

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 14 March 2011

**Public Authority:** Commissioner of the Metropolitan Police  
Service  
**Address:** New Scotland Yard  
Broadway  
London  
SW1H 0BG

### Summary

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The complainant requested Special Branch related information about the poet Adrian Mitchell. The public authority refused to confirm or deny whether it held information falling within the scope of the request, citing the exemptions from the duty to confirm or deny provided by sections 23(5) (information relating to, or supplied by, security bodies), 24(2) (national security) and 31(3) (law enforcement) of the Act. The Commissioner finds that the exemption provided by section 23(5) was applied correctly and so the public authority is not required to confirm or deny whether it holds the information requested.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. On 5 January 2009, the complainant made the following information request:

*"I would like to see any Special Branch or Metropolitan Police files dealing with the poet Adrian Mitchell."*

3. The public authority responded to this request on 30 January 2009 and stated that it held no information within the scope of the request in all areas apart from Special Branch. In relation to Special Branch information, the public authority refused to confirm or deny whether it held information falling within the scope of the request. The exemptions provided by sections 23(5) (information relating to, or supplied by, security bodies), 24(2) (national security), 31(3) (prejudice to law enforcement) and 38(2) (endangerment to health and safety) of the Act were cited. Little explanation as to why these exemptions were believed to be engaged was given, and none as to why the balance of the public interest favoured the maintenance of the qualified exemptions cited.
4. The complainant subsequently requested an internal review of the refusal of the request on 5 February 2009 and the public authority responded with the outcome of the review on 3 June 2009. The public authority maintained its refusal to confirm or deny if it held Special Branch related information on the basis that the exemptions provided by sections 23(5), 24(2) and 31(3) were engaged. The citing of section 38(2) was withdrawn at this stage. The public authority provided further detail in this response as to why the exemptions cited were engaged and as to why the public interest favoured the maintenance of these exemptions to that given in the refusal notice.

## **The Investigation**

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### **Scope of the case**

5. The Commissioner received the complaint on 9 July 2009. The complainant referred to information that had been disclosed to him by the Home Office which recorded that Adrian Mitchell had been the subject of surveillance by Special Branch. The complainant referred to the techniques recorded in the information disclosed and argued that other information held by the public authority that fell within the scope of his request would record the use of similar techniques and that disclosure of the use of these techniques would not result in prejudice relevant to the exemptions cited. The complainant also believed that information previously disclosed about the work of Special Branch indicated that Adrian Mitchell may have been the subject of monitoring by Special Branch, due to his association with left-wing causes.
6. At this stage the complainant referred only to the refusal to confirm or deny if Special Branch related information was held; no reference was

made to the denial by the public authority that other information was held. In an e mail from the Commissioner's office to the complainant dated 26 August 2009 it was clarified that the scope of this case would cover only the refusal to confirm or deny whether information related to Special Branch was held; this would not cover the denial that other information was held.

7. Since this complaint was made, the issue of whether the exemption provided by section 23 applies when a request is made specifically for information relating to Police Special Branch activities has been considered by the First-tier Tribunal (Information Rights) (the "Tribunal") in a number of cases, including one arising from another information request made by the complainant. The evidence presented in these other cases, some of which was given in closed session (with press, public and non-security cleared personnel excluded), is taken into account in the section 23(5) analysis in this Notice.

## **Chronology**

8. The Commissioner contacted the public authority on 22 October 2009 and asked that it respond with further reasoning for the exemptions cited. The public authority responded with this reasoning on 26 November 2009.
9. A further exchange of correspondence between the Commissioner's office and the public authority followed. Through this correspondence, the public authority confirmed that its stance was that the exemptions provided by sections 23(5), 24(2) and 31(3) were engaged.

## **Analysis**

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### **Exemptions**

#### **Section 23**

10. Section 23(5) 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.

11. At paragraph 7 above, reference is made to relevant Tribunal cases and specifically the question as to whether section 23(5) is engaged in circumstances where a request for information is made to a police force and it is argued that the information requested, if held, would have been supplied by or relate to a security body listed in section 23(3) of the Act. The argument advanced in those cases was that special branches work closely with security bodies and routinely share information with them such that, on the balance of probabilities, any information relating to the work of special branches would relate to, or have been supplied by, a section 23(3) body.
12. Based on the evidence presented at the Tribunal, the Commissioner is now satisfied that this argument is supported by cogent evidence and applies in the circumstances of this case. The relevant evidence had not previously been made available to the Commissioner, so had not influenced earlier decisions. The Commissioner is satisfied 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.
13. The Commissioner accepts, based on the evidence submitted to the Tribunal, that there may be instances where Special Branch information would not relate to a section 23(3) body, although these would be few and far between. 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 public authority holding relevant information that was not related to, or supplied by, a section 23(3) body would undermine its reliance on section 23(5).
14. However, 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) body and, therefore, section 23(5) 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)
15. The approach of the Commissioner on this point is that he accepts the Tribunal view that the balance of probabilities is the correct test to apply. This means that for section 23(5) to be engaged, the evidence

must suggest to a sufficient degree of likelihood (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).

16. The Commissioner is satisfied on the basis of the evidence presented to the Tribunal that information comprising "*any Special Branch...files dealing with [a specified individual]*" will, on the balance of probabilities, relate to or have been supplied by a body specified in section 23(3). Therefore any information falling within the scope of this request which might be held by the public authority would be exempt under section 23(1). To disclose whether such information is or is not held would itself be a disclosure of exempt information. The conclusion of the Commissioner is, therefore, that the exemption from the duty to confirm or deny provided by section 23(5) is engaged in this case.
17. Section 2(3) provides that section 23 confers absolute exemption, so no public interest test applies.

### **Sections 24(2) and 31(3)**

18. As the Commissioner has found that section 23(5) is engaged, it has not been necessary to go on to consider the other exemptions cited by the public authority.

### **The Decision**

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19. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it applied the exemption from section 1(1)(a) provided by section 23(5) correctly.

### **Other matters**

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20. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
21. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to provide the outcome to the review within 20 working days. Neither did the public authority respond with the outcome of the

review within 40 working days. The public authority should ensure that internal reviews are carried out promptly in future.

## Right of Appeal

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22. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

23. Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 14<sup>th</sup> day of March 2011**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

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### Section 1

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

### Section 23

Section 23(3) provides that –

"The bodies referred to in subsections (1) and (2) are-

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (d) the special forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,
- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,
- (k) the National Criminal Intelligence Service, and
- (l) the Service Authority for the National Criminal Intelligence Service."

Section 23(5) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or

indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)."

## **Section 24**

Section 24(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security."

## **Section 31**

Section 31(1) provides that –

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."

Section 31(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).”