

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 January 2011

Public Authority: Greater Manchester Police
Address: Chester House
Boyer Street
Manchester
M16 0RE

Summary

The complainant requested, from the Greater Manchester Police (GMP), documents compiled by its Special Branch on the BBC in the 1980s. GMP replied, refusing to confirm or deny that it held information relevant to the request, ultimately citing the exemptions in sections 23(5) (information relating to security bodies), section 24(2) (national security) and section 31(3) (law enforcement) of the Act. The Commissioner finds that section 23(5) is engaged: therefore the public authority is not required to provide the complainant with confirmation or denial that the information is held. However, the Commissioner has identified procedural shortcomings on the part of the public authority relating to its refusal notice (section 17).

The Commissioner's Role

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.

Background

2. Within the police service, Special Branches acquire and develop intelligence to help protect the public from national security threats, especially terrorism and other extremist activity. In this way they play

a role in protecting the public and maintaining order and promoting community safety and cohesion.

The Request

3. On April 1 2009, the complainant wrote to the Greater Manchester Police Service (GMP) requesting:

“complete copies of any and all documents compiled and held by the Special Branch of the Greater Manchester Police Service on the British Broadcasting Corporation (BBC) relating to events between January 1 1980 and December 31 1989”.
4. On 1 May 2009, GMP advised the complainant in writing that it had not been able to complete its response to his request. It ultimately provided its response on 15 May 2009.
5. In this correspondence, GMP told the complainant it could neither confirm nor deny (NCND) that it held information relevant to his request. In this respect, it cited the exemptions at section 23(5) (information relating to security bodies), section 24(2) (national security), section 31(3) (law enforcement), section 38(2) (health and safety) and section 40(5) (personal information) of the Act.
6. The complainant requested an internal review on 6 July 2009. In this correspondence, the complainant made reference to other Special Branch records from the same era that he was aware had been released. In particular, he drew attention to Metropolitan Police Service Special Branch files that had been released. He gave examples of such files relating to the activities of the Anti-Apartheid Movement in the 1980s, on the activities of the Campaign for Nuclear Disarmament for the period spanning the 1960s and 1980s and on demonstrations during the Wapping dispute in 1986.
7. GMP responded on 21 August 2009. At this stage, GMP confirmed that it was continuing neither to confirm nor deny whether it held information relevant to the complainant's request. However, it varied its decision in relation to the exemptions cited. It confirmed that it was still relying on the exemptions at sections 23(5), 24(2) and 31(3) but that it was no longer citing the exemptions at sections 38(2) and 40(5).
8. In response to the complainant's point about other Special Branch records apparently having been released, GMP told the complainant

that *"we cannot comment on the rationale for a disclosure by another public authority, even though other police forces' decision-making principles may be similar. Indeed, to speculate on their decisions, in contrast to those of GMP could pose a risk of harm"*.

The Investigation

Scope of the case

9. On 12 October 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - *"these documents relate to events a long time [sic]. I do not believe that there is any danger to national security to release this information"; and*
 - *"it is wrong to apply a blanket refusal to release any records relating to the BBC in the 1980s. I believe that the sensitivity of these records has greatly diminished and so they can now be made public. It is apparent that other Special Branch records from that era have been released without causing the damage claimed [by the GMP in its letter of 15 May 2009]"*.
10. The Commissioner has previously issued a Decision Notice in connection with a request the complainant made to the Metropolitan Police Service (MPS) for similar information to that requested in this case.
11. In that case, the MPS had also refused to confirm or deny whether it held information falling within the scope of the request. The conclusion of the Decision Notice (FS50231561) had been that the exemptions were not engaged.
12. Since the issuing of that Decision Notice, 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 further in cases before the First-tier Tribunal (Information Rights) ("the Tribunal"). 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

13. The Commissioner wrote to GMP on 9 February 2010 asking it to provide him with further information about its decision to apply the exemptions cited and, in connection with the qualified exemptions, why the public interest favoured the maintenance of those exemptions.
14. GMP responded on 9 March 2010. In this correspondence, GMP provided some information in support of its NCND response. It also requested additional time in which to expand on these arguments. The Commissioner agreed to this and, accordingly, a further response was provided on 28 May 2010.

Analysis

Exemptions

Section 23 Information supplied by or relating to bodies dealing with security matters

15. 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), the exemption is engaged.
16. GMP acknowledged that Special Branch is not a prescribed body under section 23 of the Act. However, it maintained that the nature of its remit means that its core work must necessarily relate to section 23(3) bodies as close working partners. The Commissioner understands this to be based on the fact that, as described in the *Special Branch Guidelines 1995*, one of its roles is "to assist the British Security Service and Secret Intelligence Service in fulfilling their statutory roles". GMP told the Commissioner that any disclosure by the police would "compromise the integrity of the public authority's role in the partnership".
17. GMP has argued strongly that:

"if information is held and disclosed, the effect would be to provide confirmation that GMP and/or its security partners had collected

information about events in the 1980's. To discuss the risk of harm would mean divulging the nature of the information".

18. At paragraph 12 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.
19. 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 and 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.
20. 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).
21. 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 that 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)*

22. The Commissioner's approach on this point is that he accepts the Tribunal's 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).
23. The Commissioner is satisfied on the basis of the evidence presented to the Tribunal that information comprising "all documents compiled and held by the Special Branch" 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. 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.
24. Section 2(3) provides that section 23 confers absolute exemption so no public interest test applies.
25. As the Commissioner has found the exemption in section 23 engaged, he has not found it necessary to consider the other exemptions which GMP also cited in this case.

Procedural Requirements

Section 17

26. In this case, in failing to provide a refusal notice within 20 working days of receipt of the request, the Commissioner finds the public authority in breach of section 17(1).

The Decision

27. 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 the duty to confirm or deny provided by section 23(5) correctly. However, the Commissioner also finds that the public authority failed to comply with the procedural requirements of section 17(1) in its handling of the request.

Steps Required

28. The Commissioner requires no steps to be taken.

Right of Appeal

29. 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.

Website: 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.

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

Dated the 20th day of January 2011

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

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

Section 23(1) provides 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 subsection (3)."

Section 23(2) provides that:

"A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact."

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(4) provides that:

"In subsection (3)(c) "the Government Communications Headquarters" includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist

the Government Communications Headquarters in carrying out its functions."

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)."