

Guidance Note D7: The Duty to Either Confirm or Deny whether Information is held

The Principle

1. The premise for the long established principle of “neither confirm nor deny” (“NCND”) is the protection of information which is considered sensitive on national security grounds. The NCND principle is likely to be used most often in relation to requests about the work of the Security and Intelligence Agencies, however under Freedom of Information NCND can be applied when using other exemptions.

The Act

2. The FOI Act provides applicants with two rights under section 1. These are;
- s.1(1)(a) The right to be told (in writing) whether the authority holds the information that has been requested
 - s.1(1)(b) The right to have that information communicated to them

The duty under s.1(1)(a) is referred to as the duty to confirm or deny. When responding to a request for information, it may be necessary to Neither Confirm Nor Deny (NCND) that the authority holds the information.

Why is NCND needed?

3. Quite simply, the NCND principle is required to protect sensitive information. A common misconception is that NCND is used to ‘hide’ the fact that a Department has information which it does not wish to disclose. While this can be the case, the NCND principle is broader in that it also affords the ability to avoid having to disclose that information does not exist.

4. In some situations, simply confirming or denying whether the public authority holds a particular category of information could itself disclose sensitive and damaging information. The principle of NCND is needed to protect harm which may arise if authorities have to confirm or deny whether they hold particular information. In such circumstances the confirming or denying of the existence of information can communicate sensitive and potentially damaging information.

5. A good example of this in practice is where a Police Force is asked for all the information that they have on surveillance operations in relation to particular premises. In the hands of the Police Force, any information that they do have is likely to fall within the exemption in section 30 (investigations and proceedings conducted by public authorities), as it is held by that authority for the purposes of a criminal investigation (the application of section 30 is subject to the balance of the public interest but there is a strong public interest in maintaining the integrity of surveillance operations). However, simply refusing to provide the requestor with the information would not go far enough to protect the integrity of any operations. If the Police were to confirm or deny that they have the information then that would, in itself, indicate whether or not the Police have had an interest in the premises concerned. To disclose even that amount of information could be prejudicial to any operations or investigations that are taking place or may take place in the future.

When can NCND be used?

6. Under FOI, all exemptions, bar section 21 (Information accessible to the applicant by other means), include a provision which enables a public authority, in certain circumstances, to neither confirm nor deny whether it has the information that has been requested.

7. When withholding information, it is necessary to:
- consider if an exemption applies; and
 - consider whether (if an exemption applies) it is necessary for the authority to Neither Confirm Nor Deny that it holds the information requested

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8. NCND provisions are complex and will not be applicable in all circumstances.

When considering whether or not it is necessary to use NCND a number of factors will need to be taken into account, particularly the wording of the exemption and the wording of the request.

Taking each in turn:

The wording of the request

9. The wording of the request will be a useful indicator of whether it is necessary to apply NCND. As a general rule, the broader the request the less likely it will be necessary to NCND. Conversely, the more specific the request, the more likely it will be necessary to NCND.

10. For example, a prominent individual may be treated after a traffic accident. The hospital receives a request for information on the treatment he received, which is likely to be exempt under s.40 (personal information) because its disclosure would breach the data protection principles. However, if it is public knowledge that the individual was treated at the hospital concerned, the hospital would be unlikely to breach the data protection principles by confirming that it has information on the treatment that the individual received. Consequently, the duty to confirm or deny would be excluded.

11. If a more detailed request for information relating to any heart condition the individual suffered from or treatment they received for any heart condition, the hospital would refuse the information under s.40 (personal information) and would NCND that it holds such information (if it was not otherwise in the public domain), as to confirm or deny in this circumstance would reveal whether the individual had a heart condition – which would in itself be a release of personal information.

The wording of the exemption

12. The NCND provisions are different according to the type of exemption, and the wording of the provisions for NCND must be considered carefully in each circumstance.

13. Absolute exemptions (except sections 34, 41 and 44) and sections 30, 35, 37 and 39 – In these cases, NCND provisions generally operate by reference to whether or not the information that has been requested is itself exempt. For instance, if a person requests information that is, or would be, exempt under section 35(1)(a) because it relates to the formulation and development of government policy, then the duty to confirm or deny is automatically excluded (section 35(3)). Section 37 exempts information that relates to communications with members of the Royal Family. If a request is received for information that would fall within this category, then the duty to confirm or deny whether that information is held is automatically excluded (section 37(2)).

Although section 23 is also an absolute exemption, the situation is slightly different. In the case of section 23, the duty to confirm or deny does not arise if compliance with section 1(1)(a) would involve the disclosure of any information which was supplied by, or relates to, any of the section 23 bodies listed at s.23(3).

14. Qualified exemptions (except sections 30, 35, 37 and 39) and sections 34, 41 and 44 – In these cases, NCND provisions generally operate by reference to the harm or prejudice that would occur if the existence of the information was confirmed or denied. For example, if No 10 receives a request for 'all correspondence between the Prime Minister and the president of country X', it is quite possible that the disclosure of some of that information would prejudice international relations so would be exempt under section 27. However, to confirm that No 10 does hold some correspondence between the PM and the president of country X may be entirely uncontroversial and so unlikely in itself to harm international relations: the duty to confirm or deny would not be excluded. It is entirely possible, and indeed most probable, for information to be withheld under a qualified exemption if the public interest favors non-disclosure, but there would be no problem with confirming that the information is held.

