

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 October 2012

Public Authority: The Commissioner of the Metropolitan Police Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant requested copies of documents from Special Branch mentioned in a Metropolitan Police file available for public inspection at the National Archives.
2. The Commissioner's decision is that, on a balance of probabilities, the public authority does not hold the information requested.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 12 October 2011 the complainant wrote to the public authority and requested information in the following terms:

'Marie Marguerite Fahmy, a French national, was charged with the murder of her husband Ali Kamel Fahmy bey on 10 July 1923. After a trial at the Central Criminal Court, Mme Fahmy was acquitted on 15 September 1923 on both counts of the indictment. The relevant Metropolitan Police file, MEP03/1589, was opened some years ago and is now available for public inspection at the National Archives.

The following note appears on the second page of the file, Minute Sheet 1 at paragraph 5:

"...E to see attached papers from Special Branch. I understand that – as we expected – the wife is making horrible accusations agst the husband."

Paragraph 6, apparently in the same handwriting, reads:

"Report result.....13/7/23"

(I presume that 'E' refers to [named Superintendent] and that 'A.C.C.' endorsed on the first page of the file, is a reference to Sir Wyndham Childs then head of Special Branch)

MEP03/1589 does not contain these Special Branch papers and I have found no reference to any such material in the catalogue of the National Archives. From extensive research into the background and circumstances of the 1923 trial I now have reason to believe that the Special Branch papers may have been prepared after 1 November 1918, when a threatening letter from Marie Marguerite Fahmy (then know by the name of 'Maggie Meller') was received by the then Prince of Wales (later King Edward VIII and Duke of Windsor).

Noting that there are later Special Branch reports on open access relating to the personal life of the Prince and his associates (as, for example, in MEPO38/151 and MEPO10/35), it has occurred to me these papers may still exist, but be subject to closure.

In that latter case, I should be grateful for confirmation that the papers are in existence and, if so, would wish to make application for access to them under the Freedom of Access legislation.

5. The public authority initially wrote to the complainant on 14 November 2011 and issued a notice under section 17(2) FOIA suggesting it held the requested information. A notice under section 17(2) is issued by a public authority if it is not relying on an absolute exclusion from the duty to confirm or deny it holds information or it is not relying on an absolute exemption (i.e. a qualified exemption) from disclosing the requested information and would like more time to conduct a public interest test. The public authority stated in that letter:

'.....we are currently considering whether 'qualified exemptions' apply to the information you have requested.....we are considering the following exemption...section 31(1) (a, b and c)'

6. However, on 6 December 2011, the public authority informed the complainant that it could not locate the requested information following searches it had conducted. As it is required to under section 1(1)(a) FOIA, it informed the complainant that it did not hold the requested information.

7. On 28 December 2011 the complainant wrote to the public authority and queried the inconsistency in its responses. He further expressed the view that the letter of 14 November clearly indicated that information relating to his request had been accessed and was in the process of being reviewed in relation to the applicability of exemptions.
8. On 3 January 2012 the public authority offered the following explanation for the inconsistency:

'.....[responses from areas which hold Special Branch material] were delayed due to their workloads and at that time I did not know whether they held any information pertinent to your request and so I had to quote an exemption which may appear to be ambiguous. When the relevant parties responded to me they informed me that they held no information that was relevant to your request. If any information had been located it may have attracted the exemption quoted.'

Scope of the case

9. On 13 April 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider whether the public authority was correct to claim it did not hold the information requested.
10. He confirmed that his request was for attached Special Branch papers referred to in the quoted extract from the Metropolitan Police file MEPO3/1589 available for public inspection at the National Archives (TNA).
11. He submitted that the letter of 14 November from the public authority was evidence that the requested information is held. In further support of his claim, he made the following statement:

'.....the first page of MEPO3/1589, first registered on 10 July 1923, contains a box headed 'Former papers'. Here the handwritten words 'No trace' have been struck out. Below these words, there is a reference '1/E/113 (with a short illegible addition). Underneath this is one further reference. 'SB 20[or 6]386'. I believe that the letters 'SB' refer to Special Branch. In TNA MEPO38/151, for example, a file which contains Special Branch material dating between 1924 and 1933, there is a backsheet endorsed with the reference 'Protection of Royalty SB 345/Gen'
12. The scope of the investigation therefore was to determine whether the public authority held the attached Special Branch papers referred to in

the quoted extract (in the complainant's request of 12 October 2011) from file MEPO3/1589.

Reasons for decision

Section 1 FOIA

13. Section 1(1) states:

'Any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, and if that is the case, to have that information communicated to him.'

14. Section 1(2) states:

'Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.'

15. Section 1 FOIA therefore grants individuals a presumptive right of access to information under FOIA so that, subject to other provisions of FOIA including exemptions, a public authority is under a duty to inform the person making the request in writing whether it holds the information and if it does, to provide it to that person.

16. In determining whether a public authority holds requested information, the Commissioner applies the civil standard of proof which is based on a balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.¹

17. The public authority explained that it had searched internal records and also conducted open searches to determine if it held the requested information. The internal searches were carried out by the Records Management Branch (RMB). The searches were restricted to known names, Marie Marguerite Fahmy or Maggie Meller and to the search dates 1918 - 1923 given the likely age of the file, based upon the original TNA reference MEPO 3/1589.

¹ This is in line with the views expressed by the Information Tribunal in *Linda Bromley & Others v The Information Commissioner & Environmental Agency* – EA/2006/0072

18. RMB is generally responsible for providing access to information through the efficient and effective management of the registered file system and other records stored centrally. It specifically provides the following services:
 - The management of registered files, including;
 - Creating new registered files
 - Indexing the titles of files, including names and subject matter
 - Tracking the location of registered files
 - Storage of registered files
 - Destruction and disposal of registered files
 - Transfer of files of historical interest to The National Archives
 - Storage of non-registered records such as personal files of MPS staff and Borough records
 - Advice and information about the retention and disposal of records.
19. The searches were carried out on the Records Management System (RMS). RMS is an electronic index of all registered files that allows suitably trained personnel to carry out registry searches and order files if available from the repository. The searches reported no trace under the names Marie Marguerite Fahmy and Maggie Meller. Searches undertaken of the current Special Branch database for the same period (i.e. 1918 – 1923) using the same names resulted in no trace.
20. The open searches revealed that information is held at the TNA in relation to the request under the following references:
 - MEPO 3/1589 (Date 1923): Acquittal of Marie Marguerite Fahmy: charged with the murder of her husband Ali Bey Kemel Fahmy
 - FO141/796/10 (Date 1923): Case of Marie Marguerite Fahmy: charged with the murder of her husband Ali Bey Kemel Fahmy
 - CRIM 1/244 (Date 1923): Central Criminal Court deposition
 - CRIM 1/247(Date 1923): Central Criminal Court deposition
21. The public authority explained that Metropolitan Police Service records created before 31 March 2000 are defined as public records by the Public Records Act 1958. This means that all records created up until 31 March 2000 fall within the ambit of section 3 of the Public Records Act

which imposes a number of statutory requirements, most significantly the legal duty to select for permanent preservation public records and transfer them no later than 30 years after creation to the TNA. It also imposes the requirement to obtain the approval of the Lord Chancellor for the retention of all public records over thirty years.

22. The public authority further explained that 182 Special Branch records have been selected, offered and accepted for permanent preservation at TNA. These are included in the MEPO 38 series (which was referred to by the complainant in his request), fully described as, '*Metropolitan Police: Special Branch: Registered Files.*' Most of the material dates as far back as the 1920s and 30s. It also pointed out that much of the material in the MEPO 38 series is reflected in the records of the Security Service already available to the public at TNA via the KV series.
23. According to the public authority, the file MEPO 3 series including the specific file in question was transferred to TNA under the Public Records Act 1958. It explained that sections 3 (4) and (6) of the Public Records Act 1958 are relevant to the request. Sections 3 (4) and (6) state:

'(4) Public records selected for permanent preservation under this section shall be transferred not later than thirty years after their creation either to the Public Record Office or to such other place of deposit appointed by the Lord Chancellor under this Act as the Lord Chancellor may direct:

Provided that any records may be retained after the said period if, in the opinion of the person who is responsible for them, they are required for administrative purposes or ought to be retained for any other special reason and, where that person is not the Lord Chancellor, the Lord Chancellor has been informed of the facts and given his approval.

(6) Public records which, following the arrangements made in pursuance of this section, have been rejected as not required for permanent preservation shall be destroyed or, subject in the case of records for which some person other than the Lord Chancellor is responsible, to the approval of the Lord Chancellor, disposed of in any other way.'

24. The public authority explained that, as it is permitted to under section 3 of the Public Records Act 1958, certain types of information including intelligence which it has a duty to protect for operational and national security reasons would be retained and not transferred to TNA in line with the 30 year rule. According to the public authority, given that MEPO 3/1589 has been an open file at TNA since 25 July 1989 and the transfer some considerable time before that (between December 1962 and June 1963), it is very likely that since the transfer, any retained information,

including that mentioned as belonging to Special Branch (i.e. relevant to the information requested) has been destroyed.

25. Whilst there is a clear indication in MEPO 3/1589 that the requested information may have been held in the past, the public authority explained that given the passage of time since the creation of the document (1923) and the weeding process undertaken at the time of the transfer of the records to TNA, the requested information would have been deemed no longer of operational significance and destroyed. A record of the destruction could not be provided as it is not held. That, according to the public authority, would explain why the search of the RMS (the MPS electronic record management system) did not reveal any information pertinent to the request.
26. The public authority further explained that a manual search of records held by Special Branch was deemed unnecessary in the specific circumstances of this case given the age of the material and the fact that electronic indexes are sufficient to identify files held that relate to named individuals. The public authority provided further explanation in confidence to the Commissioner to explain why it considered the electronic indexes sufficient to identify and locate the requested information. The Commissioner is satisfied with the explanation and he accepts it was not necessary in the circumstances to additionally conduct manual searches.
27. The Commissioner is satisfied with the nature of the searches conducted by the public authority. He is also satisfied with the explanation provided and accepts it is more likely than not that the information requested would have been destroyed in line with section 3(6) of the Public Records Act 1958.
28. The public authority acknowledged that its initial response to the complainant on 14 November 2011 was erroneous. In other words, it had not established at that point whether or not it in fact held the requested information. The Commissioner is not persuaded the public authority's initial response of 14 November is conclusive evidence or a clear indication that the information requested is held or had been accessed at the time of the request. The response was unfortunate and it clearly does not represent good practice. However, in the Commissioner's view, that fact alone is not sufficient to undermine the public authority's explanation above as to why it does not hold the information requested.
29. In view of the above reasons, the Commissioner finds that, on a balance of probabilities, the public authority does not hold the information requested by complainant.

Right of appeal

30. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

31. 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.
32. 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

Alexander Ganotis
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