in disclosure will usually be quite weak against the PI in favour of withholding the information.

In Kalman case, Tribunal accepted that an argument in favour of disclosure was a valid one: ie the public had an interest in knowing the source of the legal obligations they were under ("secret law" idea)– but this did not equate to the public interest in disclosing the criteria for searches. Ultimately PI in favour of preventing acts of terrorism outweighed the PI in disclosure.

The public interest of the UK



- Public Interest under s24 is that of the UK and its citizens
- However the impact of disclosure on other countries may be relevant where it affects the security of the UK (see earlier)
- **Case study:**
Peter Burt v Ministry of Defence [EA/2011/0004], 20 September 2011

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Give out handout 9 – read at leisure.

In an earlier slide (country Z – slide 28) we noted how in protecting the interests of the UK under s24 we may also need to protect the interests of other countries (eg co-operating on international terrorism).

Go through the Burt case – concerned both s24 and s27 but similar arguments applied to both re effect on USA. In this case study we can see the correct order in which to apply the s24(1) exemption and then apply the PIT.

Burt case – Atomic Weapons Establishment (AWE).

Disclosure of technical details of US nuclear facility would prejudice US national security.

Not directly concerned with extent of damage to US 's national security – but how badly damaged our national security would be as a result of US reaction to the UK disclosing this information – if they withdrew cooperation or stopped sharing information with UK how badly would this damage our national security?

Case officer tips re s24(1) and (2)

- In s24(1) cases it is more likely than not that we will need to see the information.
- However in s24(2) NCND cases this is less likely. Where a public authority refuses to confirm or deny whether it holds information, in most cases you will be able to determine the position without knowing whether it is actually held or not.
- The ICO always reserves the right to know whether or not information is held, and if it is, to have access to that information.
- Get advice from signatory

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Practical tips for handling PAs - in s24 cases they will often resist letting the ICO see the information.

Ministerial certificates: s23(2) and s24(3)

- s23(2) and s24(3) allow a Minister to sign a certificate certifying that the exemption applies.
- Certificate provides conclusive evidence of that fact
- Differences in s24(3)certificate:
 1. Subject to PIT
 2. It has wider effect than s23(2) and may also be prospective.
- Appeal is to First Tier Tribunal; FTT must transfer appeal to the Upper Tribunal for hearing by the National Security Appeals Panel.



To date no certificates issued.

- **Differences in s24(3)certificate:**
 - **Subject to PIT** - a certificate will only mean that the exemption is engaged. The public authority still has to carry out the public interest test and the Commissioner is free to reach his own conclusion on the public interest test should he receive a complaint.
 - Wider effect than s23(2) and may be prospective
- **For both s23 and s24 certificates, unlike s35/36 there is a right of appeal.**

Summary: Section 24

- s24(1) applies to information not covered by s23(1)
- s24 exempts information if exemption from s1(1)(b) is required to safeguard national security
- "required" is interpreted as meaning reasonably necessary
- the threat to national security does not need to be direct or immediate
- consider the mosaic effect of information in the hands of motivated people
- no duty to confirm or deny that information is held, if exemption is needed to safeguard national security
- s24 is subject to PIT

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Break

10 minutes



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10 minutes max

Interaction of s23 and s24

s23(1) and s24(1) – exemptions from the duty to communicate

- Mutually exclusive

s23(5) and s24(2) – NCND

- Not mutually exclusive



Explain that we've looked at each exemption in isolation – but significant overlap.

There are complications caused by the fact that the exemptions from the duty to communicate are mutually exclusive. This means there are risks – if a public authority can only use one of the two exemptions from the duty to communicate this, in itself, will reveal something about the nature of the information being withheld, i.e. that it will reveal whether it relates to a security body or not. We'll look at this issue in more detail later but for now just hold onto the fact that there are problems with using either s23(1) or s24(1) on its own.

Because of this, public authorities have in the past tried to forestall having to rely on an exemption from the duty to communicate information by refusing to confirm or deny that the information is held even where it has already been publicly acknowledged that the information is held – in other words public authorities have applied the NCND provisions on the basis of what having to rely on the exemptions from duty to communicate would reveal rather than what would be revealed by saying either 'yes we hold the information', or 'no we don't hold the information'.

So first we are going to have to look at how the NCD provisions should be applied

Couple of points to make first though

- 1) The approach we're describing represents a shift in position from that before October 2011
- 2) We've also changed the language we use to describe the new approach – although this is more relevant to looking at s23(1) & s24(1).

S23(5) & s24(2) NCND

Not mutually exclusive

- Just one can apply or both can apply
- Must be applied independently, in isolation, each on their own merits
- If a public authority cites both exemptions they must both actually be engaged.

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More detail is on the next slides.

I'll explain the theory but it may only crystallise once we've had the examples – so just stick with it.

Not Mutually exclusive

The NCND provisions are **NOT** mutually exclusive. The approach differs from that adopted by the tribunal in the Baker case. In Baker case (phone tapping MPs) tribunal found they were mutually exclusive – but tribunal wrong on this point. But many/some public authorities will still be working on this basis.

Just one can apply or both can apply

Self explanatory but...

The reality is that very often they are used together and quite often the way public authorities use them together is wrong.

Must be applied independently, in isolation, each on their own merits

Self explanatory

If a public authority cites both exemptions they must both actually be engaged.

Note – we'll see later that we do allow public authorities to cite both s23(1) and 24(1) in their refusal notices to disguise which one is actually engaged – don't worry about this for now but recognise that this is **not** allowed when looking at s23(5) and s24(2). If a public authority cites both the NCND provisions, it must be because it believes they are both actually engaged.

S23(5) & s24(2) NCND

s23(5)

The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which... relates to any of the specified security bodies.

s24(2)

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.

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This slide just clarifies that the language of the Act sets the test as being what would be revealed by confirming or denying the information is held.

Point is that both exemptions are engaged on basis of what would be revealed by a public authority confirming or denying whether it holds the information.

It's not about what would be revealed by either having to rely on the exemptions from the duty to communicate the information – i.e. public authorities can't NCND because they're concerned what might be revealed by relying on just one of those exemptions.

Nor do the exemptions concern what would be revealed by only relying on just one of the exceptions to the duty to confirm or deny.

So where both NCND provisions have been applied, look at each one in turn and consider what would be revealed by saying either 'yes we hold the information' or, 'no we don't hold the information'.

Again as per previous slide – each provision has to be considered in isolation; when looking at section 23(5) the question is: would confirming or denying any information is held tell you something about a security body? If yes - the exemption is engaged.

Then put that to one side and ask the question – would confirming or denying in any way undermine national security?

Note to presenter – although in this example both confirming or denying whether the information was held would reveal something about the activities of a security body (MI5), remember that we only need one of the potential responses to reveal something for the exemption to be engaged i.e. either

confirming **OR** denying the information is held.,

s23(5) and s24(2) applied together / jointly Examples

Handout 11: The Daily Royalist

Do both s23(5) and s24(2) apply? If so, they may be cited jointly.

NB either term "jointly" or "together" may be used: ensure all parties understand the meaning.



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Note to presenter – these aren't case studies – it's just another means of providing of the information to the audience – it's just a case of getting them to read the handout and getting some immediate feedback from them.

So now we're going to look at a couple of scenarios – handout 11 (give this out) –

First we'll consider the application of each of the NCND provisions in the Daily Royalist case.

S23(5) is engaged on the basis that the subject matter is terrorism and we'd expect MI5 to be involved in countering terrorism of this nature if it was aware of the risk - and the request is made to a public authority which would have some dealings with security bodies on issues around the protection of the Royals – we're in the **territory of national security** – therefore either confirming or denying would reveal something about the involvement or non involvement of MI5.

S24(2) can be engaged on the basis that confirming the information is held would tip terrorists off that their activities had been investigated, or alternatively if the public authority said the information was not held this would embolden any terrorists and so increase the risks of an attack

This demonstrates how the PA must establish that **both** s23(5) and s24(2) apply to the information , in order to apply them jointly.

Both are engaged on their own merits – based on what would be revealed by confirming or denying whether the information is held.

Now compare this with the next example...

S23(5) and s24(2) applied separately Example

Handout 11: Mr Blofeld

Only one exemption is engaged, so only one exemption applies, on its own.



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Contrast this case with the previous one.

In this case – **s23(5)** revealing that the FCO does hold the address of MI6 is information relating to that security body. Therefore, technically, the FCO could refuse to confirm or deny under s23(5) – even though on the face of it would be obvious they do hold the address and no harm would be done by confirming this was the case.

However re **s24(2)** – it would not undermine national security to confirm the information was held. So where it's obvious the information was held s24(2) would not be engaged.

In this example only one of the exemptions are engaged i.e s23(5).

Note to presenter – no need to explain this if not challenged on the issue – but if for any reason the public authority had tried to apply both s23(5) and s24(2) to the duty to confirm or deny, we would find that s24(2) was **not** engaged. In this situation there is no conceivable harm to national security by confirming the

information is held and the Commissioner would still be acting as a responsible regulator if he were to dismiss the application of s24(2).

Will revealing the involvement of a security body undermine national security ?

Consider Royal wedding case.

- Hypothetical denial that information is held reveals lack of MI5 involvement – s23(5) engaged.
- Ignore s23(5) – Just ask yourself the simple question – could revealing that MI5 was not investigating anti-monarchist groups undermine national security?

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Returning to the Royal Wedding Case ...

Both confirmation or denial would disclose information relating to a s23 body & therefore engage s23(5).

Equally...

Both confirmation or denial that any terrorist had been investigated would undermine national security and therefore engage s24(2) – either tipping off terrorists that their activities had been investigated or alternatively giving them confidence to continue to plan their attacks.

Re 2nd bullet- Idea is to imagine s23 doesn't exist, FOIA never contained a s23, there were no special provisions for the security bodies, all we had to rely on to protect information relating to the security bodies was s24.

Q - In that imaginary world – if confirming the information was not held revealed that MI5 had not been aware of any terrorist threat to the Royal Wedding, would we accept that this undermined national security?

A – yes – therefore s24(2) is engaged **in its own right** (albeit for the very same reasons that s23(5) is engaged)

S23(5) & s24(2) Investigations

1. Look at s23(5) first.
2. Are we in the territory of national security?
3. Then denying information held would reveal security bodies not involved - s23(5) engaged.
4. Check if public authority happy for DN to just deal with s23(5)?
5. If not, would revealing the non-involvement of the security bodies undermine national security?
6. S24(2) engaged
7. S24 - public interest test - strong public interest in not undermining national security.
8. But if application of s23(5) looks doubtful we need full s24(2) investigation

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Bullet 4

Normally where multiple exemptions from either the duty to communicate information or the duty to confirm or deny have been applied to the same information, once the Commissioner was satisfied that one exemption applied he would not go on to look at the other exemptions eg if s26 - Defence, s29 - the economy - had been applied to the same report, if the Commissioner found that s26 was engaged he would not bother looking at s29.

However public authorities, particularly central govt (less so the police), remain concerned that if we only dealt with s23(5) when both s23(5) & 24(2) had been cited, this would be interpreted as meaning that only s23(5) was engaged and that security bodies were involved in some way. This is despite it being possible to explain how these provisions work and that no such inference could be logically drawn.

Therefore....

..we will go on to also look at s24(2) if public authority wishes us to. (We are trying to persuade them that there's no need to take this belt and braces approach but if they insist we will look at both exemptions).

Reason why public authority may want us to look at both exemptions - The intelligence community are not just bothered with what can rationally be deduced from any disclosure - they are also concerned with people's perception and if people - Terrorists - perceive the use of s23(5) as saying one thing i.e. security bodies were some way involved in this issues- then their actions will be based on that perception.

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If public authority does want us to consider both exemptions, follow steps 5 onwards.

Bullet 6

Note to trainer - In one presentation it was suggested that this slide contradicted the Blofeld hand out (slide 49). Blofeld demonstrates a rare occasion when disclosing the interaction between the public authority to which the request was made, and a security body, would **not** undermine national security – in Blofeld confirmation or denial would only reveal whether the FCO had the address for MI6. Blofeld simply demonstrated that s24(2) is not automatically engaged whenever s23(5) is. But the Blofeld request was not typical of the requests made.

Bullet 6 could read "if yes, s24(2) engaged".

But in most cases revealing the involvement or non-involvement of a security body in an issue **would** undermine national security and what we're wanting to emphasise is that where s23(5) and 24(2) have both been cited, section 50 complaints can usually be resolved by focusing on the one issue - whether confirmation or denial would reveal something about a security body.

S23(5)& S24(2) Decision Notices

- Issue – concern over what may be inferred from official documents expressing views on the existence, or not, of the information.
- Not appropriate to go into too much detail
- No need to refer to change in position regarding mutual exclusivity of s23(5) and s24(2).



First 2 bullets.

This really builds on the point from bullet 4 of the last slide – despite what rationally may be deduced from a DN, there are genuine concerns about what people will infer from DNs

Last bullet

There is no need make the point that we changed our position regarding mutual exclusivity of s23(5) and 24(2); to do so in every DN simply **undermines our authority.**

S23(1) & 24(1) - duty to communicate the information

- Where it's obvious information is held, we'll encourage public authority to confirm this is the case.
- E.g. Information identified as being redacted from an open file at The National Archives (TNA).
- Public authority will then need to withhold the information.
- But the exemptions are mutually exclusive and there are problems with relying on just one of the exemptions



Note to presenter – this slide is really just used to set up the next two slides

Although the reality is that most national security type cases will involve the application of the NCND provisions there will be cases where, because it is obvious that the information is held, the application of the NCND provisions is nonsensical.

Examples – (i) The Blofeld example (slide 49)

(ii) Cases where the bulk of a file is available at The National Archives but redactions have been made – we have had cases eg FS50160252, where the contents of a file have been requested, quoting an actual reference number obtained from inspection of an open file at TNA. Cabinet Office originally refused to confirm or deny under s23(5) & 24(2), only to later confirm the information was held.

(iii) Govt announces that British special forces had released UK hostages in a war-torn part of the world. And then receives requests for further information.

In all these scenarios, because of the nature of the information, s23(5) could technically be applied on basis that we're in the territory of national security.

However such responses are unhelpful – the public authority seems unnecessarily obstructive and faintly ridiculous – and applicant becomes very frustrated.

Therefore in such situations we are trying to encourage public authorities to take a more open and pragmatic approach. There are problems however as alluded to earlier

S23(1) & s24(1) – The Problem

Home Secretary announces Cumbrian Police arrested a number of terrorist suspects.

Two scenarios:

- (i) Well planned, intelligence-led operation
- (ii) Local police arrest suspects acting suspiciously

It's known that the information is held, but what is revealed by relying on either s23(1) or s24(1) alone?

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Imagine it's the second scenario – i.e. no security body involvement –

Would disclosure of the information undermine national security?

Yes – if it revealed what activities aroused suspicion,

But...

What would the application of s24(1) on its own reveal?

Since it can only apply to information that doesn't relate to a security body then it would reveal that no security bodies were involved in the operation.

Conversely if we're in scenario (i), relying on s23(1) would reveal that the information **did** relate to a security body i.e. that they were involved.

Problems caused by the way these provisions have been drafted.

To overcome the problem public authorities have tried to forestall having to rely on either s23(1) or s24(1) on their own by refusing to confirm or deny whether the information is held – i.e. applied s23(5) & 24(2)

This is often nonsense when it's known information is held but ...

Public authorities have argued that the NCND provisions are engaged on the basis of what would be revealed by having to rely on either s23(1) or 24(1) rather than simply what would be revealed by saying 'Yes we hold the information' or 'No we don't hold the info' which is the real test for the NCND provisions.

S23(1) & s24(1) – The Solution

Cite s23(1) & 24(1) '**in the alternative**'

i.e. Although only one of the exemptions is actually engaged the public authority may cite both exemptions.

e.g. The requested information is held but is exempt under either section 23(1) or s24(1). It is not appropriate to identify the actual exemption used.

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- 1) 'In the alternative' = **ICO jargon – different from** when public authority cites one exemption and then uses another as back up just in case ICO finds first exemption claimed doesn't work. Eg claims s35 but in case we find it doesn't relate to government policy the public authority claims it would be exempt under s36.
- 2) Although mutually exclusive, we think the tribunal would accept this approach – because it's necessary – in Baker tribunal considered s23(5) & 24(2) were mutually exclusive but allowed a similar approach in respect of those two exemptions.
- 3) Used to call this '**in conjunction**'. – Important that everyone we deal with (complainants, public authorities etc) understand how we're using this term.
- 4) Outcomes = i) applicant at least gets to know whether the information is held
ii) public authority doesn't look ridiculous & unnecessarily obstructive

We're trying to encourage public authorities to take this approach – but technically as in this request we're in the territory of national security, then public authority could technically refuse

to confirm or deny under s23(5),....

RNs, Investigations & DNs

s17 RN must state which exemption applies, why it applies, and public interest.

Investigation – we need:

- To know which exemption is actually engaged.
- Explanation why it's engaged.
- If s24(1) – the public interest arguments.
- Likely to want access to the information.

Decision Notices

- Can't give too many details.

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Looking at situation where public authority has confirmed it holds the information but has applied s23(1) & 24(1) in the alternative

Refusal notices

Have to accept that we're bending the law technically. But once you get over that there's no real problem in writing a decent RN explaining rationale.

S17 We recognise that public authorities are obliged by law to specify which exemption applies – so our approach could certainly be challenged. But again tribunal seemed OK with a similar approach in Baker where it believed that the NCND provisions were mutually exclusive.

In fictional Cumbrian police/terrorist case the RN could explain that there are two possible scenarios – that, depending on which scenario is the reality, one of the two exemptions will apply, - see comments on 's23/24 The Problem' slide for an explanation re s24 as to how national security could be undermined.

Public interest in s24 – great public interest in not providing terrorists with any intelligence as to how their operation was detected and foiled.

Investigation

Public authority must tell us which exemption is engaged

Reason for engagement & if s24(1) the public interest arguments

More likely than not to want access to the information (as per slide 40).

Decision Notice

Can only explain that Commissioner has considered the issues carefully, has had sight of the information (if this is the case) and is satisfied that one of the exemptions does apply and if that exemption was s24(1), that the public interest favoured maintaining it.

OR

That we're not satisfied the exemption is engaged or that in respect of s24(1) that the public interest favours disclosure.

FOI policy are considering drawing up **standard paragraphs** – but this will be done in consultation with caseworkers.

Also **don't flag up this is a new approach in DNs** – again it undermines the authority of the DN

Summaries

Read at your leisure.

Any questions?

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Summary: Section 23

- s23(1) exempts information supplied to a PA by a s23(3) security body (directly or indirectly) or which relates to such a body
- s23 has a broad but not unlimited coverage
- s23(5) no duty to NCND if it would disclose information (even if unrecorded) supplied to a PA as above
- no PIT
- list of s23(3) security bodies is due for amendment; check latest position

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Summary: Section 24

- s24(1) applies to information not covered by s23(1)
- s24 exempts information if exemption from s1(1)(b) is required to safeguard national security
- "required" is interpreted as meaning reasonably necessary
- the threat to national security does not need to be direct or immediate
- It is important to consider the mosaic effect of information in the hands of motivated people
- no duty to confirm or deny that information is held, if exemption is needed to safeguard national security
- s24 is subject to the PIT

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Summary:

Points common to s23 and s24

- above all, the key is to focus on the consequences of disclosure or of confirming or denying
- case officers should try to engage with PAs in order to clarify their position under both s23(5) and s24(2)
- under both s23(5) and s24(2), the ICO reserves the right to know whether information is held, and if it is, to see it. However we will only need to do either of these things in exceptional circumstances
- case officers should seek signatory advice where there is uncertainty about handling case

Summary:

Interaction of s23 and s24

- s23(1) and s24(1) are mutually exclusive
- however s23(1) and s24(1) may be cited "in the alternative": one exemption is engaged in its own right, but the PA wishes to disguise which one
- ensure all parties understand the meaning of the term "in the alternative" in this specific context

continued.....⇒

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Summary:

Interaction of s23 and s24 ... continued...

- s23(5) and s24(2) can be applied separately or, if BOTH are engaged, jointly, to NCND whether information is held
- the ICO view is that it is sensible for a PA to apply s23(1) and s24(1) in the alternative rather than to NCND under s23(5)/s24(2), unless NCND is necessary to obscure the fact that the PA actually holds the information
- avoid using the term "in conjunction" in relation to subsections of s23 and s24

Summary of s23 and s24

- **S23(1)** exempts info supplied by or relating to a security body - listed in s23(3)
- **S23(5)** no duty to NCND if doing so would disclose info supplied by or relating to a security body
- **S24(1)** exempts info not covered by s23(1) if exemption is required to safeguard national security
- **S24(2)** no duty to confirm or deny where exemption is required to safeguard national security
- **S23** is absolute but **s24** is qualified
- **S23(1) and s24(1)** are mutually exclusive but may be cited "in the alternative" where one exemption is engaged, but PA wishes to disguise which one
- **S23(5) and s24(2)** can be applied separately or, if both are engaged, jointly, to NCND whether info is held
- for both sections: focus on consequences of disclosure or of confirming or denying
- Where both exemptions cited the public authority must be satisfied they both actually engaged.

Course outline

Advanced module – FOIA sections 23 (information supplied by, or relating to, bodies dealing with security matters) and 24 (national security).

Objectives

By the end of the session delegates should be able to:

- understand the range of interests of national security that s23 and s24 may need to protect in order to secure our national security;
- Identify when s23 and/or s24 apply;
- understand how s23 and s24 work together;
- explain how/when the requirement to confirm or deny is excluded;
- appreciate the need to consider all the consequences of responding to a request under sections 23 and 24; and
- be able to engage with public authorities and complainants from a position of understanding the ICO approach and how it works in practice.

The training is suitable for:

Existing ICO staff who have either no, or only limited, experience of applying sections 23 and 24 but who will need an understanding of these exemptions and issues around them as part of their duties. In relation to case officers, we anticipate that a limited number of staff will specialise in sections 23 and 24 cases.

Timing of delivery:

Ideally, staff should undertake this training when they are about to start to deal with, or have just started to deal with, sections 23 and 24 and issues around them.

Pre-course requirements:

We assume that delegates will have completed FOIA Foundation Training Modules 2 (exemptions) and 3 (the public interest test), or that they will already have equivalent knowledge.

It would be helpful for delegates to have familiarised themselves with our new external guidance on sections 23 and 24, although this is not essential.

Post-course requirements:

Delegates should work through the advanced training workbook on sections 23 and 24, to strengthen and consolidate their understanding. This will need to be done either with a mentor (who will be allocated by your line manager) or by attendance on a follow up workbook seminar.

Course outline

1. Introduction
2. Comparison and overview of s23 and s24
3. s23: how it is engaged
how to apply it
4. s24: how it is engaged
how to apply it
public interest test
5. Ministerial certificates
6. Interaction of s23 and s24: overview of the ICO's new approach
s23(5) and s24(2)
s23(1) and s24(1)
7. Summary

We deliver the training course by means of presentation, discussion and exercises. We use case studies – based on real and fictional cases – to explain the exemptions, both separately and when they interact.

References

We will refer to the following real cases in the training course. Delegates will find it helpful to have read them before attending, but they should bear in mind that the ICO's approach to the application of sections 23 and 24 changed in autumn 2011.

Commissioner of the Police of the Metropolis v the Information Commissioner [EA/2010/0008], 23 May 2010)

West Yorkshire Fire and Rescue Service FS50308040

Kalman v the Information Commissioner [EA/2009/0111], 6 July 2010

Secretary of State for the Home Department v Rehman (AP) [2001] UKHL47 (non FOI)

Baker v the IC [EA/2006/0045], 4 April 2007

Summers v Metropolitan Police Service FS50368290 and [EA/2011/0186] 24 February 2012

Peter Burt v Ministry of Defence [EA/2011/0004], 20 September 2011

Camden Community Law Centre v FCO [EA/2011/0167], 29 June 2011

Dowling v Police Service NI [EA/2011/0118], 22 February 2012

Cabinet Office FS50160252

s23/ s24 training session

Objectives

You should be able to:

- understand the range of interests of national security that s23 and s24 may need to protect in order to secure our national security;
- identify when s23 and/or s24 apply;
- understand how s23 and s24 work together;
- explain how/when the requirement to confirm or deny is excluded;
- appreciate the need to consider all the consequences of responding to a request under sections 23 and 24; and
- be able to engage with public authorities and complainants from a position of understanding the ICO approach and how it works in practice.

FOI advanced training session s23 and s24

Schedule for today's session

1. Introduction
2. Comparison and overview of s23 and s24
3. s23: how it is engaged
how to apply it

approx duration 50 mins

Break 10 mins

4. s24: how it is engaged
how to apply it
public interest test

5. Ministerial certificates

approx duration 50 minutes

Break 10 mins

6. Interaction of s23 and s24: overview of the ICO's new approach
s23(5) and s24(2)
s23(1) and s24(1)

7. Summary

approx duration 1 hour

Freedom of Information Act 2000

Sections 23 and 24

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

(1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

(2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.

(3) The bodies referred to in subsections (1) and (2) are—

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (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,
- (l) the Service Authority for the National Criminal Intelligence Service.

(m) the Serious Organised Crime Agency.

(4) In subsection (3)(c) "the Government Communications Headquarters" 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.

(5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

24 National security.

(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.

(2) 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.

(3) A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.

(4) A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.

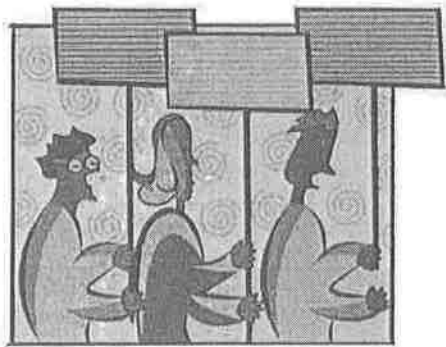
s23(5) exercise: "Ban All Religion"

A fictional request is made to the Home Office;

"Please provide me with information on any investigations into allegations that the organisation "Ban All Religion" has links with terrorism".

If the government was concerned that this organisation did have links with terrorism it is reasonable to surmise that the Home Office, with its remit of home security, would hold that information. Furthermore it is safe to assume that it is highly likely that a s23 security body would have been involved in any investigation of Ban All Religion and that such a body would have provided the Home Office with information on its investigation.

So the question we need to ask is: what would either confirming or denying that the requested information is held by the Home Office reveal about a s23 security body?



s23(5) exercise: "Ban All Religion" - with answer

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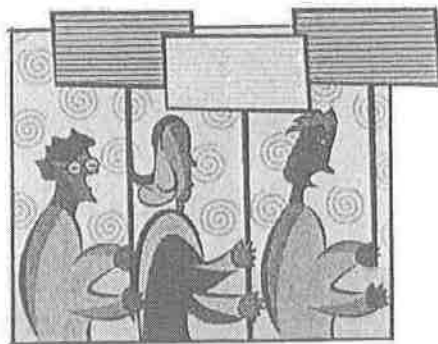
So the question we need to ask is: what would either confirming or denying that the requested information is held by the Home Office reveal about a s23 security body?

Both responses would equate to a statement about a s23(3) security body.

Confirming the Home Office holds the information would reveal that a s23 body had investigated the body – this is information about a s23 body and so the exclusion/exemption is engaged.

Denying the information is held would reveal, very definitely, that no investigation into Ban All Religion had taken place and that therefore a security body (eg MI5) was not interested in the organisation – this also is information about the security body – again the exclusion/exemption is engaged.

Looking at the request from the Home Office's point of view, you can understand that it would not wish to reveal which organisations had attracted the attention of a security body.



s23(5) Balance of probabilities: Case study

In *Commissioner of the Police of the Metropolis v the Information Commissioner*, (EA/2010/0008, 23 May 2010) the Metropolitan Police ("the Met") had received a request for information about how a plot to carry out terrorist attacks in central London had been foiled using information obtained by the US from terrorist suspects held overseas. The request was made following President Bush's public statement that information obtained in this way had been used to stop such attacks.

At the Information Tribunal the Met produced evidence that, if the information was held, it would most likely have been passed from the USA by the CIA to the UK's security bodies, who would have informed the Met. Therefore confirming that the information was held would, in effect, reveal that the security bodies held the information and had supplied it to the Met. Conversely, denying that the information was held would say the opposite.

The Tribunal therefore found that section 23(5) was engaged. It acknowledged that the test of whether a disclosure "would" relate to a security body was the normal civil standard of proof: ie if it is more likely than not that the information relates to a security body, the exemption is engaged.

s24(1) case study: Mosaic effect. Summers v Information Commissioner and Metropolitan Police Service

Decision Notice:

In FS50368290 the Commissioner considered arguments by the Metropolitan Police Service in favour of applying s24(1) to requested information about the cost of the Royal Protection Unit (also known as "SO14"). The Commissioner upheld the application of s24(1): "The Commissioner has carefully considered the public authority's arguments including the examples it helpfully provided to illustrate how publicly available information is (*sic*) powerful source of intelligence for those wishing to target the security of the UK. In view of the compelling arguments as to how the disputed information could be used by those who wish to target the security of the UK, the Commissioner accepts that, under those circumstances, the exemption is reasonably necessary in this case to safeguard national security".

The "compelling arguments" and examples cited by the public authority included the following:

- "gathering publicly available information and analysing it to produce intelligence to compile profiles and identify targets is one of a number of recognised strategies employed by those planning criminal activities, including terrorism";
- terrorists could combine the requested information with publicly available information on expenditure to assess the vulnerabilities of potential targets;
- "disclosure would allow for comparison with other similar disclosures to draw inferences about the level of protection provided by the SO14 unit as well as the security arrangements for other high profile public figures and buildings. For instance, the official confirmation of the total cost of security for the House of Commons referred to by the complainant illustrates how official confirmation of the total cost of the SO14 unit could be used to compare security expenditure for targets of a similar profile and consequently provide intelligence regarding the vulnerability or otherwise of those targets to attacks"

PTO ⇒

Tribunal decision:

On appeal, the First Tier Tribunal upheld the decision notice (Summers v Information Commissioner and Metropolitan Police Service [EA/2011/0186], 24 February 2012). The Tribunal accepted the arguments about the "mosaic effect", in support of withholding the information: "There can be no doubt in the Tribunal's judgment that the mosaic effect alluded to in some detail by the Chief Superintendent would be enough to raise the level of risk attendant upon the possibility of an attack on the persons and sites protected by SO14."

s24 The public interest of the UK Case study

Peter Burt v Ministry of Defence [EA/2011/0004], 20 September 2011

Request had been made for briefings and summary reports following site visits by UK Atomic Weapons Establishment (AWE) staff to a US atomic energy facility.

1. First engage the exemption

It was argued that disclosing details of a US nuclear facility could prejudice the US's national security; disclosure would be very damaging to its nuclear programme. The First Tier Tribunal accepted that if the UK disclosed such information, it was probable that the US would consider withdrawing its co-operation with the AWE. This threat to Anglo-US co-operation had the potential to undermine UK national security and it was this factor that engaged the exemption.

2. Then apply the PIT

Where did the public interest lie? When it came to considering the public interest test, it was not the severity of the damage to the US' nuclear weapons programme that was of direct concern. Instead, the issue was how the US would react in terms of its co-operation with the UK; and the ensuing severity of the prejudice to UK national security.

The Tribunal commented: "overall there was and is a very limited public interest in disclosure which needs to be weighed against a real risk of disclosure reflecting a possible or anticipated adverse reaction from the United States. As has been made clear above, the United States has finally expressed its desire to maintain proper confidence in what it regards as a sensitive area".