

## The NCND Principle – its use, importance and effectiveness

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be effective, and there is an obvious, and widely recognised, need to preserve that effectiveness. This requirement of secrecy has long been recognised by the Courts which have stated :

*“The Security and Intelligence Services are necessary for our national security. They are, and must remain, secret services if they are to operate efficiently.....”<sup>1</sup>*

6. If a hostile individual or group were to become aware that they were the subject of interest by the Agencies, they could not only take steps to thwart any covert Agency investigation or operation but also attempt to discover, and perhaps reveal publicly, the methods used by the Agencies, their capabilities and techniques, or the identities of the officers or agents involved. Compromise of any of this information would affect both the individual investigation or operation and potentially all others. It could also jeopardise the future willingness of agents or prospective agents to cooperate and puts at personal risk the officers and agents concerned.
7. Successive governments have therefore adopted an approach where they neither confirm nor deny assertions, allegations or speculation in relation to the Agencies, meaning that, as a general rule, the Government will apply the NCND principle when responding to questions about whether the Agencies are carrying out, or have carried out, an operation or investigation into a particular person or group, have a relationship with a particular person, hold particular information on a person, or have shared information about that person with any other agencies, whether within the UK or elsewhere.
8. In order to be effective the NCND principle must be applied consistently. This includes when no activity has taken place and a denial could properly be made. If the Government were prepared to deny a particular activity in one instance, the inference might be drawn that the absence of a denial in another amounted to confirmation of the alleged activity. If the Government were forced to depart

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<sup>1</sup> *Attorney General v Guardian Newspapers Ltd (No.2)* (“Spycatcher”) [1990] 1 A.C. 109 @ paragraph 269

from the NCND principle in one case, it would create a clear risk of serious harm to essential UK national security interests. It could, furthermore, potentially put lives at risk.

9. An illustration of the application of the NCND policy is found in the Northern Ireland case of *In re Scappaticci*<sup>2</sup>. The claimant in that case alleged that his life was in danger because of media speculation that he had been an undercover agent working within the IRA as an informer for the security services. A Northern Ireland Office minister declined his request to confirm that he was not an agent, and evoked the NCND policy. The court accepted that there was “a real and present danger” to his life but nevertheless refused to overturn the Minister’s decision. The then Lord Chief Justice of Northern Ireland, Lord Carswell said<sup>3</sup>:

*“To state that a person is an agent would be likely to place him in immediate danger from terrorist organisations. To deny that he is an agent may in some cases endanger another person, who may be under suspicion from terrorists. Most significant, once the Government confirms in the case of one person that he is not an agent, a refusal to comment in the case of another person would then give rise to an immediate suspicion that the latter was in fact an agent, so possibly placing his life in grave danger.*

*...If the Government were to deny in all cases that persons named were agents, the denials would become meaningless and would carry no weight. Moreover, if agents became uneasy about the risk to themselves being increased through the effect of Government statements, their willingness to give information and the supply of intelligence vital to the war against terrorism could be gravely reduced. There is in my judgment substantial force in these propositions and they form powerful reasons for maintaining the strict NCND policy.”*

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<sup>2</sup> [2003] NIQB 56

<sup>3</sup> at [§15]

10. Whilst the judgment in Scappaticci is expressed in the particular context of the threat posed by terrorist organisations, the rationale in relation to other circumstances where persons or organisations pose a threat of harm to agents or others providing information to the Agencies is the same. Neil Garnham QC (as he was then) advanced these arguments in the Litvinenko Inquiry and referring to the Scappaticci judgment he argued the following:

*“...there will be occasions when confirming or denying information may be of vital and immediate importance to individuals interests, but because doing so would cause real and immediate damage to wider public interests, it would be wholly inappropriate, despite the disadvantage or risk of harm to the individual to do so. It follows that the policy of neither confirming nor denying must be applied consistently to be effective. That is so even where, in one particular case, the direct damage to wider public interests might appear, at first blush, to be slight.”*

11. The IPT again commented on the importance of the NCND principle in its judgment in Steiner (IPT/06/81/CH 2008). The Tribunal decision stated that:

*“The NCND response, if appropriate, is well established and lawful. Its legitimate and significant purpose and value has been discussed and ratified by the courts”*

### **Exceptions to the principle**

12. The application of the principle of NCND, and the role of the courts in permitting it, was considered in Mohammed v Secretary of State for the Home Department [2014] EWCA Civ 559 at paragraph 20 where it was noted that whilst:

*“...there are circumstances in which the courts should respect [NCND]...it is not a legal principle. Indeed it is a departure from*

*procedural norms relating to pleading and disclosure. It requires justification similar to the position in relation to public interest immunity (of which it is a form of subset)."*

13. The underlying rationale for NCND is the need to protect national security: there is no basis for the application of the principle where public confirmation or denial of the Agencies' involvement or interest would not cause damage to national security. Indeed, in some instances, disclosure of the relevant Agency's involvement or interest would actually assist, or at any rate, not be inconsistent with the proper performance of its statutory functions. In these instances, the NCND principle does not apply. Any disclosure in these instances remains subject to the overarching principle that such disclosure may only be made where it is consistent with the governing statutory principles.

Examples of such instances include:

- Where a person knows conclusively through their dealings with an Agency that the Agency holds data on them, this fact may be confirmed to the individual (though not more widely) and information about them may be disclosed;
- Where the Agency judges that its involvement should be acknowledged publicly, and even that the information should be disclosed, in the public interest eg where information is deployed by an Agency or with its authority in court proceedings;
- Where a person subject to court proceedings makes claims about Agency involvement which they know are untrue and which there is a public interest in rebutting;
- Where it would be ridiculous to maintain NCND – for example, where an alleged act is clearly outside the Agency's statutory functions. (Some years ago, the Security Service dealt with a subject access request under the Data Protection Act, where the applicant alleged that the

Service was seeking to assassinate her. The Service denied this, as the Service would never engage in such an act.);

- In very exceptional cases, where maintaining the NCND line in response to allegations about Agency intrusive operations would not be sustainable and where it would be in the public interest for the relevant Agency publicly to disclose its involvement. As such a departure from NCND may well cause some damage to national security, disclosure in such cases can only be contemplated where there has been prior agreement between the relevant officials and appropriate Ministerial clearance (Home Secretary, Foreign Secretary and any other interested Minister).

14. In all instances where a department or agency is considering a departure from NCND, that department or agency should inform relevant Whitehall colleagues, including the Cabinet Office, in a timely fashion in order that the context and any wider considerations can be considered. The Cabinet Office may need to consult the National Security Liaison Group (which ordinarily considers the application of NCND in non-litigation matters including FOI requests) as an existing Whitehall body best placed to consider the departure. The National Security Secretariat can provide contact details as necessary.
15. Finally, it may be the case that bodies outside of Government, for example courts, inquiries or investigations, may seek to make a departure from NCND. In such circumstances, where a departure is being considered, HMG should invite that body to allow the relevant state party to make submissions in advance of any such departure. The relevant state party may need to consult other interested Whitehall departments and agencies as set out in paragraph 14 above.