

Neither confirm nor deny: when the answer is the secret

The fact that a public authority holds - or does not hold - information can itself reveal something sensitive. Richard Hanstock, Barrister at Cornerstone Barristers and founder of Deeptech Legal, explains when an authority may neither confirm nor deny that information is held, and sets out a practical framework for applying and defending this important but narrowly drawn response

The Freedom of Information Act 2000 ('FOIA') confers two rights on an applicant: to be told whether the authority holds the information described (section 1(1)(a), the duty to confirm or deny) and, if it does, to have that information communicated (section 1(1)(b)). Both rights are subject to the absolute and qualified exemptions in Part II. In most cases, the authority says it holds nothing, or confirms that it does and provides or withholds the information with reasons. In a smaller class of cases, the authority neither confirms nor denies ('NCND') that it holds the information, because a 'yes' or a 'no' would itself reveal something that the exemption protects.

NCND is therefore concerned with the sensitivity of the fact of holding or not holding, as distinct from the sensitivity of the content of any information that would otherwise fall to be disclosed. The Upper Tribunal in *Savic v Information Commissioner* [2016] UKUT 535 (AAC) endorsed a description of NCND as a protective concept that prevents inferences being drawn about the existence of particular types of information, and enables an equivalent position to be taken on other occasions. Denials are protected as much as confirmations: a 'no' can reveal as much as a 'yes', and once denials are given where they can be, an NCND response to a later request may sustain an inference that information is in fact held (*Re Scappaticci's Application* [2003] NIQB 56).

It follows that an authority will sometimes have to withhold a 'not held' answer, even where giving it would be convenient, to preserve the position in other cases. The analysis must address both counterfactuals: what a 'yes' would reveal if the information were held, and what a 'no' would reveal if it were not.

Origins of NCND

NCND predates FOIA. Its classic setting is the treatment of agents in national security cases, where to confirm their status would endanger the person, to deny it might endanger someone else, and to comment in one case invites the inference that silence in another means there is something to hide (*Scappaticci*). Outside FOIA, it is policy rather than law (*Mohamed v Secretary of State for the Home Department* [2014] EWCA Civ 559).

NCND has its critics. Before the Undercover Policing Inquiry, the policy was called "a mere husk"; the Chairman rejected the argument but accepted that it is the weight of the underlying public interest that matters, not the utility of the policy (ruling of 3rd May 2016). JUS-TICE's 2018 report, To "Neither Confirm Nor Deny", found NCND often applied in a blanket fashion without a proper assessment of the risk.

The same risk arises under FOIA: applied by habit rather than analysis, NCND becomes the husk. The statutory framework should prevent this. The test attached to each exemption, published guidance and the right of appeal together require a reasoned decision on the particular request.

The statutory scheme

Every exemption in Part II, apart from sections 21 and 43(1), is paired with a provision excluding the duty to confirm or deny. By section 2(1), the duty does not arise where the provision confers absolute exemption, or where the public interest in maintaining the exclusion outweighs the public interest in disclosing whether the information is held.

The exclusions divide in the same way as the exemptions. Some are class based: the duty does not arise in relation to information which is, or if held would be, exempt (sections 30(3), 35(3) and 40(5A)), or where the answer would itself disclose information of an exempt class (section 23(5)); harm is irrelevant to engagement and goes, at most, to the public interest. Others turn on the effect of the answer: whether confirming or denying would, or would be likely to, prejudice or endanger the protected interest (sections 26(3), 31(3), 36(3), 38(2) and 43(3)), would constitute an actionable breach of confidence (section 41(2)), would disclose privileged information (section 42(2)) or would contravene a data protection principle (section 40(5B)).

The starting point is the wording of the request. According to the Information Commissioner's Office guidance, answering a highly specific request can amount to disclosing the information itself, so the more precisely a request

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identifies the information, the more readily an exclusion is engaged. In *Cabinet Office v Information Commissioner and Peagram* [2026] UKUT 140 (AAC), the Upper Tribunal accepted that the bare fact that legal advice had been sought would not be privileged, but the Upper Tribunal held that confirming that the Prime Minister had sought advice on the lawfulness of the March 2020 lockdown would to an extent reveal privileged information. The same decision notes that section 42(2) recognises in terms that the mere denial that information is held may itself be privileged.

Information already in the public domain is relevant, but not decisive. In *Commissioner of Police of the Metropolis v Information Commissioner and Rosenbaum* [2021] UKUT 5 (AAC), the Upper Tribunal held that official confirmation adds something to credible third party information and that the difference is qualitative. In *Eco-tricity Ltd v Information Commissioner and Animal and Plant Health Agency* [2026] UKUT 24 (AAC), the Upper Tribunal treated information already in the public domain as a factor in, rather than a substitute for, the statutory question.

The weight of official confirmation is a question of fact, not a rule of law (*Bramall v Information Commissioner and Home Office* [2025] UKFTT 01165 (GRC)). The factor cuts both ways: what is already public may go a long way to meeting the interest in transparency, or it may show how much turns on the absence of an official answer. An authority should at least know what it has itself released on the topic, since its own earlier disclosures are the most direct form of official confirmation.

Consistency is part of the protection. NCND is most effective, and most defensible, when it is applied consistently to requests of a type, whether or not information is held; an inconsistent practice reads as an admis-

sion. The Commissioner therefore encourages authorities to publish a policy identifying the types of request that will receive an NCND response. A policy is a starting point, not an answer: the public interest is assessed in all the circumstances of the case, and a general policy “must not be inflexibly applied” (*Hogan v Information Commissioner* (EA/2005/0026, 17th October 2006),

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applied to NCND in *Bramall*); a policy treated as decisive becomes the blanket approach the tribunals have deprecated (*Bramall*). The record for each request should show why a ‘yes’ or a ‘no’ would reveal what the exclusion protects, so that the decision maker can defend the response in evidence.

Sections 40(5B) and 41(2)

Outside the national security context, a common occasion in which FOI practitioners may be tempted to reach for NCND is in responding to a request about a named individual, where the answer would reveal whether a complaint or allegation has been made or an investigation opened. Many of the decided personal data cases were of that kind (Philip Coppel KC, *Information Rights: A Practitioner’s Guide to Data Protection, Freedom of Information and Other Information Rights* (6th edition, Hart Publishing 2023), Vol 1, para 33-027). Section 40(5B) is the exclusion in point, with section 41(2) where the information would have been supplied in confidence. Section 40(5B)(a)(i) disapples the duty where confirming or denying would, apart from the Act, contravene any of the data protection principles; section 41(2) where it would constitute an actionable breach of confidence. For the first, section 40(8) makes the legitimate interests basis in Article 6(1)(f) UK GDPR available (but not, since 5th February 2026, the recognised legitimate interests basis in Article 6(1)(ea)), so the question under Article 5(1)(a) is typi-

cally threefold:

- is there a legitimate interest in knowing whether the information is held;
- is confirming or denying reasonably necessary to meet it (*South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55); and
- is that interest overridden by the data subject’s interests and rights? As ever in FOIA, each question is asked of disclosure to the world at large, rather than of disclosure to the particular applicant.

Whether an answer about a company constitutes personal data depends on whether it relates to an identifiable individual, reading the request in context. In *Myhill v Information Commissioner and General Medical Council* [2022] UKUT 207 (AAC), the request named nobody, but the correspondence it referred to identified the doctors concerned. An answer about a named individual’s application is plainly personal data. Where the request links a company to a named person, an answer about the company is likely to relate to that person as well. In *Hinkel v Information Commissioner and HM Treasury* [2025] UKFTT 00611 (GRC), which concerned applications for sanctions licences, the First-tier Tribunal accepted that confirming or denying an application by a company would reveal whether it had a relationship with the individual named alongside it. A request about companies with no individual in view is a different case: section 40 may not be available, though sections 41(2) and 43(3) may be.

For section 41(2), the Commissioner’s guidance adapts the test in *Coco v A N Clark* (Engineers) Ltd: would the information, if held, have the necessary quality of confidence and have been imparted in circumstances importing an obligation of confidence; and would confirming or denying constitute an unauthorised use causing detriment to the person to whom the duty is owed? ‘Actionable’ means that the authority must show that a claim would, on the balance of probabilities, succeed, including that a public interest de-

fence would fail; an arguable claim is not enough (*Higher Education Funding Council for England v Information Commissioner* (EA/2009/0036, 13th January 2010)). Within that defence, the balance runs the other way from the usual FOIA test: the starting point is the public interest in confidences being respected and, the Upper Tribunal has recently held, the case for disclosure must be an exceptional one (*United Kingdom Research and Innovation v Information Commissioner and Kirkham* [2026] UKUT 146 (AAC)); the burden of making it out lies on the party seeking disclosure (*Page v Information Commissioner* [2023] UKFTT 00476 (GRC)).

The Commissioner expects it to be engaged rarely: a request framed by reference to a class of information can usually be answered, whereas one naming the person said to have supplied it may not be, because the answer would itself reveal whether a confidence exists.

Conducting the analysis

An authority considering NCND should ask itself four questions:

- what would an official confirmation tell a member of the public, on the exact words of the request and given what is already officially known;
- what would an official denial tell them;
- is that revelation, in itself, what the exclusion describes: information of the exempt class, or the prejudice, breach or contravention the provision names; and
- can the same response be given in the same words, to every comparable request, whether or not information exists.

Where the exclusion is qualified, the section 2(1)(b) balance concerns disclosure of whether the information is held, not of the information itself (*Savic*).

A fifth question runs alongside: what can the authority say to assist the applicant without undermining its reliance on NCND? Section 16 still applies, but anything said must be capable of being said in identical

terms whether or not information is held, so an authority cannot suggest an alternative request that it would only suggest if information existed. What it can do is describe what it publishes, or could answer, in general terms; a request in general terms may be answerable where a narrow one is not. The same test governs a pointer to another authority: safe where that authority is the natural source for information of the type, a signal where it is prompted by the fact that nothing is held.

The refusal notice follows the same discipline. Section 17(1) requires it to state that the authority relies on a provision excluding the duty, to specify the provision and to say why it applies; section 17(3) requires public interest reasons where the exclusion is qualified; section 17(4) excuses the reasons only where giving them would itself disclose exempt information. A notice that names the provision but does not explain how it applies does not comply with section 17 (*Hogan*). The notice should say nothing about searches, and every sentence in it should be one the authority would write whether or not it held the information.

When NCND is challenged

On a complaint or appeal, the Commissioner and the tribunal can look behind NCND. The authority should tell the Commissioner the true position and, on appeal, may put it before the tribunal in closed under rule 14 (6) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, with the tribunal remaining as open as the circumstances permit (*Browning v Information Commissioner* [2014] EWCA Civ 1050). The case for NCND should nonetheless be made in open so far as it can be, and an NCND appeal can often be argued largely or wholly in open, because the argument is about what an answer would reveal rather than about the content. Closed material is needed where the tribunal must see what is held, or where the explanation of why a 'yes' or a 'no' would be revelatory cannot itself be given openly, as it often cannot in national security cases. The discipline is the same as at the notice stage: the open case must ex-

plain, on its own terms, why a 'yes' or a 'no' would reveal what the exclusion protects; if that can only be explained by reference to what the information says, the exclusion is being asked to do the work of the exemption.

Invoking NCND at all conveys something, since the exclusion relied on must be specified and section 17(4) excuses only the reasons. Sections 23(5) and 24(2) provide the acknowledged example: they are not mutually exclusive, and the Information Commissioner accepts that both may be cited, each independently engaged, because citing section 23(5) alone would suggest that a security body was involved (Commissioner's guidance; Coppel para 26-063).

Elsewhere, the choice of exclusion is itself information: an authority relying on section 41(2) has said that the information, if held, would be confidential, which for a narrow request may approach the gist.

The position must also be protected in the proceedings. In *Ecotricity*, the Upper Tribunal upheld NCND and then named the farm and its owner, because the identity had been referred to in the open hearing below and before the Upper Tribunal without objection. An authority that wants identities protected should seek that protection at the outset, under rule 14 and in any related proceedings. NCND is a narrow instrument. It protects the fact of holding, rather than the content, and applies only where the answer would reveal what the exclusion describes and the same answer can be given whatever the true position. An authority that asks the four questions and records the answers will be able to defend the response; one that reaches for NCND because the information is sensitive will not be able to explain it in open, and the tribunal will see why.

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