

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 May 2012

**Public Authority:** The Commissioner of the Metropolitan Police Service

**Address:** New Scotland Yard  
Broadway  
London  
SW1H 0BG

#### Decision (including any steps ordered)

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1. The complainant asked the Metropolitan Police Service (MPS) for any Special Branch files it held relating to the student demonstration on 24<sup>th</sup> November 1988, which ended with a confrontation on Westminster Bridge. The MPS relied on a number of exemptions within the Freedom of Information Act to refuse to confirm whether or not it held such information, including section 23(5) which concerns the security bodies. The Commissioner has decided that the MPS is entitled to rely on this exemption to refuse to confirm whether or not it holds Special Branch files of the nature requested.

#### Request and response

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2. The complainant submitted the following request to the MPS on 27 November 2010:

*'I would like to see all Metropolitan Police files, including Special Branch files, relating to the Student demonstration on 24<sup>th</sup> November 1988, which ended with a confrontation on Westminster Bridge'.<sup>1</sup>*

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<sup>1</sup> The role of Special Branch is essentially to gather intelligence to meet national security requirements as well as to support other policing priorities such as the prevention of disorder. There are Special Branch units in each of the 43 Home Office police forces in

3. The MPS provided a substantive response to this request on 25 February 2011. In respect of the part of the request which sought Special Branch files the MPS relied on the following sections of FOIA to refuse to confirm or deny whether it held any information: 23(5), 24(2), 30(3), 31(1), 38(2) and 40(5). However, the MPS confirmed that it held other, non-Special Branch files relating to the demonstration in question but also cited a number of further exemptions as a basis to withhold these files.
4. The complainant contacted the MPS on 1 March 2011 and asked it to conduct an internal review of its decision to refuse to confirm whether or not it held any Special Branch files.
5. The MPS informed the complainant of the outcome of the internal review on 6 June 2011. The review upheld the decision to refuse to confirm whether or not the MPS held Special Branch files of the nature requested on the basis of the exemptions cited in the refusal notice.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 7 October 2011 in order to complain about the MPS' refusal to confirm whether or not it held Special Branch files about the incident referred to in his request. The complainant highlighted the following points in his submissions to the Commissioner:
    - The Home Office had provided documents to him about the 1988 student protest which referred to the existence of Special Branch files;
    - In the past the MPS had provided him with a number of Special Branch files on different demonstrations and industrial disputes. On the basis of these files he could surmise that there would be Special Branch files, including a 'threat assessment', drawn up in advance of the 1988 student demonstration;
    - With regard to section 23, this only provides an exemption for the security bodies listed in it whereas the MPS' approach was attempting to stretch this exemption to also apply directly to Special Branch which was not listed in the exemption.
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## Reasons for decision

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

*The Commissioner's interpretation of the relevant legislation*

7. Section 23(1) of 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).'*

8. Section 23(5) of FOIA states 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).'*

9. The full list of bodies specified in section 23(3) can be viewed online; for the purposes of this case the Commissioner wishes to highlight the fact that neither the MPS, nor any Special Branch of any police force, is listed in section 23(3).<sup>2</sup>

10. In the Commissioner's opinion the exemption contained at section 23(5) should be interpreted so that it is only necessary for a public authority to show that **either** a confirmation **or** denial of whether 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. Furthermore, the Commissioner believes 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.<sup>3</sup>

11. Consequently, whether or not a security body is interested or involved in a particular issue is in itself information relating to a security body.

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<sup>2</sup> <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

<sup>3</sup> See for example [Dowling v Information Commissioner and The Police Service for Northern Ireland](#), EA/2011/0118, paras 17 to 22.

Therefore in the Commissioner's opinion section 23(5) could be used by a public authority to avoid issuing a response to a request which revealed either that a security body was involved in an issue or that it was not involved in an issue.

12. The test of whether a disclosure would relate to a security body is decided on the normal civil standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the exemption would be engaged.
13. From the above it can be seen that section 23(5) has a very wide application. If the information requested is in what could be described as within the ambit of security bodies' operations, section 23(5) is likely to apply. 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.

*The MPS' position in respect of this request*

14. In its responses to the complainant the MPS explained that the function of Special Branches has been and remains to undertake covert work to acquire and develop intelligence to protect the public from threats to national security, especially terrorism and other extremist activity. Such extremist activity can include animal rights matters, environmental extremism/anarchism, extreme left wing and extreme right wing activities and political violence that pose threats to public order and lawful commerce. Within this remit the primary focus of Special Branch units is to provide support for the work of the security bodies and thus there is the potential for security body involvement in the work of Special Branch.
15. The MPS explained to the complainant that the nature and sensitivity of Special Branch information extended to 'threat assessments', i.e. the type of information the complainant believed was contained within the files he had requested, and the points set out in the preceding paragraph were equally applicable to this type of information as they are to other types of intelligence or information which may be held by Special Branch in any given case. The MPS explained that this was demonstrated by the comments in the Her Majesty's Inspectorate of Constabulary thematic inspection of Special Branches – 'A Need to Know' – which highlighted the use of intelligence in the production of

threat assessments and identified that there is also the potential for security body involvement in this process.<sup>4</sup>

16. With regard to the complainant's comments concerning previous MPS' disclosures, the MPS emphasised that each request which seeks Special Branch information is considered on a case by case basis and a neither confirm nor deny response is only issued after a consideration of a number of factors. The assessment of these factors required a focus on the specific wording of the request, the requested information and the wider context of the operational remit in which Special Branch information is created and held. However, it explained to the complainant that there are occasions where it is not able to provide more specific reasoning as to why it had adopted a neither confirm nor deny response in one case, when it had not adopted that stance in another case, as to do would involve a discussion of specific circumstances that themselves would be exempt from disclosure.
17. In submissions to the Commissioner, the MPS provided specific arguments as to why it had adopted a neither confirm nor deny position in response to this request. For obvious reasons the Commissioner has not referred to these submissions in this decision notice but has made reference to them in a confidential annex which will be sent to the MPS only.

*The Commissioner's position in respect of this request*

18. The Commissioner is satisfied that on the balance of probabilities confirming whether or not the MPS held Special Branch files of the nature requested would be likely to reveal something about the security bodies. He has reached this conclusion for three reasons: Firstly, the close relationship that exists between Special Branch and the security bodies with the former working closely with the latter and routinely sharing information with them. Secondly his view that section 23(5) has a very broad application. And, thirdly, the specific circumstances of this case, in particular the fact that the request only seeks information about one event. In other words the Commissioner is satisfied that if the MPS confirmed that it did hold Special Branch files, then it would, in effect, be confirming that the security bodies had an interest in the demonstration in question. Conversely, if it confirmed that no Special Branch files were held then it would, in effect, be revealing that the security bodies did not have an interest in the demonstration in question. The Commissioner is therefore satisfied that the MPS is

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<sup>4</sup> [A Need to Know](#); the MPS referenced paragraphs 3.34, 3.36 and 3.57.

entitled to rely on section 23(5) to refuse to confirm whether or not it holds Special Branch files of the nature requested.

19. In reaching this conclusion the Commissioner wishes to emphasise that it is third of these reasons, i.e. the particular circumstances of this case, upon which his finding that section 23(5) is engaged ultimately rests. In respect of the complainant's third point of complaint set out at paragraph 6, the Commissioner agrees with the complainant that the exemptions contained within section 23 of FOIA cannot be stretched to apply directly to **any** Special Branch information that may be held by a public authority. Although, the close links between Special Branches and the security services inevitably increases the likelihood of section 23 being applicable, it will always be the nature of each particular request and all the relevant circumstances which will determine whether, on the balance of probabilities, confirming or denying whether relevant information is held would itself involve the disclosure of information relating to a security body.
20. With regard to the complainant's first two points of complaint, the Commissioner can understand why it may be considered irrational for a public authority to adopt a neither confirm nor deny response if it was already known, via previous FOI disclosures, whether a public authority held the requested information. However, given the way in which section 23(5) is drafted, even if it is a matter of public record that information as requested is held, a public authority could still rely on this exemption to refuse to confirm whether or not it holds it. This is because the engagement of section 23(5) is simply a question of establishing whether confirming whether such information is held or not would on the balance of probabilities reveal something about a security body. It is not a question of determining whether confirmation as to whether information is held or not would have some sort of prejudicial effect.
21. In light his findings in respect of section 23(5) the Commissioner has not considered whether the MPS are also entitled to rely on the other exemptions cited in the refusal notice. However, he notes that section 24(2) was specifically used together with section 23(5) in line with standard practice in cases potentially concerning information relating to security bodies. The Commissioner accepts this is a valid approach, although not always strictly necessary.

## 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

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

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

23. 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.
24. 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** .....

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