

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 December 2018

Public Authority: Commissioner of the Metropolitan Police Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested information from the Metropolitan Police Service (the "MPS") about files and information generated / held by its Special Branch. The MPS would neither confirm nor deny whether it holds any information, citing the exemptions in FOIA sections 23(5) (information supplied by, or relating to, bodies dealing with security matters), 24(2) (national security), 27(4) (international relations), 30(3) (criminal investigations), 31(3) (law enforcement) and 40(5) (personal information).
2. The Commissioner's decision is that section 23(5) of the FOIA is engaged. No steps are required.

Request and response

3. On 26 January 2018 the complainant wrote to the MPS and requested information in the following terms:

"I have two separate applications to make under the Freedom of Information Act 2000 for files under the legal control and responsibility of The Home Office.

The first relates to all files generated by Metropolitan Police Special Branch concerning the activities of staff and students of University of London, Goldsmiths' College, any staff and students who were members of Communist Party, any staff and students who were

members of the British Union of Fascists during the 1930s, and any staff and students who had contact and relations with the Soviet Union between 1917 and 1989.

My request is based on public domain information revealed by the Warden of the College, Ross Chesterman in his book 'Golden Sunrise' published by The Pentland Press Ltd in 1996. He stated that he was in contact with Metropolitan Police Special Branch about the activities, subversion and disruption caused by Communist members of staff and students. He describes relations between the College's student Union, and its staff with the Soviet Union during the 1950s, which was, as is generally known, a key period of the Cold War.

I would respectfully submit that Met Police Special Branch is not listed in Section 23 of the Freedom of Information Act as 'Information supplied by, or relating to, bodies dealing with security matters' and so the statutory exemption does not apply.

As the public interest balancing act is engaged, I would like to submit that this information is of intense and powerful public historical interest in the context of my university approved project to write three books on the history of the College, its students, staff and people associated with it. The very fact that a past Warden (equivalent of chief executive/Vice Chancellor) chose to address the issue in his 1996 book is clear evidence to support the public interest importance. I would also add that the files and information are very historical in relating to events of more than 42 years ago. The vast majority of individuals referred to will have been deceased and it is highly unlikely there would be any national security reason for not providing full disclosure in the spirit of the Freedom of Information Act legislation.

My second, separate and specific application concerns any information and files held by Metropolitan Police Special Branch on the President of the Goldsmiths' College Student Union, Clifford Peter Faith, who had visited Moscow and the Soviet Union for a period of at least 6 months unlawfully using student union funds. Ross Chesterman makes specific references to these matters in his book 'Golden Sunrise' though he refers to Faith using the pseudonym 'Soames'. Faith was President of the Student Union 1952-53. Again my application is supported by the submission that this information is not statutorily excluded under the terms of Section 23 because Met Police Special Branch is not listed as one of the security bodies, and furthermore, the public interest and historical nature of this information means there can be no legitimate and compelling justification for continued withholding of this information. Mr Faith is no longer alive.

Many thanks for your consideration of these applications”.

4. On 23 February 2018 the MPS responded. It refused to confirm or deny whether it holds the requested information citing the exemptions in the following sections of the FOIA: 23(5), 24(2), 27(4), 30(3), 31(3) and 40(5).
5. Following an internal review the MPS wrote to the complainant on 24 July 2018. It maintained its position.

Scope of the case

6. The complainant contacted the Commissioner on 23 September 2018 to complain about the way his request for information had been handled.
7. The complainant asked the Commissioner to consider the application of exemptions to the request. He specifically argued that: *“... historical information collected and retained pertaining to events and activities before 1989 cannot be shielded from public interest consideration by 'statutory exemption'”.*
8. The complainant argued about his rights under Articles 1, 3, 7, 11, 47 and 52 of the Charter of Fundamental Rights of the European Union. He also referred to Article 8 of the European Convention on Human Rights and Fundamental Freedoms as well as a case currently before the fourth chamber of the European Court of Human Rights which he considered to be of relevance.
9. In the Commissioner’s view, she is not under a specific duty to give effect to any provisions of the Charter of Fundamental Rights of the European Union, when making FOI decisions. Whilst she would accept that its Articles are important concepts for the good of society, and will be a strong factor in the public interest test where relevant, Article 51 of the Charter makes clear that the Charter applies to national bodies *“only when they are implementing Union law”*. As FOIA is domestic law, she does not consider that the Charter applies.
10. In respect of Article 8 of the European Convention on Human Rights and Fundamental Freedoms, the complainant stated to the Commissioner:

“I would also argue that there is a drawing down of the inherent privacy rights in relation to education and pursuing this in a university college under Article 8 of the European Convention on Human Rights and Fundamental Freedoms as legislated for in the 1998 Human Rights Act.

... It is a matter of acute public interest to receive and evaluate historical information about the interference of students' Article 8 Rights by a public authority i.e. Special Branch of the Metropolitan Police in the exercise of their privacy rights as students enrolled on courses at Goldsmiths, University of London and the exercise of academic freedom and privacy rights by members of staff at the College”.

11. The Commissioner would agree that it may be a matter of public interest to evaluate historical information about the possible interference with students' Article 8 Rights by a public authority. However, whilst the arguments given by the complainant may be valid ones for holding the MPS to account for any possible breaches of privacy, they would only fall to be considered in the public interest test for qualified exemptions, where they may be used to balance competing interests.
12. In respect of the Court case before the fourth chamber of the European Court of Human Rights referred to by the complainant, although not available at the time that this request was made, the Commissioner notes that the finding in this case has now been promulgated. On that basis, it is her opinion that the complainant's rights under Article 10 are not infringed by the MPS's refusal to neither confirm nor deny (NCND) whether or not it holds the information he has requested under the FOIA. This is because the complainant could alternatively request the information from the MPS under common law and that such a request would satisfy the requirements of Article 10. If a request, formulated in this way, were then refused and the complainant considers that he has been denied access to information in breach of Article 10, a judicial review of that decision would provide an effective remedy.
13. The Commissioner will consider below whether or not the MPS is entitled to maintain its NCND position on the basis of the FOIA exemptions cited.

Reasons for decision

Neither confirm nor deny

14. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose sensitive or potentially exempt information. In these circumstances, section 2(1) of the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.
15. The decision to use a NCND response will not be affected by whether a public authority does or does not in fact hold the requested information.

The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.

16. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
17. The MPS has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety citing six different exemptions. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not the MPS is entitled to NCND whether it holds any information of the type requested by the complainant.
18. Put simply, the Commissioner must consider whether or not the MPS is entitled to NCND whether it holds any Special Branch files about communists / fascists and a visit to the Soviet Union as per the requested information.
19. The MPS has said that the information described in the request, if it was held, would be fully exempt from disclosure by virtue of sections 23(5), 24(2), 27(4), 30(3), 31(3) and 40(5) of the FOIA.
20. In refusing the request the MPS advised the complainant as follows:

"This request attracts a NCND response, as to confirm or deny that information is held prevents disclosure of whether or not there has been any involvement of the security bodies and that national security issues are affected and as such Sections 23(5) and 24(2) of the Act applies. In addition, confirmation or denial that information is held would highlight whether the MPS had an interest in any staff and students involved with the Soviet Union and as such if an overseas investigation took place, which would therefore identify policing operations. This would hinder the prevention and detection of crime and could upset international relations and therefore Sections 27(4), 30(3) and 31(3) of the Act are engaged. In addition, to confirm or deny that Special Branch held information relating to individuals based at University of London, Goldsmiths' College would be a breach of the Data Protection Act, and as such Section 40(5) has been applied.

Please note this response should not be taken to as an indication of whether or not the requested information is held".

21. When requesting an internal review the complainant provided the following counter-arguments to the MPS:

"I would argue that this decision and the denial of information is a disproportionate interference with my freedom of information rights, a wrong interpretation of the statute, and a wrong application of the public interest balancing exercise where applicable.

The information sought is historical and does not and cannot represent a blanket justification on the grounds of national security, the protection international relations, criminal investigations, law enforcement and personal information".

And:

"The information is so historical and old and neither security sensitive, nor security relevant and so does not qualify under the statutory exemption".

22. He further argued:

"The history of education in relation to an institution such as Goldsmiths, University of London, and the experience of individual participants such as students and members of staff in that process and any encounter they had in the historical past (e.g. before 1989), a matter of 29 years ago, in respect of Metropolitan Police Special Branch investigation and the collection of information is a matter of intense, powerful, and highly significant public interest. The length of time past increases the public interest justification over any present countervailing interest such as 'relations between the UK and another state', whether and what information has been held on individuals and their involvement in investigations, and prejudicing criminal investigations and law enforcement.'

I do not believe Norman Baker MP v IC (2007) and Secretary of State for the Home Department v. Rehman (2001) are relevant precedents justifying your absolute and unqualified engagement of the NCND rule. The particular circumstances of this application and the information sought are different.

... All the arguments advanced by you throughout under the heading 'Overall Harm for NCND' are unreasonable and disproportionate because they relate to clear and present imminent risks. It is my belief and understanding that any such risk pertaining to the information I am seeking are now non-existent with the passage of 29 years.

23. The complainant included further arguments relating to each exemption cited and also referred to his rights under the Articles mentioned in paragraph 9 above.
24. In completing its internal review the MPS advised the complainant that it needed to use NCND in a consistent manner and provided him with extracts from the Commissioner's guidance to support its rationale.

Section 23 - information supplied by, or relating to, bodies dealing with security matters

25. Section 23(1) of the FOIA states that:

"Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in sub-section (3)".

26. Section 23(5) of the FOIA provides an exemption from the duty imposed by section 1(1)(a) to confirm or deny whether information is held if to do so would involve the disclosure of information, whether or not recorded, that relates to or was supplied by any of the security bodies listed in section 23(3). This is a class-based exemption, which means that if the confirmation or denial would have the result described in section 23(5), this exemption is engaged.
27. The full list of bodies specified in section 23(3) FOIA can be viewed online¹.
28. Section 23(5) FOIA is engaged if the wording of the request suggests that any information falling within its scope would be within the class described in this section. There is no requirement to go on to consider what the results of disclosure of the confirmation or denial may be, nor whether confirmation or denial would be in the public interest as section 23(5) is an absolute exemption and not subject to the public interest test set out in section 2(3) of the FOIA.
29. Furthermore, the Commissioner considers that the phrase 'relates to' should be interpreted broadly. Such an interpretation has been accepted by the First-Tier Tribunal (Information Rights) in a number of different decisions.
30. The Commissioner's published guidance² on this exemption states that a request must be "*in the territory of national security*" in order for section

¹ <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

23(5) of the FOIA to be relevant. This means there has to be a realistic possibility that a security body would be involved in the issue that the request relates to. There also has to be a realistic possibility that, if a security body was involved, the public authority that the request is addressed to would hold information relating to its involvement.

31. When asking for an internal review the complainant argued as follows:

"The Metropolitan Police Special Branch is not one of the bodies listed in the legislation. The matters and information sought do not, in my opinion, relate to security matters and are certainly not security sensitive in any way.

As these matters are not to do with 'security', and before the exemption under the FOIA can be applied, Article 10 of the Human Rights Act requires that the Metropolitan Police evaluate specifically whether the information requested does deal with and relate to 'security matters.'

My FOIA request is for information concerning issues of education, the historical development of Goldsmiths, the political allegiances and activities of staff and students and their social behaviour and how these connected with the operation of Metropolitan Police Special Branch in the historical context up until 1989.

The question of whether they are 'security matters' according to the terms of the legislation must also be a matter of time present. This is a legal issue about the interpretation of the statute. I argue that the information I am seeking is not covered by the terms of Section 23(5).

I further argue that historical information collected and retained pertaining to events and activities before 1989 cannot be shielded from public interest consideration by 'absolute statutory exemption.'"

²https://ico.org.uk/media/fororganisations/documents/1182/security_bodies_section_23_foi.pdf

32. At internal review the MPS cited previous decision notices where the Commissioner has accepted that that section 23(5) may be applied to Special Branch work, for example³:

"...it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies' operations, section 23(5) is likely to apply. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request."

And:

"... the exemption contained at section 23(5) should be interpreted so that it is only necessary for a public authority to show that either confirmation or denial as to whether the requested information is held would involve the disclosure of information relating to a security body. It is not necessary for a public authority to demonstrate that both responses would disclose such information. Whether or not a security body is interested or involved in a particular issue is in itself information relating to a security body."

33. In further correspondence with the Commissioner the MPS advised:

"It has been established at Information Tribunal [EA/2010/0008] and reinforced in a later decision notice issued by the ICO FS50258193⁴, "that there will be very few instances where information held by Special Branch is not also held by a Section 23(3) body, even if it was not directly or indirectly supplied by them, as the nature of the work of special branches involves very close working with security bodies and regular sharing of information and intelligence".

The exclusion of the security bodies from the FoIA is significant that the legislators took such a step acknowledges that this is recognised as a key element necessary for the purposes of

³ https://ico.org.uk/media/action-weve-taken/decision-notices/2012/768126/fs_50443643.pdf

⁴ https://ico.org.uk/media/action-weve-taken/decision-notices/2011/594104/fs_50258193.pdf

safeguarding national security. This in itself indicates a recognised public interest in protecting the work of such bodies.

The principle of protecting information relating to the security bodies is well established. However, in the case of requests made for MPS information on extremist groups will potentially include special branch, the nature of their relationship with certain security bodies has the potential to circumvent the protection accorded by the Act to the security bodies, should the existence of security body related information be confirmed or denied. In such a scenario, the public authority, who works in partnership with the exempt body, becomes the 'weak link' in a necessarily covert process. Using intelligence to determine whether threats to national security are real or unsubstantiated is part of the work of special branch and the ability to collect and analyse this material and make an assessment of its value and significance is a key function of their role. Any or all of these actions may be performed in partnership with a security body.

...

It is in the public domain that Special Branch had a national security remit and utilised covert techniques. With this in mind, any information relating to Special Branch directly or indirectly relates to national security. Therefore, when FoIA exemptions are applied to requests this is not necessarily due to the named groups/individuals and is likely to be due to the remit of the MPS Special Branch. Similarly, it is also in the public domain that the primary purpose of Special Branches was to support the work of the Security Service. Consequently, inferences could be made in relation to the Security Service based upon information held, or not held by Special Branch".

34. The argument from the MPS in respect of this exemption is, therefore, that if the information specified in the request did exist, it is very likely that it would have come from, or be related to, a section 23(3) FOIA body, namely the Security Service. Were it the case that absolute certainty of the connection with a section 23(3) body was required, this might mean that the possibility, however slim, of the MPS holding relevant information that was not related to, or supplied by, a section 23(3) body would undermine its reliance on section 23(5) of the FOIA.
35. As referred to by the MPS above, in the Tribunal case *The Commissioner of Police of the Metropolis vs Information Commissioner* (EA/2010/0008) the argument was advanced that it was *highly likely* that any information held by the public authority that fell within the scope of the request would have been supplied to it by a section 23(3) FOIA body and, therefore, that section 23(5) FOIA was engaged. The counterargument was made that only certainty as to the source of the

information would be sufficient. The Tribunal rejected this counterargument and stated:

*"[The evidence provided] clearly establishes the **probability** that the requested information, if held, came through a section 23 body."* (paragraph 20)

36. The approach of the Commissioner on this point is that she accepts the Tribunal view that the balance of probabilities is the correct test to apply. This means that for section 23(5) of the FOIA to be engaged, the evidence must suggest to a sufficient degree of likelihood as provided by the balance of probabilities (rather than certainty) that any information held that falls within the scope of the request would relate to, or have been supplied by, a body specified in section 23(3).
37. The subject matter being considered in this case concerns any files that may have been specifically generated or held by Special Branch in respect of staff and students at a specific location who either had involvement with the Communist Party or the British Union of Fascists, or were known to have visited the Soviet Union during a specified time period. In this case, whilst the complainant may be of the view that what he has requested are not matters of 'security' the Commissioner considers it clear that the subject matter of the request is within the area of the work of bodies specified in section 23(3). She also accepts that it is likely that, if the information described in the request did exist, this would have been compiled with input from, or involvement with, the Security Service. Albeit that the information might, in the complainant's view, be 'historical', this is not a relevant factor when considering information being withheld under the exemption at section 23 of the FOIA.
38. The Commissioner therefore accepts that, on the balance of probabilities, any information held by the MPS falling within the scope of the complainant's request would relate to, or have been supplied by, a body or bodies listed in section 23(3) of the FOIA. Her conclusion is therefore that section 23(5) of the FOIA is engaged.
39. In light of her findings in respect of 23(5) of the FOIA, the Commissioner has not gone on to consider the MPS's reliance on the other exemptions cited.

Right of appeal

40. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

**Carolyn Howes
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