

GUIDANCE NOTE

When to refuse to confirm or deny information is held

The Freedom of Information (Jersey) Law, 2011

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INTRODUCTION

1. The Freedom of Information (Jersey) Law, 2011 (“the **Law**”) gives rights of public access to information held by scheduled public authorities (“**SPAs**”).
2. An overview of the main provisions of the Law can be found in the Guide to Freedom of Information. This is part of a series of guidance, which goes into more detail than the guide to the Law to help SPAs to fully understand their obligations and to promote good practice.
3. This guidance explains when a SPA can respond to a freedom of information request by refusing to confirm or deny that information is held to avoid disclosing whether or not information is held which is absolutely exempt or qualified exempt information. This is often called a ‘neither confirm nor deny’ (“**NCND**”) response.
4. Guidance issued by the Information Commissioner may include references to cases and decisions linked to operation of the Freedom of Information Act 2004 (“the **U.K. Act**”). Such references are provided as additional context to relevant areas given the lack of case law regarding the interpretation of the Freedom of Information (Jersey) Law 2011 (“the **Law**”). It should be noted, however, that judgments from the Courts of England and Wales (which includes any decisions from the Information Tribunal) are not binding in Jersey (albeit that they may be viewed by the Royal Court as being persuasive). There are, however, differences between the Law and the UK Act and so the judgments which have flowed following an interpretation of the UK Act may not be directly applicable in this jurisdiction.

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OVERVIEW

- In certain circumstances, even confirming or denying that requested information is held can reveal information is or is not held maybe sensitive. In such circumstances, a SPA may be able to give a NCND response by considering Article 10(2) of the Law.
- 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 NCND response consistently, every time a certain type of information is requested, regardless of whether the information is actually held or not. For this reason SPAs need to be alert to the possibility of receiving future requests for the same type of information when handling very specific or detailed requests.

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WHEN TO USE A NCND RESPONSE

5. Article 8 of the Law provides that a person has a general right to be supplied with information by a SPA and that except as otherwise provided by the Law, the SPA has a duty to supply the person with the information. This is a slightly different provision from that as set out in section 1(1)(a) of the Freedom Of Information Act 2000 (“the UK Act”) which specifically requires a public authority to inform an applicant whether it holds the information specified in the request. Whilst Article 10(1)(b) of the Law places a specific obligation upon a SPA to inform an applicant if it does not hold the requested information, there is no specific obligation for the SPA to confirm that it does hold the requested information.
6. However, pursuant to Article 10(2) of the Law, if an applicant makes a request for information to a SPA and:
 - a. The information is absolutely exempt or qualified exempt information; or
 - b. If the authority does not hold the information, the information would be absolutely exempt information or qualified exempt information if it had held it,

the SPA may refuse to inform the applicant whether or not it holds the information if it is satisfied that, in all the circumstances of the case, it is in the public interest to do so.
7. In such circumstances a SPA has the option to consider whether an NCND response is appropriate.
8. However, there may be occasions when providing an indication to an applicant that the requested information is either absolutely exempt or qualified exempt would in itself disclose sensitive or potentially damaging information that falls under an exemption. In these circumstances, the Law allows a SPA to respond by refusing to confirm or deny whether it holds the requested information. This is called a NCND response.
9. A SPA can only consider the use of a NCND response if this would in itself reveal information that falls under an exemption under Part 4 or 5 of the Law. SPAs should take decisions to provide a NCND response in a similar manner to decisions to refuse to disclose information. A SPA must be certain that the requested information is either absolutely exempt or qualified exempt, and that the public interest favours neither confirming nor denying that the information is held.
10. For many requests the starting point and main focus in the SPA’s decision making process as to whether or not a NCND response is appropriate will, in most cases, be theoretical considerations about the consequences of confirming or denying that a particular type of information is held. The decision to neither confirm nor deny is separate from a decision not to disclose information and needs to be taken entirely on its own merits.
11. SPAs should be able to explain why it is appropriate to provide a NCND response in all the circumstances of the case and should carefully document the decision making process. Whilst the rationale for that decision does not need to be disclosed to the applicant, it is imperative that the decision is properly documented should the applicant seek to appeal the making of that decision.



The public interest test

Article 9 (2) of the Law provides that:

'A scheduled public authority must supply qualified exempt information it has been requested to supply unless it is satisfied that, in all the circumstances of the case, the public interest in supplying the information is outweighed by the public interest in not doing so.'

12. It is only once a SPA has conducted the above test in respect of qualified information that they then may conduct a further public interest test as to whether a NCND response is appropriate in the circumstances. For absolutely exempt information (on the basis that it is absolutely exempt from disclosure), the SPA can move directly to the provisions contained in Article 10(2) of the Law. For more advice, see our more detailed guidance on the "Public Interest Test".
13. In the case of either absolutely exempt or qualified exempt a SPA has to conduct a public interest test when considering the appropriateness (or not as the case may be) of a NCND response.
14. This is a complex area and in order to assist SPAs please see at **Appendix 1** and **Appendix 2** of this guidance note, flowcharts regarding the consideration of the appropriateness of a NCND response for both absolutely exempt and qualified exempt information.



PRACTICAL CONSIDERATIONS

WHEN USING A NEITHER

CONFIRM NOR DENY

RESPONSE

15. When considering whether or not to provide a NCND response a SPA should only consider whether or not the public interest in providing a NCND response outweighs any public interest in not so doing.
16. It is sufficient to demonstrate that either a hypothetical confirmation or denial would confirm the nature of the exemption being relied upon under Part 4 or 5 of the Law.

The wording of the request

17. The exact wording of the request for information is an important consideration when a SPA is deciding whether or not a NCND is appropriate under Article 10(2) when dealing with information which is either absolutely exempt or qualified exempt information but in either case, the SPA has decided to not disclose the information requested.

Information in the public domain

18. In some cases, it may be already known or obvious that information must be held which is in line with the request. When considering whether a NCND response is appropriate under Article 10(2) of the Law, a SPA 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 may be enough to support the public interest in maintaining a NCND response.

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Using the neither confirm nor deny response consistently

19. There are situations where a public authority will need to use the neither confirm nor deny response consistently over a series of separate requests. This is to prevent refusing to confirm or deny being taken as an indication of whether 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 and/or the nature of any exemption.
20. This does not mean that SPAs should use a NCND response in a blanket fashion. For example, a particular SPA should not provide a NCND response to all requests for all information falling seemingly under the same exemption. They should base their decision on the circumstances of the particular case, with regard to the appropriate consideration being given to the public interest test.

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PROVIDING A NEITHER CONFIRM NOR DENY RESPONSE TO AN APPLICANT

21. When a SPA decides to issue a NCND response in accordance with Article 10(2) it may refuse to inform the applicant whether or not it holds the information if it is satisfied that, in all the circumstances of the case, it is in the public interest to do so.
22. If a SPA so refuses then pursuant to Article 10(3)(a) the SPA “shall be taken for the purposes of the Law to have refused to supply the information requested on the ground that it is absolutely exempt information” and (b) “it need not inform the applicant of the specific ground upon which it is refusing the request or, if the authority does not hold the information, the specific ground upon which it would have refused the request had it held the information”.
- Whilst a SPA does not need to inform the applicant of the grounds upon which it has decided to issue a NCND response it must keep a clear record of its decision making process, should the applicant appeal the SPA’s decision.
23. A NCND response needs to be worded carefully to avoid revealing exempt information.

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MORE INFORMATION

24. This guidance has been developed with assistance of the Office of the Information Commissioner in the United Kingdom. The guidance will be reviewed and considered from time to time in line with new decisions of the Jersey Information Commissioner and the Royal Court.
25. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
26. If you need any more information about this or any other aspect of freedom of information, please contact us:

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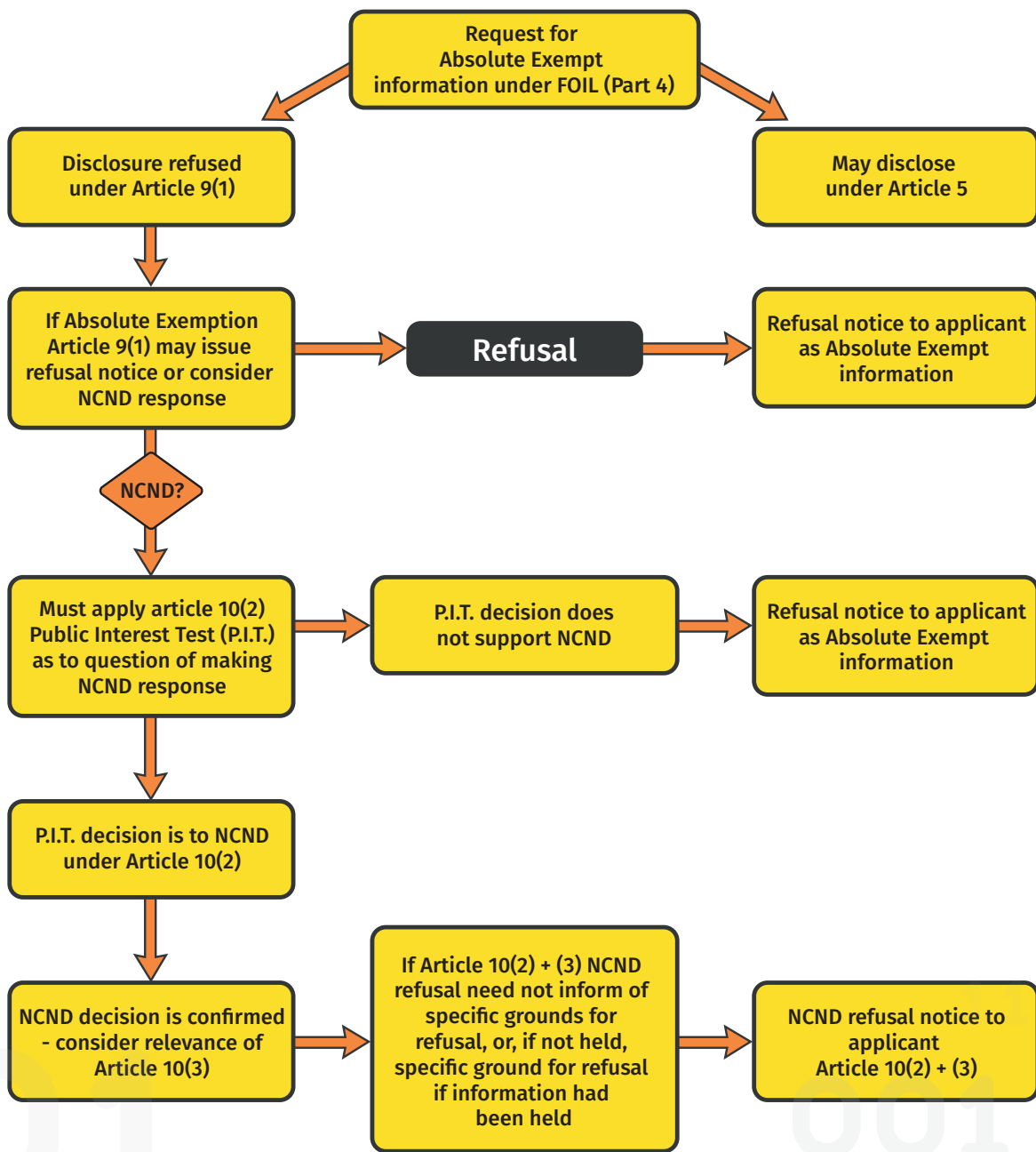
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APPENDIX 1

FOIL - Neither confirm nor deny (NCND) for Article 10(2) 'Absolute Exempt' information





APPENDIX 2

FOIL - Neither confirm nor deny (NCND) for Article 10(2) 'Qualified Exempt' information

