

## **MEMORANDUM OF UNDERSTANDING ON NATIONAL SECURITY CASES (FOIA/EIRs)**

- (A) This Memorandum of Understanding (“the National Security MoU (FOIA/EIRs)”) between the Secretary of State for Justice (on behalf of Government Departments) and the Information Commissioner (ICO), sets out guidelines on the handling of national security cases (as defined in Recital (B) below) in the context of the Freedom of Information Act 2000 ("FOIA") and the Environmental Information Regulations 2004 (S.I. 2004/3391 – “the EIRs”).
- (B) Specifically, these guidelines provide for co-operation between Government Departments and the Information Commissioner in the operation of (i) sections 50 and 51 of FOIA (including sections 50 and 51, as amended by Regulation 18 of the EIRs), insofar as they relate to cases where the exemptions in section 23 or 24 of FOIA or the national security exception in regulation 12(5)(a) of the EIRs have been relied on.
- (C) This Memorandum of Understanding describes the respective roles of the Information Commissioner and Government Departments under FOIA and the EIRs in relation to national security cases. It is to be read in conjunction with the “DPA Memorandum of Understanding on national security cases”
- (D) This Memorandum of Understanding replaces, with reference to FOIA and the EIRs, the previous Memorandum of Understanding that was signed by Lord Falconer, the then Secretary of State for the Department of Constitutional Affairs, and Richard Thomas, the then Information Commissioner, on 24 February 2005.

## **Purpose of the National Security MoU (FOIA/EIRs)**

1. The purpose of this MoU is to promote good standards of co-operation between Departments and the Commissioner in national security cases, that is to say in cases where:
  - (a) the exemptions in section 23 or 24 of the FOIA or the exception in regulation 12(5)(a) of the EIRs (insofar as that exception relates to national security) have been relied on; or
  - (b) any of the exemptions/exception above have been relied on to support a “Neither Confirm Nor Deny” response; and
  - (c) an application has been made to the Commissioner for a decision under section 50 of FOIA, or the Commissioner is considering serving a notice under section 51 of the FOIA.
2. This MoU does not apply in situations in which only one or more of the other exemptions under the FOIA or exceptions under regulation 12(4) and (5) of the EIRs are being relied on.
3. The Definitions in the Annex apply to this MoU. The respective roles and responsibilities of the ICO and Ministry of Justice (MoJ) under the FOIA and the EIRs are summarised in a separate document, to which this document is subject. This MoU sets out guideline procedures designed to apply to national security cases generally.
4. This MoU takes effect subject to the FOIA, the EIRs and any other relevant legal provisions, and should be read alongside the relevant Codes of Practice. For the avoidance of doubt, nothing in this MoU will operate to restrict or otherwise inhibit the exercise of the powers and duties of the Commissioner or of Departments under the FOIA or the EIRs.

5. This MoU seeks to minimise the costs of complying with the FOIA and the EIRs, and to promote the efficient administration of the respective requirements of this legislation within Departments and the Commissioner's Office. However this is secondary to the proper fulfilment of the Commissioner's functions under the FOIA and the EIRs.
6. It is recognised that, in order to discharge his important regulatory functions, where:
  - (a) information is withheld from disclosure under the FOIA or the EIRs; or
  - (b) a Neither Confirm Nor Deny response is given to the requester,the Commissioner has to satisfy himself that the relevant exemptions (in the case of the FOIA) and the relevant exception (in the case of the EIRs) justifying non-disclosure and/or the Neither Confirm Nor Deny response have been properly relied on.
7. It is also recognised that national security cases will normally be particularly sensitive and it is accepted that the sensitivity of such cases means that there will often be a need for greater dialogue between the Commissioner and Departments before the Commissioner reaches any final conclusions.

**Steps to be taken where an application is made for a Decision under section 50 of the FOIA**

8. The Commissioner will contact the relevant Department(s) (via the nominated contact, where known) when he receives an application under section 50 of the FOIA relating to a national security case, as soon as practicable and where possible within 20 working days of such receipt. At this time he will:
  - (a) provide the Department with details of the Complainant's application;
  - (b) request the Department to provide a reasoned explanation which justifies the application of the relevant exemption in the particular case as at the time of the request, together with any relevant background information;

- (c) invite the nominated contact to comment on the case;
- (d) aim to establish a single channel of communication.

If national security exemptions are claimed at a later stage, the Department should inform the ICO in writing as soon as possible.

9. The Department will:

- (a) provide the reasoned explanation, together with any additional relevant background information, as quickly as possible and, in any event, within 20 working days of being contacted by the Commissioner, unless the Commissioner otherwise agrees;
- (b) provide any additional relevant background information subsequently requested by the Commissioner as quickly as possible and in any event, unless the Commissioner otherwise agrees, within 20 working days of it being requested; and
- (c) inform the Commissioner, giving reasons, where it is not able to provide the reasoned explanation and other relevant information within the time periods set out in this paragraph and provide an indication of when it expects to be able to do so.

10. The reasoned explanation referred to in paragraphs 8 and 9 above:

- (a) in cases where the exemption in section 23 of the FOIA is relied on, will explain in general terms how the information was supplied by or otherwise relates to a section 23 exempt body;
- (b) in cases where the exemption in section 24 of the FOIA or the exception in regulation 12(5)(a) of the EIRs is relied on, will explain in general terms why it is necessary to withhold the information requested in order to safeguard national security and why the balance of public interest is in favour of non-disclosure;

- (c) in cases where any of these exemptions/exception are relied on to support a Neither Confirm Nor Deny response, will explain in general terms why it is necessary to neither confirm nor deny whether the requested information is held, in order to safeguard national security.
11. It is envisaged that in the vast majority of cases it will be possible to resolve the case by dialogue and correspondence between the Commissioner and the relevant Department(s). In other words, it is envisaged that a reasoned explanation, together with any relevant background information, normally by way of a letter from an appropriate person in the Department, will usually be sufficient to satisfy the Commissioner that the relevant exemptions or exception have been properly relied on or that a Neither Confirm Nor Deny response has been properly given, without disclosing to the Commissioner the detailed content of the withheld information or, in a Neither Confirm nor Deny case, without disclosing whether the information that has been requested is held and without recourse (on the Commissioner's part) to an Information Notice or (on the Department's part) to a Section 23/Section 24 Certificate under the FOIA.
12. In those exceptional cases where a reasoned explanation, together with any relevant background information, is (for whatever reason) not sufficient to satisfy the Commissioner, he will explain in writing why this is the case. It is recognised that it may be necessary for him to be granted confidential access to the withheld information, or, in a Neither Confirm nor Deny case, to be informed whether the requested information is held, in order to satisfy himself that the relevant exemptions or exception have been properly relied on or that a Neither Confirm Nor Deny response has been properly given. The process and requirements for Commissioner access to the information is set out in paragraphs 21-23 below.

### **Information Notices**

13. The Commissioner will generally only serve an Information Notice under section 51 of the FOIA on any Department where:
- (a) it has not been possible to resolve the case by agreement; and
  - (b) the Commissioner believes either:

- (i) that relevant information is being withheld from him, for example, the information which is the subject of the complaint and which, in an exceptional case, he considers he needs to see in order to satisfy himself that the relevant exemptions have been properly relied on; or
- (ii) that there has been undue delay in providing such information or data to him.

14. Where the Information Commissioner intends to serve an Information Notice, wherever possible he will inform the Department and the MoJ in advance.

### **National Security Certificates**

15. Departments will seek a Ministerial Certificate under section 23 or 24 of the FOIA or regulation 15 of the EIRs only where:

- (a) the individual whose request for information has been refused complains to the Commissioner; and
- (b) the Commissioner indicates that he will issue an Information Notice under section 51 of the FOIA; or
- (c) in other circumstances where the Department considers this appropriate.

Where the relevant Department proposes to serve a Certificate under section 23 or 24 of the FOIA or under regulation 15 of the EIRs, then wherever possible it will inform the Commissioner in advance.

### **The protection of information provided to the Commissioner in accordance with this MoU**

16. Where the Commissioner has received the withheld information in order to enable him to discharge his statutory obligations, such information or data will be held by him subject to the arrangements set out in paragraphs 17-23 of this MoU.

17. The Commissioner will not disclose to the Complainant or to any third party the reasoned explanation or any other information provided to him by a Government Department either under the terms of this MoU or as a result of serving a notice under section 50 or 51 of the FOIA. In addition, except where expressly provided for under the FOIA the Commissioner will not in any event disclose the withheld information covered by this MoU to the Complainant or any third party unless:
  - (a) the Department consents to the disclosure (after consultation), or
  - (b) all appeal proceedings have been exhausted.
18. Where release of such information seems to the Commissioner to be necessary under or in connection with any enactment, Community obligation, proceedings or otherwise, the Commissioner shall inform the Department and the MoJ as soon as possible.
19. Where the circumstances mentioned in paragraph 18 arise, the Commissioner acknowledges that he will resist release of the information, where in all the circumstances it is reasonable to do so, and by all reasonable means including the use of any appeals processes.
20. The Commissioner will ensure that any information that is protectively marked will be handled and protected in accordance with the standards of security required by the Security Policy Framework (HMG's guidance on the protection of government assets, issued by the Cabinet Office) for as long as he retains the information.
21. As described in paragraph 12, it is recognised that in exceptional circumstances it may be necessary for the Commissioner to seek and be granted access to the relevant information. In such cases, the Commissioner agrees to inspect at the premises of the relevant Department any papers which are particularly sensitive.
22. Where particular security or sensitivity considerations so demand, the Department may indicate that it would, in its view, be more appropriate for the Commissioner himself, or nominated members of the ICO staff (with the appropriate level of security clearance if necessary), to inspect the information. The Commissioner will take full account of such a view and will not refuse any such representations unless

there are overriding reasons why adoption of such a procedure would significantly obstruct the discharge of his statutory functions.

23. The Commissioner will not hold information provided to him under this MoU for longer than is necessary for the discharge of his statutory functions. The Commissioner will, in consultation with the Department, arrange for the secure return or secure disposal of the information, in accordance with the Security Policy Framework.

### **Process on whether to issue a Decision Notice under the FOIA**

24. The Commissioner will consider all information provided to him in reaching a decision whether to serve a Decision Notice under the FOIA on the Department.
25. The Commissioner will contact both the Department and the Complainant, whenever appropriate, throughout his consideration of a complaint and, in any event, will normally provide progress reports every 28 days.
26. Wherever practicable in a national security case, the Commissioner will explore the scope for a settlement of the complaint, which would be acceptable to the Complainant and to the Department. Where such settlement can be achieved (by means, for example, of the provision by the relevant Department of an explanation in general terms of the sensitivity of the information requested), the Complainant will be invited to withdraw the complaint.

### **Draft Decision Notices under the FOIA**

27. In view of the inherent sensitivity of national security cases, the Commissioner recognises the obligation on the ICO to avoid the disclosure of exempt information in Decision Notices. In cases where Departments raise specific concerns, the ICO will enter into appropriate consultation, including where necessary the provision by the ICO of the relevant extracts of draft text, in order to ensure that Decision Notices as published do not contain any information the disclosure of which would be likely to damage national security.



## **Decision Notices under FOIA**

28. If the Commissioner decides to issue a Decision Notice under section 50(3)(b) of the FOIA, he will serve the Notice on the Department and the Complainant simultaneously. He will give both the Department and the Complainant a reasonable period of time to digest the Decision Notice before making the Notice publicly available.
29. On a case by case basis the Department will decide whether to inform the Commissioner in advance of the possibility of a Certificate under section 53 of the FOIA (exception from duty to comply with decision notice or enforcement notice). In the event of a Section 53 certificate being issued, the Commissioner will fulfil his commitment to report to Parliament on the circumstances.

## **General**

30. Wherever possible and subject to the requirements to ensure the security of sensitive documents relating to national security or, the Commissioner and Departments shall communicate by means of electronic communication.
31. This MoU will be kept under review and will be amended, as necessary, in the light of experience by agreement between the Participants.
32. The MoJ shall ensure that this MoU is widely disseminated within government and shall encourage compliance with it.
33. The Commissioner and the Secretary of State for Justice shall place copies of this National Security MoU on their respective websites.

**Signed by:**

The Rt Hon Chris Grayling MP,  
Secretary of State for Justice  
on behalf of central Government  
Departments

Christopher Graham,  
Information Commissioner

CHRIS GRAYLING

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CHRISTOPHER GRAHAM

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**Dated:**

2 SEPTEMBER 2013

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## **ANNEX: Definitions**

In this Memorandum of Understanding:

"The Participants" means the Secretary of State for Justice and the Commissioner.

"The MoJ" means the Ministry of Justice

"The Commissioner" means the Information Commissioner

"MoU" means Memorandum of Understanding

"Department" means:

- (a) where the information to which the request relates is governed by the Freedom of Information Act 2000, a government department for the purposes of section 84 of, and paragraph 1 of Schedule 1 to FOIA;
- (b) where the information to which the request relates is governed by the Environmental Information Regulations 2004, a government department, the Security and Intelligence Agencies and the Serious Organised Crime Agency;

and for the purposes of the operation of this MoU, the armed forces of the Crown and the Ministry of Defence Police are to be treated as part of the Ministry of Defence.

"The FOIA" means the Freedom of Information Act 2000.

"The EIRs" means the Environmental information Regulations 2004.

"The Tribunal" means either the First-tier Tribunal (General Regulatory Chamber) or the Upper Tribunal (Administrative Appeals Chamber).

"Complainant" means a person who has applied to the Commissioner for a decision under section 50 of the FOIA.

"Information Notice" and "Decision Notice" in relation to the FOIA have the meanings assigned to them in the FOIA.

“The Security and Intelligence Agencies” means the Security Service, the Secret Intelligence Service and the Government Communications Headquarters.