

Neither Confirm Nor Deny (“NCND”)

Introduction

In certain circumstances it will be appropriate for a public authority to respond to a freedom of information request by neither confirming nor denying that it holds the information. This is to avoid inadvertently disclosing exempt information.

A public authority must assess this at an early stage and use the provision consistently. For example, if a requester is advised, on one occasion, that the information is not held but on the next occasion the public authority neither confirms nor denies whether the information is held, there may be a perception that the public authority does actually now hold the information requested.

A public authority cannot use NCND if the only reason that it is being used is because the information is available elsewhere.

When considering what the information might confirm or reveal, a public authority can take into account someone having a more specialist knowledge.

The question is not whether a public authority holds the information but if it did, whether that information would be exempt?

Example

A public authority receives a request for information in the following terms:

"Can you please advise me where, on Broadway, are the location of any covert surveillance cameras authorised for deployment under the Regulation of Surveillance etc. Act 1996?"

If a public authority held this information then it would likely apply the s32(1)(a) exemption, that disclosure “would or would be likely to prejudice the prevention or detection of crime” and the public interest test would address why the public interest remains in favour of maintaining the exemption.

If a public authority does not NCND and just applies an exemption, then it will be disclosing the fact that there are covert surveillance cameras on Broadway. The effect is that this, in itself, could prejudice the prevention/detection of crime and therefore engages the same exemption as above.

If you confirm where the surveillance cameras are, then again this could prejudice the prevention or detection of crime.

Therefore in this scenario you should NCND.

Assessing the information	
If your public authority were to hold information of the type that has been requested, would it fall within an exemption within the Freedom of Information Act 2015? These will likely be theoretical considerations about the consequences of confirming if certain information is held or not.	
Which exemption would it fall within?	
If the exemption is a qualified prejudiced based exemption, what prejudice would, or would be likely to arise from confirming whether or not the information is held?	
If the exemption is a qualified exemption, does the public interest test weigh in favour of neither confirming nor denying that the information is held?	

If a public authority determines that NCND is relevant	
It should issue a refusal notice.	
Advise the requester of the exemption which is applicable and why.	
Where the public interest test applies advise where the balance lies.	

Specific guidance in relation to personal data	
As disclosures under FOIA are deemed to be to the world and disclosures under the DPA 2002 are only to the requester care needs to be taken.	
Even if a public authority confirms that it does not hold the requested information, it might tell the world something about a particular individual.	
Ask, if a public authority either confirms or denies that it holds the information, will it contravene one of the data protection principles?	