

## Examples of s23(5) and s24(2)

### 1. Applying s23(5) and s24(2) together to the same information

A fictional request is made by the Daily Royalist newspaper to the Department for Culture Media and Sport for information on any investigations into whether anti-monarchist organisations had links with threats by terrorists to disrupt arrangements for the Royal Wedding in 2011. The request was made to the DCMS because of its responsibility for ceremonial arrangements.

Does s23(5) apply? First, consider whether confirming or denying that the information is held would reveal information relating to a security body. It would reveal whether or not MI5 was interested in the anti-monarchist group, so s23(5) is engaged.

Does s24(2) apply? Similarly, consider whether confirming or denying that the information is held would undermine national security. To confirm that the information is held would warn any anti-monarchist organisation that did have links with terrorism that it may have been under investigation, and might cause it to try to hide or destroy any evidence of such links. This could harm any investigations and threaten national security in future. Therefore, s24(2) is engaged.

In this case, we have established that **both** s23(5) and s24(2) apply. In refusing the request, they may therefore be cited jointly in respect of the same information.



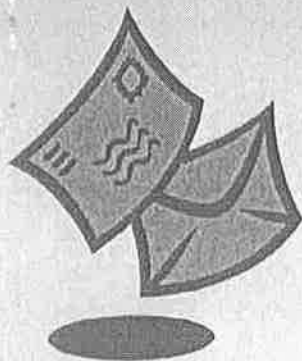
Contrast the Daily Royalist case with the example below;

## 2. Applying s23(5) and s24(2) separately

Mr Blofeld requests from the Foreign Office the London HQ address of MI6. MI6 is of course listed in s23(3) as the Secret Intelligence Service; therefore for the Foreign Office to state that it holds the address of MI6 would disclose information relating to a s23 body. s23(5) is engaged and therefore, technically, the Foreign Office does not have to confirm or deny whether it holds the information. Of course this is a faintly preposterous example: the MI6 building is well known to the public from its prominent Thames-side location and from its inclusion in feature films. Nevertheless, s23(5) is engaged.

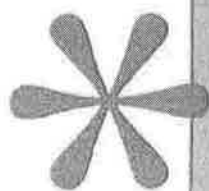
However s24(2) is not engaged. Apart from the public knowledge about the building (whose location is also specified on the MI6 website), it is widely presumed by the public that the Foreign Office is in regular contact with MI6. What would be the threat to national security of the Foreign Office confirming that it holds the information?

In these hypothetical circumstances, only s23(5) could apply.



# Making the connection between learning and work

Sections 23 and 24 advanced training workbook



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## Preface

This workbook takes you through the national security exemptions in sections 23 and 24 of the Freedom of Information Act 2000 ("FOIA"). Issues of national security have gained importance in modern times. Conscious of these issues, and as a responsible regulator, the Information Commissioner has issued revised guidance on these exemptions. This new workbook and associated training session are aimed at ensuring you, as ICO staff, fully understand how to interpret and apply the exemptions in the cases which come before you.

Graham Smith (Deputy Commissioner) handles most of the difficult and sensitive national security issues arising from FOI casework. You should discuss any difficulties with cases involving s23 or s24 first with your manager and then with Graham or another signatory.

In October 2011 there was a change to the ICO's approach to handling cases where s23 and s24 overlap, and have to be applied together in some way. You will therefore notice that the conclusions we reached in Decision Notices prior to then might not accord with our current thinking. You might find it a useful exercise to look at older decisions and consider what conclusion we would reach under the new approach.

Policy Delivery  
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## Using this workbook

- Please refer to the section on "Using this workbook" in the FOI and EIR foundation training workbook.
- As you go through this workbook, you might find it helpful to refer at regular intervals to the final section:

### Summary of main points of s23 and s24

- Please also read the ICO's latest external guidance on sections 23 and 24, to which this training workbook is complementary.

# 1. Objectives and introduction

When you have worked through this workbook, 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
- engage with public authorities and complainants from a position of understanding the ICO approach and how it works in practice.

## 1.1 Introduction

This workbook deals with sections 23 and 24 together. They have differences, but both cover aspects of national security; they are related, and interact in particular ways.

The workbook will explain points by reference to real cases and hypothetical examples, and by including some practical exercises to help you to think about the issues.

## 1.2 s23 and s24 in brief

s23 exempts information **supplied by or relating to specified bodies dealing with security matters**. 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.

s24 exempts information **in respect of which exemption from section 1(1) is required in order to safeguard national security**. Where exemption is needed in order to safeguard national

security, a public authority does not have to confirm or deny whether information is held.

Note emphasis in bold above – It is essential to understand the meaning of these exemptions.

You must refer closely to the precise wording of FOIA.



## 2. Section 23

### 2.1

#### 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, and
  - (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).

## **2.2 Section 23 is a class-based, absolute exemption**

Section 23 is listed as an absolute exemption in section 2 FOIA. For the meaning of the term "class-based, absolute exemption", please refer back to the FOI and EIR foundation training workbook. There is no public interest test.

## **2.3 s23(1) How the exemption is engaged**

"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)".

The exemption is engaged in respect of information in the following circumstances:

- **if a specified body supplies that information to a public authority, either directly or indirectly**

**OR**

- **if the information relates to a specified body**

That's all that is required. There is no need to show prejudice, or apply the public interest test.

### **Case officer tip**

Our current position is as follows.

When investigating complaints about the application of s23(1) the Commissioner will need to be satisfied that the information was in fact supplied by a security body or relates to such a body if he is to find in favour of the public authority. In certain circumstances the Commissioner is prepared to accept a written assurance from the public authority that this is the case. This only applies where it initially appears plausible that the information would engage the exemption. The written assurance acts as confirmation that this is the case.

The assurance must be provided by someone who by reason of their seniority and responsibilities has regular access to information relating to the security bodies and understands the relationship between the public authority and those bodies. Furthermore they must also have seen the disputed information.

Where it is less clear that the withheld information would have been supplied by or relates to a security body, it will not be appropriate to accept assurances of this nature from the public authority as sufficient evidence on its own. The Commissioner will need to discuss the matter with the public authority in order to gain a better understanding of the public authority's grounds for applying the exemption. In some cases it will be necessary to see the information in order to understand its nature and provenance, even if we have to visit the public authority in order to do so. This is likely to involve a senior member of the IC's staff who has Developed Vetting clearance.

### **Example**

In FS50193945 the complainant had requested from the Cabinet Office details of information provided to the UK by the Saudi Government, prior to the terrorist attacks of 7 July 2005, about expected terrorist attacks in the UK. The Cabinet Office confirmed it held information within the scope of the request but stated that it was exempt from disclosure under section 23(1). When the Commissioner investigated the complaint, the Cabinet Office provided him with a letter from its Director of Security and Intelligence, assuring him that information falling within the scope of the request was either received from one of the s23(3) bodies or related to one of those bodies. The Commissioner agreed that the Cabinet Office had applied the exemption correctly. In particular, he

pointed out to the complainant that, since the exemption was absolute, there was no requirement to consider the public interest.

## **2.4 s23(1): When does information "relate to" a specified body?**

s23(3) lists the specified security bodies. s23(1) provides that information is exempt if it was supplied directly or indirectly by one of those bodies, or if it "relates to" one of those bodies (NB: these phrases are also used in s23(5)).

Thus, s23(1) would cover information provided by a third party, but which originated from a security body. This means the exemption can protect intelligence as it is disseminated through different channels.

The words "relate to" obviously have a wide application. They would include any information concerning or linked to the activities of a security body. However they do not have unlimited application; the connection to a security body must not be too remote.

## **2.5 s23(3) List of the specified security bodies**

### **Case officer tips**

- Printed copies of the FOIA are likely to be out of date. Please check the up to date s23(3) list at: [www.legislation.gov.uk](http://www.legislation.gov.uk)
- In particular, SOCA was added most recently at s23(3)(m), but in 2010 the coalition Government announced that it would be abolished and subsumed into a new National Crime Agency from 2013. Therefore we are already aware, at the time of writing this workbook, that further amendments to the s23(3) list will be required.
- However in practice the public authority receiving the request is likely to know whether the body to which the information relates is a section 23 body and should be able to clarify the situation if necessary as a part of any subsequent ICO investigation.

It might be helpful for us to clarify which bodies are captured by s23(3) and how some of the bodies are more commonly known:

**s23(3)(a) the Security Service** is commonly known as MI5; it works to protect the UK against threats to national security.

**s23(3)(b) the Secret Intelligence Service** is commonly known as MI6, which works overseas and collects foreign intelligence in order to promote and defend national security.

**s23(3)(d) the Special Forces** include the SAS (Special Air Service) and SBS (Special Boat Service) and Special Forces Signals.

#### **s23(4) GCHQ**

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

### **2.6 s23(5) The exclusion of the duty to confirm or deny**

There is no duty on a public authority either to confirm or deny under s1(1)(a) whether it holds information, if to do so would mean disclosing any information "whether or not already recorded" which:

- was directly or indirectly supplied to the PA by a specified body

**or**

- relates to a body specified in s23(3).

To apply this subsection, you need to consider very carefully and precisely what would be revealed if the public authority either confirmed or denied it held the requested information, ie would confirming or denying whether a public authority holds requested information disclose any information supplied by a security body or relating to a security body?

In some cases it will be very clear that the confirming or denying the information is held would reveal information about a security body.

#### **Example**

A fictional request is made to the Home Office for information on

investigations by MI5 into allegations that a fictional 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. It is also 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? Confirming the Home Office holds the information would reveal that a s23 body had investigated the organisation, Ban All Religion, – 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 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 MI5.

There is no requirement for the confirmation or denial to reveal anything prejudicial to the work of security bodies.

The NCND provisions of s23(5) could be applied even if there is public knowledge that a listed security body is involved. Consider the next example.

### **Example**

In this fictional example, following a successful operation to rescue UK hostages, the government issued press statements about the role played by British special forces. The MoD then received a request for more details about the involvement of British special forces.

Despite the fact this was public knowledge, the MoD could technically still refuse to confirm or deny that it held such

information, because confirming the involvement of special forces is the disclosure of information relating to a s23(3) body. However, note that in reality it would be more likely to cite s23(1).

**A response that reveals that a security body is not involved is information relating to a security body.**

The Ban All Religion example, above, illustrates the point that to give a response which says, in effect, that "no security body is investigating this issue" constitutes the disclosure of information relating to a security body. Consider the example again – once we accept that denying the information is held would reveal that MI5 was not investigating or had not investigated Ban All Religion, we simply have to ask ourselves what is the consequence of providing a statement that, in effect, says "No, MI5 has not investigated Ban All Religion". Is this in itself information about MI5? Clearly the answer is yes.

**"Not already recorded"**

Where a security body is not involved in the issue to which the request relates, it's likely that no information is held recording that fact. However s23(5) refers to "the disclosure of any information (**whether or not already recorded**) which....." relates to a security body. Therefore the fact there is no record of a security body's non-involvement is not a bar to the application of s23(5).

**Example**

This refers back to the example of the fictional organisation Ban All Religion above. If MI5 had not investigated the organisation, obviously the Home Office would not hold the requested information. However for the Home Office to deny it held the information would reveal that MI5 had not investigated the organisation, and might even imply that it was not interested in it. This very disclosure is therefore information relating to a security body.

In this scenario there would be no recorded information about the fact that Ban All Religion was not being investigated. However s23(5) also applies to unrecorded information relating to a security body. Therefore s23(5) can be applied to this request.

### **In the territory of national security**

In the previous examples, it has been very clear that the requests concern the work of security bodies. The factors that bring the request within the ambit of s23(5) are:

- the subject matter of the request
- the language used in the request
- the nature of the work undertaken by the public authority receiving the request.

Applying these factors to the "Ban All Religion" example, we can see the following:

- the subject of the request - the potential terrorist threat posed by an organisation;
- the language of the request - the specific reference to a security body; and
- the nature of the work undertaken by the public authority to which the request was made - the Home Office (which has functions relating to national security, and therefore has working relations with security bodies. Therefore if the security bodies had investigated Ban All Religion the Home Office would be aware of it and if the Home Office did hold the requested information it is most likely to have been provided by such a body).

Together this means that confirming or denying the information is held equates to a confirmation or denial that a security body is interested in that body. These are the factors that place the request in the **territory of national security**.

NB The phrase "in the territory of national security" is used by the ICO, but it does not appear in the legislation and has not been routinely used by the Tribunal or by public authorities.

There will be cases, different to the "Ban All Religions" scenario above, where there is no such link to matters of national security, or the link is not so explicit. The following examples will help to illustrate this point.

#### **Example**

A fictional request is made to the Department for Business, Innovation and Skills (BIS) for the minutes of a meeting on competition matters between the Prime Minister and representatives from the main supermarkets.



There is no reason to think that this particular meeting dealt with issues of national security. This information is not in the "territory" of national security. The subject matter - competition in retailing - does not obviously relate to national security, the request does not explicitly relate to national security and the involvement of BIS does not suggest the meeting had a national security dimension. Therefore revealing whether or not BIS held this information would not, in itself, reveal anything about security matters or the involvement of the security bodies. It would therefore be incorrect for BIS to apply s23(5) to the request, and we would certainly not expect it to do so.

This is a rather extreme example, but illustrates the point.

Contrast that example with the one below:

### **Example**

In this fictional example, the Home Office receives a request for minutes of any meetings between the Prime Minister, the Home Secretary and major retailers from Westfield Stratford City shopping centre about arrangements for the 2012 Olympics. The request is received following threats being made on an extremist website to target the shopping centre during the games.

Although superficially this is similar to the previous example in that it's a request for meetings between the government and retailers, there are several factors that might ring warning bells in respect of national security issues. The Home Office plays a major role in national security. The shopping centre is located at the transport hub for the Olympics, and one would expect the Home Office to respond in some way to the threats that had been made. Therefore if the Home Office holds the requested information, it is plausible that some of it will have been supplied by a security body and/or that it might relate to a security body.

Applying the factors listed earlier, it can be seen that the request is indeed in the "territory" of national security; the Home Office could correctly apply s23(5) and neither confirm nor deny that it holds the requested information about the meetings.

**Read:**

ICO guidance: When to refuse to confirm or deny whether information is held

**2.6.1 The balance of probabilities**

Section 23(5) excludes the duty to confirm or deny if doing so "**would** involve the disclosure" of information supplied by a security body or relating to it. The use of the word "would" does not mean there must be 100% certainty; instead, we interpret it as meaning "more likely than not" that the information, if it was held, would have been supplied by, or relates to, a security body.

This makes sense when you consider that a public authority must be able to claim the exemption even in situations where it does not actually hold the information. If the request was for "file X" and the public authority did not in fact hold file X, then it could never say with 100% certainty that the file would have been provided to it by a security body. So the question must be whether, if the public authority did hold file X, is it more probable than not that it would have been supplied by a security body? This interpretation of "would" allows it to do just that, regardless of the circumstances.

**Example**

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.

### **2.6.2 Consistency under s23(5)**

In certain circumstances, consistency of response is also highly relevant. This is where there is a risk that information about a security body could be disclosed by an inconsistency in responses given by a public authority. For instance, if a public authority such as the Home Office denied that it held certain information, for example a file on a particular group compiled by MI5, only to provide a NCND response to a later request, the inconsistency would itself reveal something about the security body. This, too, demonstrates how you need to consider the consequences of giving a particular response, and you should consider applying s23(5) in such circumstances. The circumstances in the following case illustrate this point.

#### **Example**

In *Norman Baker MP v the Information Commissioner, Cabinet Office and the National Council for Civil Liberties* (EA 2006/0045, 4 April 2007), a request was made to the Cabinet Office for information on whether there had been any change in policy from the Wilson Doctrine. The Wilson Doctrine was a commitment, originally made by Harold Wilson but maintained by subsequent administrations, that no authorisation would be given for the tapping of MPs' phones, and that if the policy was to change for any reason the prime minister of the time would make a statement to that effect to the House of Commons. The request was also for the number of MPs who had had their phones tapped since the Wilson Doctrine came into operation.

Because some bodies that can be authorised to carry out phone tapping are s23 bodies, there is a potential risk in denying that any MPs are having their phones tapped: this would equate to a denial that a s23 body is tapping MPs' phones.

At the time of the request, it might have been that no MP's phone was being tapped, so the Cabinet Office could have denied it held any such information. However it is impossible to rule out the need to tap an MP's phone in future; therefore under s23(5) the Cabinet Office refused to confirm or deny whether it held any information so it could ensure it provided a consistent response to any future request, regardless of the circumstances.

(Note: the conclusion reached in this case regarding the application of s23 and s24 does not accord with our current approach, but the circumstances of the case as outlined here remain relevant as a case study).

### **2.6.3 What does s23(5) mean in practice?**

- We only need to show that **either** confirmation **or** denial would entail such disclosure; there is no need to show both.
- Even if the public authority does hold information, you can also consider what would be revealed if it had to deny that the information was held. The converse would also apply. Thus, even if it is only a hypothetical confirmation or denial that would disclose sensitive information relating to a security body, s23(5) would be engaged.
- s23(5) also covers information which is not already recorded,

There now follow two exercises to recap what we have covered so far.

### **Exercise A**

The Home Office receives a series of requests for information over 3 years.

Request 1) On how many occasions was authority given to tap the phones of companies in the defence industry in 2008?

Request 2) On how many occasions was authority given to tap the phones of companies in the defence industry in 2009?

Request 3) On how many occasions was authority given to tap the phones of companies in the defence industry in 2010?

In 2008 no phones were being tapped, but in 2009 authority was given to a s23 body to tap the phones of one defence company and in 2010 authority was given to HM Revenue and Customs to tap the phone of a different defence company.

How should the Home Office respond each year? What are the implications of responding?

The answer is overleaf »

#### Exercise A with answer

The Home Office receives a series of requests for information over 3 years.

Request 1) On how many occasions was authority given to tap the phones of companies in the defence industry in 2008?

Request 2) On how many occasions was authority given to tap the phones of companies in the defence industry in 2009?

Request 3) On how many occasions was authority given to tap the phones of companies in the defence industry in 2010?

In 2008 no phones were being tapped, but in 2009 authority was given to a s23 body to tap the phones of one defence company and in 2010 authority was given to HM Revenue and Customs to tap the phone of a different defence company.

How should the Home Office respond each year? What are the implications of responding differently?

Answer:

HM Revenue and Customs is not listed as a security body in s23(3). Regardless of this fact, the Home Office could respond consistently to all three requests by relying on s23(5) to refuse to confirm or deny whether any information was held. The reasoning is as follows. For any of the requests, compliance with s1(1)(a) requiring the public authority to state that no information was held would in effect be a statement that no s23 body was given authority to tap phones.

**Exercise B**

How should the public authorities respond to the following?

1. Request to the Cabinet Office for information about an alleged plot to kidnap a high profile politician.
2. Identical request to Camberwick Green Parish Council.
3. Request to Camberwick Green Parish Council for any information it has received from MI5 about the assassination plot.

The answer is overleaf »



### **Exercise B with answers**

How should the public authorities respond to the following?

1. Request to the Cabinet Office for information about an alleged plot to kidnap a high profile politician.

If such information was held, it would undoubtedly have been provided by, or shared with, a security body and so confirmation or denial would reveal something about those security bodies. In effect confirmation would disclose that they were aware of the kidnap plot, whereas denial would say that the security bodies are not aware of the alleged kidnap plot. Both of these responses are information relating to a security body. In this case it would be appropriate for the Cabinet Office to neither confirm nor deny under s23(5). Both the public authority and the issue have a clear relationship with national security.

2. Identical request to Camberwick Green Parish Council.

There is no obvious connection between Camberwick Green Parish Council and the s23 security bodies (in the terms used earlier, it is not in the 'territory' of national security). Therefore a response that "no, Camberwick Green Parish Council does not hold information on the alleged assassination plot" does not amount to a denial that the security bodies have an active interest in any plot. For the parish council to ever be able to claim s23(5) NCND, something must have happened involving the council that would realistically attract the attention of a s23 body, or the request must relate directly to a s23 body. It would therefore be inappropriate for the Parish Council to apply s23(5) in these circumstances.

3. Request to Camberwick Green Parish Council for any information it has received from MI5 about the kidnapping plot.

Although the request seems very similar to question 2, confirmation or denial would be a statement to the effect that "yes, we hold information provided by MI5" or "no, MI5 didn't provide us with any information". Either of these statements is information relating to a s23 body. Therefore the council could potentially claim s23(5). However it's worth noting that, in reality, if the council does not hold the information, it would not be alert to the need to protect national security in this way and in practice might well simply deny holding the information.



## **2.7 Ministerial certificates under s23(2)**

Please see section 5 of this workbook.

## **2.8 Historical records: PIT applies**

In respect of any historical records to which s23 applies, and which have been transferred to The National Archives ("TNA") or the Public Records Office of Northern Ireland ("PRONI"), s23 ceases to be an absolute exemption and becomes subject to the public interest test.

## **2.9 Summary of main points of s23**

- s23(1) exempts information supplied to a PA by a s23(3) security body (whether directly or indirectly), or which relates to such a body
- "relates to" in sections 23(1) and 23(5) has a wide meaning, but the connection must not be too remote
- s23(5) means that there is no duty to confirm or deny if doing so would disclose information supplied to a PA by a s23(3) security body (whether directly or indirectly), or which relates to such a body
- for s23(5), the information revealed by confirming or denying does not have to be "already recorded"
- s23(5) provides protection for the interests of national security bodies in a wide range of scenarios
- when applying s23(5), consider the impact of what a NCND response to the request might reveal
- there is no public interest test for s23
- the list of s23(3) security bodies is due for amendment; always check the up to date position.

## 3. Section 24

### 3.1

#### 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.

### 3.2 Section 24 is a qualified exemption, subject to the public interest test.

#### Read

- Chapter 4 of the FOI and EIR Foundation Training Workbook on the public interest test
- ICO external guidance: [the Public interest test](#)

Please see paragraph 3.7, below.

### 3.3 National security

#### 3.3.1 What does s24 protect?

The focus of s24 is on the protection of national security from the consequences of disclosure of information. It is expressed in broader terms than s23.

### **3.3.2 What does "national security" mean?**

There is no formal definition of this term.

In *Secretary of State for the Home Department v. Rehman* (AP) [2001] UKHL47 the House of Lords considered whether a foreign national posed a risk to national security and should be deported. The Lords made observations on the scope of national security. In *Baker v IC and the Cabinet Office and the NCCL* (EA/2006/0045), 4 April 2007 the Information Tribunal stated that it found those observations to be "helpful".

**The Tribunal listed the following observations on the definition of national security:**

- "(i) "national security" means "the security of the United Kingdom and its people";
- (ii) the interests of national security are not limited to action by an individual which can be said to be "targeted at" the UK, its system of government or its people;
- (iii) the protection of democracy and the legal and constitutional systems of the state is a part of national security as well as military defence;
- (iv) "action against a foreign state may be capable indirectly of affecting the security of the United Kingdom"; and
- (v) "reciprocal co-operation between the United Kingdom and other states in combating international terrorism is capable of promoting the United Kingdom's national security".

So you can see that the term "national security" is very broad in meaning. It covers obvious matters such as counter terrorism measures and espionage, for instance, but is wider than that. For instance, it might involve the UK government's dealings with other countries in order to co-operate on international terrorism. These countries might be traditional allies of the UK or not; they could be

any countries with which we wish to co-operate. Alternatively they might be neutral or friendly countries that we do not wish to alienate or traditionally hostile countries that we do not wish to further antagonise. In order to ultimately protect UK interests it might be necessary to protect the interests of other countries too.

### **Example**

The UK government is keen to promote better relations with a fictional former Eastern bloc state, Z. Z has significant oil reserves. It is a volatile country, and its very instability makes it an attractive base from which terrorists like to operate. As well as targeting the government of Z, some of these terrorists are actively planning attacks on the UK. The UK is keen to nurture good relations with country Z in order to help to stabilise it and to encourage the Z government to clamp down on terrorist cells operating within its borders. As part of its initiative, the UK is supporting Z's police force with training, IT equipment and other technology. The UK government has publicly acknowledged that it is co-operating with Z to defeat international terrorism but has not provided any details of what that co-operation actually involves. The government of Z is very sensitive about the existence of support from a country such as the UK and regards details about the level of co-operation as confidential. It does not wish to draw the attention of its own people, or other neighbouring states, to this issue. It is also known to have concerns, real or not, that the disclosing any information on the technology it has acquired from the UK would undermine its attempts to combat terrorism within its own borders.

A request to the UK government for the details of its meetings with Z could be exempt under s27 and/or s43 (international relations / commercial interests) but might also be exempt under s24(1). The latter exemption would apply because disclosure of the detailed information could damage our relations with Z. In turn this could undermine the UK's attempts to get Z to clamp down on terrorists operating there, when we know that some of those terrorists wish to target the UK. Ultimately the UK is aiming to protect its own national security by developing a good relationship with Z.

The link might at first sight seem a little remote, but the situation has to be considered from the point of view of the potential impact on the national security of the UK at a time of heightened risks due to global terrorism.

To put it another way, the application of the exemption depends on establishing the causal link between the disclosure of the information – the impact the disclosure has on Z – and how Z's

response would impact on the UK's national security.

A request for information might, at first sight, appear innocuous (eg the request, below, for the number of protective suits a local police authority has). However it has to be considered in the light of the impact that disclosure of the information might have on national security. This is regardless of the motives of the requester, who might be asking a perfectly innocent question, perhaps seeking reassurance that our police are properly equipped to handle particular types of emergency.

### **Example**

In FS50200695 the complainant made a request to Thames Valley Police ("TVP") for information about chemical, biological, radiation and nuclear (CBRN) suits. Some of the information was disclosed, but the remaining information was withheld under the exemptions at sections 24(1) and 31(1) (law enforcement). TVP argued that "... to provide the number of suits owned by the force would indicate to a terrorist the tactical make-up of a force. This information, if acquired on a national level, could result in the law enforcement capabilities of individual forces being compromised. If a particular force has a very low number, disclosure could potentially lead to that force becoming vulnerable and leaving it open to possible terrorist attacks thereby compromising the prevention or detection of crime. This could also compromise our national security as it would be detrimental to UK safety and resilience in the fight against terrorism." TVP stated this was particularly pertinent given the then "severe" status of terrorist threat against the UK and the fact that some terrorists were even prepared to sacrifice their own lives to achieve their goal.

TVP acknowledged that: "There is of course, a public interest in knowing in general terms what provision the UK has in place to protect the public in the event of a terrorist attack. However, detailed information relating to the precise operational capability of the police or other emergency services in any given location, would be of assistance to terrorists for the purposes of planning the location and type of potential attacks, either within a specific region or nationally".

The Information Commissioner upheld the application of s24(1), stating that "there is a specific and direct application to which such information might be put which could potentially be damaging to

national security. The information therefore has the necessary quality to fall within the definition of section 24(1)."

**Exercise D**

Consider what the concept of "national security" encompasses – thinking about it in broad terms. List the sort of things that are important to national security or that raise national security issues, including physical or non-tangible things that require protection.

See overleaf »

### Exercise D with suggested answers

Consider what the concept of "national security" encompasses – thinking about it in broad terms. List the sort of things that are important to national security or that raise national security issues, including physical or non-tangible things that require protection.

Points to make would include obvious ones such as:

- terrorist attacks
- bombs
- airport security
- weapons of mass destruction
- chemical /germ warfare or attacks
- media reporting of national security issues
- espionage

But we also need to consider:

- transport systems
- location of pipelines, transmitters, aerals etc
- supply of power, fuel and water
- communication systems and networks
- IT networks
- food supply chain
- infrastructure
- landmarks, inc historic buildings
- people who might be targets for terrorists eg politicians, judges, Royal Family members
- safety of UK citizens, within the UK and abroad

as well as:

- the systems we need to have in place to protect national security
- the work of the various security bodies as a whole
- interaction between security bodies and other public authorities
- upholding democracy (this would include Parliament and voting systems)
- the Crown and the Sovereign and heirs to the throne, as part of the democratic institutions of the UK
- the legal system and the rule of law
- international dimension (eg tensions or incidents in a foreign state might affect UK interests and need monitoring)



- maintaining good relations with international allies (note possible overlap with ss26/27)
- developing and maintaining relationships with other states (note possible overlap with ss26/27)

etc.....

### 3.3.3 What is the meaning of "required" for the purpose of national security?

In this context, "required" means "reasonably necessary". For a fuller explanation, including the way this interpretation is based on decisions of the European Court of Human Rights, please refer to the new external guidance on s24.

#### Example

The Commissioner considered the meaning of "required" in FS50178276. This case involved a request for information held by the Metropolitan Police about how a plot to hijack planes and fly them into Heathrow and Canary Wharf had been averted by the actions of CIA agents. The Met responded to the request by refusing to confirm or deny that the information was held, relying on s24(2) and other exemptions to do so. In the DN the Commissioner stated: "required in this context means reasonably necessary. It is not sufficient for the information sought simply to relate to national security; there must be a clear basis for arguing that disclosure would have an adverse effect on national security before the exemption is engaged". In this instance, the Commissioner found that he was "not convinced that the threshold for this exemption to be engaged imposed by the word *required* is reached". This was because President Bush had already made public statements about the CIA's actions in this matter.

#### Example

In *Kalman v the Information Commissioner and the Department for Transport* [EA/2009/0111], 6 July 2010, the Information Tribunal supported the Information Commissioner's line. The complainant had requested information regarding the directions issued to airport operators about the security screening of passengers at UK airports. The Information Commissioner had found that section 24 was engaged in respect of some information but ordered the disclosure of other information.

The Information Tribunal upheld the Commissioner's approach to

the interpretation of s24 , stating: "The Commissioner argued and it was not disputed by the other parties that "required" means "reasonably necessary"; and it is therefore not sufficient that the information sought simply relates to national security."

Note: the Tribunal erred in its phrasing in this judgement: it is the exemption that must be required in order to safeguard national security, rather than the information.

### **3.3.4 To what extent is exemption required to safeguard national security? Does the threat have to be immediate?**

The Information Commissioner's view is that there is no need to show that there is evidence of a direct or imminent threat. In the Rehman case, cited in paragraph 3.3.2 above, Lord Slynn supported this approach. He stated that: "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."

#### **Example**

In FS50308040 the Commissioner considered the refusal of a request made to West Yorkshire Fire and Rescue Service (WYFRS) for details of its fleet of vehicles. WYFRS had provided some details of the vehicles but had withheld number plate registrations and locations, citing s24(1). This was in contrast to other authorities which had provided that information. WYFRS argued that it differed from other authorities in that it had a particular role in hosting the UK's Fire and Rescue Service National Control Centre, which coordinated the national infrastructure for responding to critical incidents. In particular, unlike other forces it deployed automatic number plate recognition as a security measure to control access to some of its sites. To disclose registration numbers and locations of vehicles could facilitate the cloning of vehicles, allowing access to WYFRS sites. They could then be used as a weapon to threaten the coordination of national responses to critical incidents.

Although there was no intelligence to suggest terrorists were currently targeting WYFRS, ie there was no immediate threat of attack to WYFRS, the Commissioner accepted that, in these circumstances, the exemption in s24(1) was required for the purpose of safeguarding national security.

### 3.4 How the exemption in s24(1) is engaged

Information is exempt under s24(1):

- If it is not exempt under s23(1)

AND

- If exemption from s1(1)(b) is "required for the purpose of safeguarding national security"

AND

the public interest test must be applied.

s1(1)(b) is the duty to communicate information that has been requested.

Note that it is not the information that must be required for the purposes of safeguarding national security.....but the exemption from disclosing the information.

#### Example

The Commissioner's decision in the WYFRS case mentioned above (FS50308040) illustrates this point. In this case, the information on number plate registrations was not held for reasons of national security; however disclosing those numbers could assist terrorists wishing to target the UK's Fire and Rescue Service National Control centre. Hence in this case it was not the information that was required to safeguard national security. Rather, as stated in s24(1), it was the exemption from disclosing the information, namely the exemption from disclosing the registration numbers, that was required for the purpose of safeguarding national security.

In Exercise D, above, we considered topics that the concept of national security might cover. Some of these illustrate this point: ie the PA must consider whether the exemption from disclosing information is required in order to safeguard national security, when the information itself might on its own appear harmless. For instance:

- transport systems
- location of pipelines, transmitters, aerials etc

- supply of power, fuel and water
- communication systems and networks
- IT networks
- food supply chain

The actual information about these infrastructure items is not generally required for the purpose of safeguarding national security, but disclosing that information might present a risk to national security. Thus the exemption in s24(1) would provide protection where that risk exists.

### 3.5 The duty to confirm or deny: s24(2)

Section 24(2) excludes the duty to confirm or deny when “required for the purpose of safeguarding national security”.

To apply the exclusion, you only need to show that either confirming or denying whether the information is held would harm national security. It is not necessary to show that both possible responses would do so.

You must then apply the public interest test, before making a final decision on the exemption.

#### **Read:**

- The ICO’s new guidance on The duty to confirm or deny
- Paragraph 2.6 of this workbook, on NCND under s23(5).

#### **Example**

In *Baker v IC & Cab Office* [EA/2006/0045], discussed in paragraph 2.6.2 above, the request was about the operation of the “Wilson Doctrine” in relation to phone tapping of MPs. The Information Tribunal agreed that the Information Commissioner and the Cabinet Office were right to decide that s24(2) applied in this case and there was no requirement to confirm or deny whether the information was held.

The Tribunal said: “If any particular category of people were engaged in activities that were damaging to national security and the Cabinet Office effectively announced that no interceptions had

taken place in relation to that category, any person in that category could continue his or her activities safe in the knowledge that they were not subject to interception and by extension under investigation. The Cabinet Office judges it is strongly against the public interest to permit such an inference to be drawn. Conversely if a particular category of people were engaged in activities which were damaging to national security and the Cabinet Office announced that a certain number of telephones had been tapped, such an announcement would effectively act to alert that person to avoid certain forms of communication to help escape detection.”

(Note: these words remain relevant despite our current views on applying s23(5) and s24(2) – see chapter 4, below).

### **3.5.1 In s24(2) cases, does the ICO need to know whether the information is actually held?**

The ICO always reserves the right to know whether or not information is held, and if it is, to have access to that information.

However in most cases this will not be necessary. This is because what we’re considering is the damage that could be done to national security by revealing whether the information is held or not, rather than what damage would be done by disclosing the actual information requested. 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.

However there will be exceptional circumstances in which you do need to know whether or not the information is actually held.

In some, very limited, circumstances you may need to see the actual information in order to assess the public interest test.

#### **Case officer tips**

For advice in a situation like this, discuss with a signatory and in particular with Graham Smith.

For reference, in cases with national security implications where you need to view information, the ICO has a number of staff who have undergone Developed Vetting: Refer to Graham Smith for more details.

### **3.6 Information in the public domain and the "mosaic effect": s24(1) and s24(2)**

#### **3.6.1 Information already in the public domain**

Consideration must be given to what other information is in the public domain. Where the same or similar information is already in the public domain, this might well indicate there is no harm in either communicating the requested information or confirming whether or not the public authority holds it, as follows:.

- where information is already in the public domain; this suggests that there would be no harm in releasing identical information, nor would it be appropriate to neither confirm nor deny; and
- where it is already in the public domain that a public authority holds the requested information, then it would not be appropriate to refuse to confirm or deny, as this exemption would not be required to safeguard national security.

#### **3.6.2 The mosaic effect**

However, when considering requests, we and public authorities also have to be alert to the existence of other information in the public domain that could be combined with the requested information, or the very fact that the requested information is or is not held, to harm the interests of national security. This is commonly referred to as a "mosaic" or "jigsaw" effect. Public authorities need to consider how far a highly motivated and organised individual would go to make the information reveal something useful, which might harm national security. For instance, terrorists are highly motivated individuals and are often sufficiently organised and resourced to be able to compile a detailed picture by using information which is publicly available or which they obtain from other sources. Clearly public authorities should take account of the risk posed by information entering the public domain via an FOI request made by anyone, which could then be used by a motivated individual to enhance the information already available, or to fill in any gaps.

**Read**

LTT234 Mosaic arguments

LTTs222-227: Information in the public domain

Guidance: Information in the public domain

**Exercise E**

Think of examples of subject areas where the disclosure of some information might end up prejudicing national security, in the hands of a motivated person or group.

see overleaf »

### **Exercise E with suggested answers**

Think of simple examples of subject areas where the disclosure of some information might end up prejudicing national security, in the hands of a motivated person or group.

Suggestions of hypothetical areas:

- Locations of radio masts. For example, information provided piecemeal in response to a series of requests about individual mast locations could help terrorists to disable the communications network; in turn this might make it easier for the terrorists to mount a major attack on the UK.
- Free slots in the diaries of politicians or of the Royal Family. From this could be gleaned all sorts of possibilities about their activities and locations. For instance, someone might request diary information about where the Secretary of State for Defence is working on 12 days out of a particular fortnight, with no details available about the remaining two days. Another request might reveal travel arrangements for those two days. Additional information, whether from the media or obtained in other ways, about the frequency of visits by politicians to Afghanistan, might help terrorists to deduce that he is going to make an unannounced visit to Afghanistan on those two days.
- The rate of malfunction of security scanners at Manchester Airport; terrorists could use this information, gathered piecemeal, to calculate the risk of being 'caught' at Manchester and other airports which use that equipment. They could work out the relative vulnerabilities of different airports or public places.

### **Example**

#### **Summers v Information Commissioner and Metropolitan Police Service**

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".

On appeal, the First Tier Tribunal upheld this 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."

In summary, the ICO will consider arguments that it is appropriate for a public authority either to refuse a request under s24(1) or

neither confirm nor deny under s24(2) in the following circumstances:

- where disclosing information would cause prejudice as a result of the fact that a motivated person, such as a terrorist, could combine it with information already in the public domain or already known to a limited number of individuals.

However we would wish to see a specific explanation and evidence as to these factors and why prejudice would be caused.

#### **Read**

The following cases (not on s24):

FS50122063  
FS50142321  
FS50177654  
FS50123912  
EA/2010/0087

### **3.7 The public interest test in relation to s24**

As stated earlier, s24 is a qualified exemption, and therefore subject to the public interest test. Obviously, the concept of national security adds weight to cases, but despite this, it is essential to remember that, unlike s23, it is not an absolute exemption.

#### **3.7.1 The public interest in maintaining the s24 exemption**

Once you have considered whether or not the exemption is engaged, and therefore decided that the exemption is "required for the purpose of safeguarding national security", you must then look at the public interest in withholding the information, ie assess the severity of the harm to national security that would result from disclosing the information. There is a strong and weighty interest in safeguarding national security. If there is a real risk, then even if that risk is low, the public interest could lie in favour of maintaining the exemption.

We have to look at the nature of the potential harm that could arise. The more catastrophic the consequences could be, the greater the public interest in withholding the information.

In the following example, the potential harm was extreme.

#### **Example**

In *Kalman v Information Commissioner and the Department for Transport* (EA/2009/0111, 6 July 2010), mentioned at paragraph 3.3.3 above, the Information Tribunal, having satisfied itself that section 24 was engaged, went on to consider the public interest in withholding the information.

The Tribunal found that the nature of the risk added weight to the public interest in withholding the information. The consequences of a successful terrorist attack on a plane were so great that even if there was only a low risk that disclosing the information would aid such an attack, there was a very strong public interest in withholding the information.

### **3.7.2 The public interest in disclosing the information**

- Please refer to our external guidance on the Public interest test as well as to our new guidance on section 23 and section 24.

#### **Example**

This example also returns to the *Kalman* decision by the Information Tribunal (see above paragraph and paragraph 3.3.3). Obstructing the security measures which Government directives introduced at UK airports is a criminal offence. Therefore the public had an interest in knowing whether the searches had been introduced under a directive and that therefore they were legally obliged to submit to searches. In *Kalman* this was referred to as the 'secret law' argument; ie that the public should have access to the source of any legal obligations they were under. The Information Tribunal accepted this as a valid argument in favour of disclosure.

However, ultimately the public interest in favour of preventing acts of terrorism targeting air travel outweighed this public interest argument.

Note that, although there was a public interest in knowing what laws were in operation, the Tribunal also drew a distinction between this and the disclosure of information on operational details.

Although there is a public interest in passengers knowing they must submit to searches, this does not mean that there is the same public interest in disclosing the criteria by which passengers are selected for searches.

### **3.7.3 The public interest of the UK**

The public interest inherent in s24 is that in safeguarding the UK's national security. It concerns the public interest of the UK and its citizens. This is what a public authority must consider when applying the public interest test in relation to s24. However in an age of global terrorism, the security of the UK may be inextricably linked with the security of other countries; and the UK may often depend on cooperation with other countries. As we discussed in paragraph 3.3.2 above, the impact upon other countries of disclosing information might be relevant where there could be a resulting effect upon the security of the UK, as the case below illustrates.

#### **Example**

In *Peter Burt v Information Commissioner and Ministry of Defence* [EA/2011/0004], 20 September 2011, it was argued that disclosing details of a US nuclear facility could prejudice the US's national security. 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 UK Atomic Weapons Establishment. This threat to Anglo-US co-operation had the potential to undermine UK national security and it was this factor that engaged the exemption.

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 severity of the prejudice to our national security was considered under the public interest test.

### **3.8 Ministerial certificates**

Please see section 5 of this workbook.

### **3.9 Summary**

- s24(1) applies to information not covered by s23(1)
- s24 exempts information where exemption from s1(1)(b) is required to safeguard national security
- "required" in s24 has a broad meaning
- 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;
- there is no duty to confirm or deny that information is held, if exemption is needed to safeguard national security;
- s24 is subject to the PIT.

## 4. Interaction of s23 with s24

It is obvious that there is likely to be some degree of overlap between sections 23 and 24. Indeed this will often be significant. This section considers how, when and if sections 23 and 24 might work together.

### 4.1 The ICO position has changed

The ICO position has evolved with experience. When reading any Decision Notices before October 2011, you will notice that the former ICO position on using s23 and s24 together differs from that reflected here.

### 4.2 NCND: s23(5) and s24(2) are not mutually exclusive and can be relied on independently or jointly

This represents the Information Commissioner's current approach and is in contrast to s23(1) and s24(1) which cannot be used in this way (see later).

A public authority may apply s23(5) and/ or s24(2):

- **together, if both apply** to the information
- or
- **separately, if only one applies** to the information

However a public authority cannot apply s23(5) and s24(2) "in the alternative", in the way we shall discuss in relation to s23(1) and s24(1), ie where only one of the exemptions is engaged, but it is citing both at the same time.

If the public authority does apply both s23(5) and s24(2) to the information, it must genuinely believe that **both** exemptions apply.

#### Case officer tip

Ensure that the public authority and the complainant both understand clearly what you mean when you use the terms "jointly" or "together" (in relation to s23(5) and s24(2)). This is true both in discussions and correspondence as well as in any Decision Notice, the meaning of which must also be crystal clear to the wider world.

Avoid using the term "in conjunction", which is likely to lead to confusion.

#### 4.2.1 Applying s23(5) and s24(2) to the same information

##### **Case officer tips: writing a decision notice on s23(5) and s24(2)**

- In order to apply s23(5) and s24(2) together, you must be satisfied that each exemption also applies separately, on its own merits.
- In a DN we may again be limited as to the level of detail we can provide. We need to be very careful that any explanation of how we reached our decision could not be misinterpreted as suggesting that the information is held or is not held. Therefore, where we accept either both or just one of the exemptions, we need to avoid explaining our thinking by relying on hypothetical scenarios such as "if the public authority confirmed it held the information this would reveal X". This is true when explaining the engagement of both s23(5) and 24(2).

##### **Example**

A fictional request is made by the Daily Royalist newspaper to the Department for Culture Media and Sport for information on whether MI5 had investigated any anti-monarchist organisations for links with threats by terrorists to disrupt arrangements for the Royal Wedding in 2011. The request was made to the DCMS because of its responsibility for ceremonial arrangements.

Does s23(5) apply? First, consider whether confirming or denying that the information is held would reveal information relating to a security body. It would reveal whether or not MI5 was interested in the anti-monarchist group, so s23(5) is engaged.

Does s24(2) apply? Consider whether confirming or denying that the information is held would undermine national security. To confirm that the information is held would warn any anti-monarchist organisation that did have links with terrorism that it may have been under investigation, and might cause it to try to hide or destroy any evidence of such links. This could harm any investigations and threaten national security in future. Therefore, s24(2) is engaged.

In this case, we have established that **both** s23(5) and s24(2) apply. In refusing the request, they may therefore be cited jointly when refusing to confirm or deny that the requested information is held.

In the above example both s23(5) and 24(2) were engaged in their own right. S23(5) was engaged simply because confirming or denying would disclose information about MI5's involvement; section 24(2) because confirmation would tip off anti-monarchist groups that they may be under surveillance. Both exemptions have been engaged on a different basis.

But there is nothing that prohibits a public authority from considering whether disclosing information about the activities of a security body would undermine national security when considering the application of s24(2). If we just put s23 to one side for a moment and imagine that the only exemption we have to protect national security matters is section 24: in such a scenario would it be appropriate to apply s24(2) to refuse to confirm or deny that MI5 was investigating anti-monarchist groups? If revealing MI5 was or was not investigating such groups would undermine national security, s24(2) would be engaged.

So both s23(5) and s24(2) can be engaged, independently, in their own right, but on the same basis.

#### **4.2.2 Where only one of the two exemptions applies**

There is a possibility that some circumstances might lead to only one of these exemptions being engaged. The example below is extreme but illustrates the point.

##### **Example**

Mr Blofeld requests from the Foreign Office the London HQ address of MI6. MI6 is of course listed in s23(3) as the Secret Intelligence Service; therefore for the Foreign Office to state that it holds the address of MI6 would disclose information relating to a s23 body. s23(5) is engaged and therefore, technically, the Foreign Office does not have to confirm or deny whether it holds the information. Of course this is a faintly preposterous example: the MI6 building is well known to the public from its prominent Thames-side location and from its inclusion in feature films. Nevertheless s23(5) is engaged.

However s24(2) is not engaged. Apart from the public knowledge



about the building (whose location is also specified on the MI6 website) it is widely presumed by the public that the Foreign Office is in regular contact with MI6. What would be the threat to national security of the Foreign Office confirming that it holds the information?

In these hypothetical circumstances, only s23(5) could apply.

**The Commissioner does not accept that s23(5) and 24(2) can be cited in the alternative, unlike s23(1) and s24(1).**

The Commissioner's view on this has evolved with experience. He no longer accepts that sections 23(5) and 24(2) can be cited in the alternative. The original decision to allow them to be claimed in that way was based on the tribunal's decision in *Norman Baker MP v the Information Commissioner, Cabinet Office and the National Council for Civil Liberties* [EA2006/0045], 4 April 2007). We have now considered this point further and no longer accept the tribunal's position on this issue.

#### **4.2.3 Where a public authority confirms it holds at least some of the requested information but also applies the NCND provisions.**

There are a number of scenarios where a public authority may confirm it holds at least some of the requested information but also uses the NCND provisions.

The first potential scenario is where a public authority confirms some information is held, and discloses it or withholds it under another exemption. It then refuses to confirm or deny whether any additional information is held under s23(5) or 24(2) or both.

##### **Example**

A fictional request is made to the Ministry of Defence ("MoD") for all information it holds about Royal Navy patrols in the years 2007 to 2011 around islands comprising a UK Overseas Territory in the South Atlantic. A neighbouring mainland country wishes to assert rights over the islands and their potential mineral sources. The MoD confirms it holds some information but withholds the majority, citing exemptions contained in s26 (defence) and s27 (international

relations). It refuses to confirm or deny whether it holds any additional information, applying s23(5) and s24(2) jointly.

If the Commissioner received a complaint, then he would investigate the MoD's application of sections 26 and 27 in the normal way.

So long as it's plausible that any additional information, if held, could be 'in the territory of national security' then the NCND provisions would apply. In this case we would accept the use of NCND.

We would accept this as a valid approach and would investigate the complaint, and each specific exemption, on that basis.

The second scenario is where the public authority confirms **all** the requested information is held. It withholds all or part of it under a different exemption, say s26, and provides by way of an **additional explanation** that just because it has only applied s26 this does not necessarily mean that the withheld information could not also be exempted under s23(1) or 24(1). This is OK, but its value is dubious.

The third scenario is where the public authority confirms all the information is held, withholds at least part of it under, say s26, and then actually tries to apply s23(5) or 24(2) to refuse to confirm or deny that the withheld information is also exempt under s23(1) or 24(1). This is not allowed under the Act; sections 23(5) and 24(2) only concern whether or not information is held, not what exemptions from the duty to communicate information may apply.

For more details please see the external guidance "How sections 23 and 24 interact".

#### **4.3 s23(1) and 24(1) are mutually exclusive but may be used "in the alternative"**

##### **4.3.1 Mutually exclusive**

**s23(1)** "information ... directly or indirectly supplied by.... or relates to...." a specified security body

**s24(1)** "required for the purpose of safeguarding national security". Note that s24(1) only applies to information that is not exempt under s23(1).

s23(1) and s24(1) are mutually exclusive; ie they cannot apply to the same information. This is expressly stated in s24(1). This means that, if s23(1) applies, then the information cannot also be exempt under s24(1).

#### 4.3.2 Applying in the alternative

However we will allow s23(1) and s24(1) to be used "in the alternative". This approach was adopted by the ICO in October 2011.

This means that only one of the exemptions is actually engaged, but a public authority may explain to the applicant that the information is exempt **either** under s23(1) **or** s24(1), **citing both, but without stating which one is actually engaged**. Note that the authority must be clear that one of the exemptions is engaged.

Applying "in the alternative" in relation to s23(1) and s24(1) is different from applying them "in the alternative" in respect of other sections of FOIA. Usually the sort of scenario where a public authority applies exemptions in the alternative is where it thinks that one exemption applies, but cites a second exemption to cover the situation, "just in case" the first one does not apply. For instance, this has been done by public authorities in respect of ss30/31 and ss35/36.

It might be helpful to explain here how this new approach to s23(1) and s24(1) works. The fact that s23(1) and s24(1) are mutually exclusive can cause real practical difficulties for public authorities. The principle of using the two exemptions "in the alternative" provides a solution.

For instance, let's consider a situation where it is publicly known that an authority holds the requested information and that therefore the authority is happy to confirm this, but it is not publicly known whether the information relates to a security body. The involvement of a security body is, of course, sensitive. If the authority were to apply s23(1) on its own this would reveal that the requested information did relate to a security body. If it had to rely on s24(1) on its own this would reveal that the security bodies were not involved. So, the authority could adopt the practical solution of disguising which exemption actually applies, by citing s23(1) and s24(1) in the alternative. However the authority could only cite these exemptions in the alternative where one of them is actually engaged in the first place.

How this would work:

- public authority explains to the applicant that the information he has requested is exempt either under s23(1) or s24(1);
- the authority cites both exemptions;
- the authority must be clear in its own mind as to which exemption is engaged; but
- it does not have to state which one is actually engaged.

#### **Case officer tip**

The ICO has adopted the term "in the alternative" to describe a very particular application of s23(1) and s24(1) together. Adoption of this term was reached after a great deal of consideration; it was extremely difficult to come up with the right wording for this scenario. It remains a very specific usage of the term.

Therefore, please ensure that the public authority and the complainant both understand clearly what you mean when you use the term "in the alternative" in respect of s23(1) and s24(1). This is true both in discussions and in correspondence as well as in any Decision Notice, the meaning of which must also be crystal clear to the wider world.

We recommend that case officers avoid using the term "in conjunction" in relation to any subsections of s23 or s24; it has been used in various contexts to mean different things and is therefore now likely to cause misunderstanding.

The following example illustrates the point by using a practical scenario.

#### **Exercise F**

In this hypothetical scenario, three months before the 2012 Olympics two people were arrested in a house in Docklands and were subsequently charged with terrorist offences. The authorities have not revealed much to the media, other than that suspected terrorists have been arrested, but there is controversy about it, both nationally and locally. Mr B has made a request to the Metropolitan Police ("the Met") for information about why the police visited the house in the first place.

There are a number of possible explanations for the arrests. The police could have come to the house because of a report by a neighbour that someone in or near it was acting suspiciously; only later did they realise that there was a terrorism link. Or the police

could have come to the house in connection with a criminal investigation such as a theft or an assault, again only appreciating the terrorist link later on. Alternatively the police could have been acting as part of a wider security operation relating to the Olympics, based on intelligence from a body such as MI5.

It would be obvious to anyone that information on the arrests would exist and would be held by the Met.

How should it respond to this request, bearing in mind that it does not wish to disclose information on the arrests, or the involvement or otherwise of MI5?

What would be revealed about a security body by confirming or denying that the information was held?

see overleaf »

### Exercise F with answer

In this hypothetical scenario, three months before the 2012 Olympics two people were arrested in a house in Docklands and were subsequently charged with terrorist offences. The authorities have not revealed much to the media other than suspected terrorists have been arrested, but there is controversy about it, both nationally and locally. Mr B has made a request to the Metropolitan Police ("the Met") for information about why the police visited the house in the first place.

There are a number of possible explanations for the arrests. The police could have come to the house because of a report by a neighbour that someone in or near it was acting suspiciously; only later did they realise that there was a terrorism link. Or the police could have come to the house in connection with a criminal investigation such as a theft or an assault, again only appreciating the terrorist link later on. Alternatively the police could have been acting as part of a wider security operation relating to the Olympics, based on intelligence from a body such as MI5.

It would be obvious to anyone that information on the arrests would exist and would be held by the Met.

How should it respond to this request, bearing in mind that it does not wish to disclose information on the arrests, or the involvement or otherwise of MI5?

What would be revealed about a security body by confirming or denying that the information was held?

First, consider: what are the implications of relying on s23(1) or s24(1)?

s23(1)

Refusal on basis of s23(1) alone would disclose involvement of security body (ie providing intelligence).

s24(1)

Refusal on basis of s24(1) alone would reveal that security bodies were not involved and that something else led to arrests, eg some other behaviour or other crime.

The Met should apply s23(1) and s24(1) in the alternative:

- confirm to Mr B that it holds the information, but

- refuse to disclose it, stating that s23(1) and s24(1) apply in the alternative (ie either applies, but don't state which one)

The end result is that no information is revealed about whether or not there was any involvement by a security body in providing intelligence leading to the arrest. However since the Met is admitting it holds the information, it does not give the appearance of being unduly obstructive.

In the past a public authority might have been tempted to refuse to confirm or deny whether it held the information, using s23(5) and 24(2). This is because it would have been concerned that, if it had to confirm that the information was held, it would then be placed in a position where it had to rely on either s23(1) or 24(1) on their own to withhold the information. Believing that it was only allowed to cite one of these exemptions (on the basis that they are mutually exclusive) it would be concerned that this would mean it was forced to reveal whether or not a security body was in fact involved. By allowing the public authority to cite both in the alternative, the public authority is able to confirm the information is held but still obscure the involvement or non-involvement of such bodies in the operation.

### **However, public authorities might need encouragement to use s23(1) and s24(1) in this way**

Please note that if a public authority such as the Met were to insist on applying s23(5) on the basis the information is in the 'territory' of national security, we would have to consider the case carefully to determine whether technically it had grounds for doing so. It would be nonsensical for the Met to follow such an approach, since, as stated in this case example, it would be obvious that it held the information. However the bottom line is that we might not be able to prevent it from doing so.

We recognise that this is a problem which gives us real practical difficulties when investigating complaints. As part of our promotion of good practice, we want public authorities to be as open as they can with us and give us meaningful answers to our queries, without damaging national security. We intend to produce additional guidance to case officers on how to approach these kinds of investigations in the near future.

#### **4.3.3 Refusal notices and s23(1) and s24(1)**

Strictly speaking, s17(1) requires a public authority to state which exemption applies and explain why. In s23(1)/24(1) cases such as that above, the public authority is wishing to obscure precisely which exemption applies. That is the whole point of using the exemptions in the alternative. So what is the solution?

In such a scenario, we will accept a refusal notice which adopts a pragmatic approach:

- stating that s23(1) and s24(1) are being applied;
- stating they are being applied in the alternative (ensuring that the requester understands this terminology);
- explaining why the exemptions "could" or "might" apply, in general, anodyne terms; and
- in relation to s24, the balance of the public interest can be explained using a similarly generic explanation, such as the benefits of openness versus the protection of the public.

#### **Case officer tip**

- It is vital to avoid the risk of disclosing the actual information and whether or not it relates to a security body. In some cases it will be impossible to explain why exemptions may apply or why the public interest (in s24) favours withholding the information.
- In such cases, s17(4) provides a solution:  
  
"A public authority is not obliged to make a statement under subsection 1(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information."
- We would not wish to discourage a public authority from applying s17(4) as a practical solution to this problem. If you are in doubt as to how to draft on this point in a Decision Notice, discuss with your manager.



#### **4.3.4 Applying the public interest test to s24(1) when it is used in the alternative with s23(1)**

Since the public interest test applies to s24(1) but not to s23(1) which is absolute, the public authority must still undertake this exercise for s24. At first, this might appear to present a problem. For instance, what if, having found that s23(1) and s24(1) can be applied in the alternative, the authority applies the public interest test under s24 and finds that the public interest in maintaining the exemption does not outweigh the public interest in disclosure? However this is a hypothetical problem only; in practice, there is no difficulty in considering the public interest test when s24(1) has been applied in the alternative with s23(1) .

Consider two possible scenarios where section 23(1) and s24(1) have been applied in the alternative:

1. Where the information does not relate to a s23 security body but the public authority considers that s24(1) is engaged and that the public interest favours withholding the exemption. Here, by the time the public authority considers citing the two exemptions in the alternative, it will already have decided that the public interest favours maintaining the exemption.

2. Where the requested information engages s23(1). Here there is only a hypothetical need to apply the s24(1) exemption and the public interest test. If the public authority were to hypothetically apply the public interest test for s24(1), obviously it would conclude that the public interest favoured maintaining the exemption.

#### **Case officer tips**

Issues to consider when investigating cases featuring s23(1) and s24(1) applied in the alternative.

- If the requester makes a complaint to the Commissioner, the public authority would have to inform the Commissioner which exemption was actually engaged and we would have to be satisfied that the exemption did actually apply,
- If s24(1) was the exemption actually engaged ,the Commissioner would require access to the information (see para 3.5.1 above) in order to determine whether the exemption was engaged and where the public interest lay.

- If the public authority is relying on s24(1), the Commissioner would have to consider whether it is engaged, and if so, apply the public interest test. One possible outcome is a decision finding either that s24(1) is not engaged or that the public interest test favours disclosure. However the Commissioner recognises the very real importance of maintaining national security, and where disclosure would undermine national security this will carry significant weight in the public interest test.
- Where s23(1) was the exemption actually engaged, see Case Officer tip in paragraph 2.3.
- It would be possible for the Commissioner to decide that s23(1) is not engaged, if the information does not relate to a national security body.
- Ensure that the public authority and the complainant both understand clearly what you mean when you use the term "in the alternative". This is true both in discussions and correspondence as well as in any Decision Notice, the meaning of which must also be crystal clear to the wider world.

When drafting a decision notice, be careful not to reveal in the text which exemption is actually engaged; please refer to the external guidance "How section 23 and section 24 interact" and also see case officer tip regarding s17(4) at paragraph 4.3.3 above.

### **Exercise G**

- Read some s23/24 DNs dated before October 2011 and consider how our decision might differ now.
- Discuss your findings with your line manager.

### **Summary of interaction between s23 and s24**

- s23(1) and s24(1) are mutually exclusive;
- however s23(1) and s24(1) may be cited "in the alternative", where one of the exemptions is engaged in its own right, but

the public authority wishes to disguise which one actually applies;

- s24(1) is subject to the PIT but this should not cause a problem when considering s23(1) and s24(1) in the alternative;
- the term "in the alternative" is a term the ICO has adopted to describe a very specific concept in relation to s23(1) and s24(1); it is essential to explain our use of the term clearly to all parties and to ensure they understand what it means;
- case officers should try to engage with PAs in order to clarify their position under s23 and s24;
- s23(5) and s24(5) can be applied separately or, if both are engaged, jointly, to NCND whether or not information is held, but they cannot be applied in the alternative;
- case officers should now avoid using the term "in conjunction" in relation to the application of more than one subsection of s23 or s24, since this is likely to lead to misunderstanding;
- 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; and
- case officers should seek signatory advice where necessary.

## 5. Ministerial certificates

### Section 23

s23(2)

A Minister can sign a certificate certifying that the circumstances in s23(1) apply. The certificate is conclusive evidence of that fact.

Appeal against a certificate is as follows. Either the Information Commissioner or the requester may appeal against the certificate to the Tribunal (the current procedure is to apply to the First Tier Tribunal under s60. The FTT must transfer the appeal to the Upper Tribunal for hearing by the National Security Appeals Panel).

### Section 24

s24(3) and s24(4)

A Minister can sign a certificate certifying that exemption from sections 1(1)(a) and 1(1)(b) or from s 1(1)(b) alone is, or was at any time, required to safeguard national security.

However the s24(3) certificate has a wider effect than one made under s23(2). The certificate may describe information in general terms. It may also have "prospective effect": ie apply to future requests for the information.

A s24 ministerial certificate is subject to the public interest test.

As with s23, the certificate provides conclusive evidence. Procedure for appeal is as for s23(2).

### Section 25

This provides further detail on the use of ministerial certificates.

## 6. Summary of main points of s23 and s24

### 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
- no duty to confirm or deny if it would disclose information (even if unrecorded) supplied by or relating to a security body
- no PIT
- list of s23(3) security bodies is due for amendment; check latest position

### 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

## Points common to s23 and s24

- case officers should try to engage with PAs in order to clarify their position under s23 and s24
- 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 a case

## 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
- avoid using the term "in conjunction" in relation to subsections of s23 and s24
- s23(5) and s24(2) can be applied separately or, if BOTH are engaged, jointly, to NCND whether information is held, but not in the alternative.
- 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.

## Further background on s23(3) security bodies

This handout gives further background and explains how some of the listed security bodies are more commonly known.

**s23(3)(a) the Security Service** is commonly known as MI5; it works to protect the UK against threats to national security.

**s23(3)(b) the Secret Intelligence Service** is commonly known as MI6, which works overseas and collects foreign intelligence in order to promote and defend national security.

**s23(3)(d) the Special Forces** include the SAS (Special Air Service) and SBS (Special Boat Service) and Special Forces Signals.

### **S23(4) GCHQ**

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

### **s23(3)(m) the Serious Organised Crime Agency (SOCA)**

SOCA was added to s23(3) in 2005; however in 2010 the coalition government announced its abolition. It will be subsumed into a new National Crime Agency from 2013. Therefore s23(3) will require further amendment by then.

- Always refer to an up to date copy of the s23(3) list

## Consistency - example

### Compare;

2008: No phones tapped - no information held -	Not held
2009: MI5 tap the phone of defence co. A - Information held -	NCND
2010: HMRC tap phone of co B - Information held -	NCND (Under ?)

### Against;

2008: No phones tapped - no information held -	NCND
2009: MI5 tap the phone of defence co. A - Information held -	NCND
2010: HMRC tap phone of co B - Information held -	NCND



## 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).

## 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.

## 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.,,,

## 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 2<sup>nd</sup> 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.



**PTO»**

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(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.



- 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)....,

## **Ban All Religion**

### **Example**

A fictional request is made to the Home Office for information on investigations by MI5 into allegations that a fictional 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. It is also 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?

## **In the territory of national security**

It is very clear that the requests concern the work of security bodies. The factors that bring the request within the ambit of s23(5) are:

- 1)
- 2)
- 3)

### Example

In this fictional example, the Home Office receives a request for minutes of any meetings between the Prime Minister, the Home Secretary and major retailers from Westfield Stratford City shopping centre about arrangements for the 2012 Olympics. The request is received following threats being made on an extremist website to target the shopping centre during the games.

Although superficially this is similar to the previous example in that it's a request for meetings between the government and retailers, there are several factors that might ring warning bells in respect of national security issues.

List those factors

1)

2)

3)

## **S23(5) Consistency**

### **Exercise A**

The Home Office receives a series of requests for information over 3 years.

Request 1) On how many occasions was authority given to tap the phones of companies in the defence industry in 2008?

Request 2) On how many occasions was authority given to tap the phones of companies in the defence industry in 2009?

Request 3) On how many occasions was authority given to tap the phones of companies in the defence industry in 2010?

In 2008 no phones were being tapped, but in 2009 authority was given to a s23 body to tap the phones of one defence company and in 2010 authority was given to HM Revenue and Customs to tap the phone of a different defence company.

How should the Home Office respond each year? What are the implications of responding?

## **In the territory of national security**

### **Exercise B**

How should the public authorities respond to the following?

1. Request to the Cabinet Office for information about an alleged plot to kidnap a high profile politician.
2. Identical request to Camberwick Green Parish Council.
3. Request to Camberwick Green Parish Council for any information it has received from MI5 about the assassination plot.



## Meaning of national security

### Example

The UK government is keen to promote better relations with a fictional former Eastern bloc state, Z. Z has significant oil reserves. It is a volatile country, and its very instability makes it an attractive base from which terrorists like to operate. As well as targeting the government of Z, some of these terrorists are actively planning attacks on the UK. The UK is keen to nurture good relations with country Z in order to help to stabilise it and to encourage the Z government to clamp down on terrorist cells operating within its borders. As part of its initiative, the UK is supporting Z's police force with training, IT equipment and other technology. The UK government has publicly acknowledged that it is co-operating with Z to defeat international terrorism but has not provided any details of what that co-operation actually involves. The government of Z is very sensitive about the existence of support from a country such as the UK and regards details about the level of co-operation as confidential. It does not wish to draw the attention of its own people, or other neighbouring states, to this issue. It is also known to have concerns, real or not, that the disclosing any information on the technology it has acquired from the UK would undermine its attempts to combat terrorism within its own borders.

A request is made to the UK government for the details of its meetings with Z.

Consider what exemptions may apply and whether there is any causal link between the disclosure of the information and the UK's national security.

## **Meaning of national security.**

### **Exercise D**

Consider what the concept of "national security" encompasses – thinking about it in broad terms. List the sort of things that are important to national security or that raise national security issues, including physical or non-tangible things that require protection.

## **Mosaic Arguments**

### **Exercise E**

Think of examples of subject areas where the disclosure of some information might end up prejudicing national security, in the hands of a motivated person or group.

## **Public interest in s24**

### **Example**

In *Peter Burt v Information Commissioner and Ministry of Defence* [EA/2011/0004], 20 September 2011, it was argued that disclosing details of a US nuclear facility could prejudice the US's national security. 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 UK Atomic Weapons Establishment. This threat to Anglo-US co-operation had the potential to undermine UK national security and it was this factor that engaged the exemption.

What can we consider when weighing the public interest in maintaining the exemption – the severity and frequency of the harm caused?

## **Examples of s23(5) and s24(2)**

### **1. Applying s23(5) and s24(2) together to the same information**

A fictional request is made by the Daily Royalist newspaper to the Department for Culture Media and Sport for information on any investigations into whether anti-monarchist organisations had links with threats by terrorists to disrupt arrangements for the Royal Wedding in 2011. The request was made to the DCMS because of its responsibility for ceremonial arrangements.

Does s23(5) apply? First, consider whether confirming or denying that the information is held would reveal information relating to a security body.

Does s24(2) apply? Similarly, consider whether confirming or denying that the information is held would undermine national security.

## Partial NCND

No problem if request lists a number of pieces of information that's wanted;

E.g. Please send me;

- Minutes of the meeting X on dd/mm/yy
- Incident report into y
- Emails between Mrs Smith & Mr Jones

Can get more difficult when requests are for a 'body' of information

E.g. Please send me all the information on X.

Request to MoD for all information on information on Royal Navy patrols around a UK territory.

### Scenario 1

Some information can be disclosed.

Some information is exempt under s27 – international relations.

Some information concerns national security bodies and national security, the very involvement of the security bodies is sensitive.

MoD confirms **some** information is held

Disclose	Withhold under s27	NCND that any additional information held under s23(5)/24(2)
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- This is OK

### Scenario 2

Some information can be disclosed

All the remainder is exempt under s27

However some of that information is also exempt under s23(1)

MoD confirms it holds the information requested

Disclose	Withhold under s27
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The MoD may be concerned that the public would infer that there was no security body or national security issues raised by the request.

Therefore MoD could provide an additional statement to the effect that nothing could be inferred as to whether the information withheld under s27 could also have been withheld under s23(1) or s24(1). This is just an additional piece of advice – outside the Act. If we received a complaint then the only exemption we would look at was s27 because this is the only one that had actually been applied.

This is OK

### **Scenario 3**

Superficially very similar to previous example.

As before;

Some information can be disclosed

All the remainder is exempt under s27

However some of that information is also exempt under s23(1)

MoD confirms it holds the information requested

Disclose	Withhold under s27(1) but then also 'applies' sections 23(5) and 24(2) to refuse to confirm or deny that any of this information is also exempt under either s23(1) or s24(1)
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Public authority has tried to use exemptions from the duty to confirm whether information is held to refuse to reveal what grounds it is using to withhold information. This is simply not what sections 23(5) or 24(2) are about.

Also it's a nonsense to try and apply NCND provisions once the public authority has confirmed it holds the requested information.

## **Sections 23(1) and 24(1) – applying them in the alternative**

### **Exercise F**

In this hypothetical scenario, three months before the 2012 Olympics two people were arrested in a house in Docklands and were subsequently charged with terrorist offences. The authorities have not revealed much to the media, other than that suspected terrorists have been arrested, but there is controversy about it, both nationally and locally. Mr B has made a request to the Metropolitan Police ("the Met") for information about why the police visited the house in the first place.

It would be obvious to anyone that information on the arrests would exist and would be held by the Met.

How should it respond to this request, bearing in mind that it does not wish to disclose information on the arrests, or the involvement or otherwise of MI5?

What would be revealed about a security body by confirming or denying that the information was held?