

## **Appendix A - The Duty to Confirm or Deny**

Under section 1(1)(a) of the Freedom of Information Act 2000, any person making a request for information to a public authority is entitled to be informed in writing whether it holds the information specified in the request.

Furthermore, the Freedom of Information Act is designed to place information into the public domain. Therefore, once access to information is granted to one person under the Act, it is then considered to be public information and may be communicated to any individual upon request. In accordance with this principle, the MPS routinely publishes information disclosed under the Freedom of Information Act on the MPS Internet site<sup>1</sup>.

The Information Commissioner's Office (ICO) guidance titled 'When to refuse to confirm or deny information is held' states<sup>2</sup>:

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

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

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

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

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<sup>1</sup> [http://www.met.police.uk/foi/disclosure/disclosure\\_log.htm](http://www.met.police.uk/foi/disclosure/disclosure_log.htm)

<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1166/when\\_to\\_refuse\\_to\\_confirm\\_or\\_deny\\_section\\_1\\_foia.pdf](https://ico.org.uk/media/for-organisations/documents/1166/when_to_refuse_to_confirm_or_deny_section_1_foia.pdf)

The table below illustrates the harm that may be caused by being inconsistent when issuing responses to requests that may require a neither confirm nor deny (NCND) response.

	Request 1	Request 2	Request 3	Request 4
<b>Example A</b>	Not Held	Not Held	NCND	Not Held
<b>Example B</b>	Held	Held	NCND	Held
<b>Example C</b>	NCND	NCND	NCND	NCND

The rows represent examples of difference scenarios. The columns (Requests 1-4) represent either:

- the same request received over a period of time by one or more public authorities  
or
- similar requests received at the same time or over a period of time by one or more public authorities

Example A illustrates the scenario described within the ICO guidance as follows:

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

*Furthermore, this would apply even if information was requested about a property not under surveillance. If a police force only upheld its duty to confirm or deny where it was not keeping properties under surveillance, an applicant could reasonably assume that where the police force refused to confirm or deny, the property named in the request was under surveillance.’*

In this example, an inconsistent response to identical or similar queries over a period of time indicates that information is held or allows such inferences to be made which in this scenario would be harmful.

Example B illustrates the following example provided within ICO guidance:

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

*Therefore, whether or not information is held, the authority should refuse to confirm or deny.*

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

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

In this example, an inconsistent response to identical or similar queries over a period of time indicates that information is held or allows such inferences to be made which in this scenario would be harmful.

Example C illustrates how a consistent response does not provide an indication, or allow inferences to be made, as to whether or not information is held which may be necessary a confirmation would be harmful.

Additional ICO guidance<sup>3</sup> refers to 'Mosaic and precedent effects' stating:

***'Mosaic and precedent effects***

*21. The prejudice test is not limited to the harm that could be caused by the requested information on its own. Account can be taken of any harm likely to arise if the requested information were put together with other information. This is commonly known as the 'mosaic effect'. As explained in the Information Commissioner's guidance information in the public domain, the mosaic effect usually considers the prejudice that would be caused if the requested information was combined with information already in the public domain.*

*22. However, some requests can set a precedent, ie complying with one request would make it more difficult to refuse requests for similar information in the future. It is therefore appropriate to consider any harm that would be caused by combining the requested information with the information a public authority could be forced to subsequently provide if the current request was complied with. This is known as the precedent effect.'*

The ICO's 'When to refuse to confirm or deny information is held' guidance further states:

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

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

*the exemption from complying with section 1(1)(a).’*

*‘When considering what a confirmation or denial would reveal, a public authority isn’t limited to considering what the public may learn from such a response; if it can demonstrate that a confirmation or denial would be revealing to someone with more specialist knowledge, this is enough to engage the exclusion to confirm or deny.’*

Where such a statement could relate to an identifiable individual, ICO guidance titled ‘Determining what is personal data’<sup>4</sup> may be relevant which in part states:

*“When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists, estranged partners, stalkers, or industrial spies.”*

The ICO’s ‘When to refuse to confirm or deny information is held’ guidance further states:

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

The ICO guidance cited above demonstrates the following:

- Exempt information may be revealed by:
  - Confirming information is held
  - Confirming information is not held
  - Inconsistently applying NCND exemptions in response to the same or similar requests
- It is only necessary to demonstrate the harm in one of the above scenarios for an NCND response to be appropriate
- Cumulative prejudice may result from multiple disclosures
- It would be sufficient for a public authority to demonstrate that a confirmation or denial would be revealing to someone with specialist knowledge
- The wording of a request may determine whether an NCND response is appropriate.

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<sup>4</sup> <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>