

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 December 2013

Public Authority: Commissioner of the Metropolitan Police Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant requested Special Branch information relating to the late Cyril Smith. The Metropolitan Police Service (MPS) refused to confirm or deny whether it held this information and cited the exemptions provided by sections 23(5) (information supplied by, or relating to, security bodies) and 24(2) (national security) of the FOIA.
2. The Commissioner's decision is that the MPS cited sections 23(5) and 24(2) correctly and so it was not required to confirm or deny whether it held this information.

Request and response

3. On 29 November 2013 the complainant wrote to the MPS and requested information in the following terms:

"I would like to see any references on the Special Branch Index to former Rochdale MP (now deceased) Cyril Smith, and any Special Branch files concerned with Cyril Smith."

4. After issuing an earlier holding response, the MPS responded substantively on 25 January 2013. The MPS refused to confirm or deny whether it held the information requested and cited the exemptions provided by the following sections of the FOIA:

23(5) (information supplied by, or relating to, security bodies)

24(2) (national security)

30(3) (information held for the purposes of an investigation)

31(3) (prejudice to law enforcement)

5. The complainant responded on 25 January 2013 and requested an internal review. The MPS responded on 15 February 2013 and stated that the refusal of the request under the exemptions cited previously was upheld.

Scope of the case

6. The complainant contacted the Commissioner on 4 March 2013 to complain about the refusal of his information request. The complainant stated at this stage that he believed that the public interest favoured the disclosure of this information and referred to newspaper articles that he believed had already provided a public indication that the requested information was held by the MPS.
7. The MPS no longer has a section known as "Special Branch", and instead now refers to Counter Terrorism Command. For clarity and in keeping with the wording of the request, this notice continues to refer to "Special Branch".

Reasons for decision

Section 23

8. 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.
9. As the test here is only whether any relevant information that may be held by the MPS would fall within the class described in the exemption, the argument from the complainant that the existence of information falling within the scope of this request has already been disclosed through the media is not relevant to the question of whether this exemption is engaged. Also, as section 23 is not subject to the public interest, neither is it relevant to consider whether disclosure of the confirmation or denial would be in the public interest.

10. On a number of occasions the First-tier Tribunal (Information Rights) has considered the application of this exemption where a request has been made for information relating to a police special branch. The argument advanced by the police 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.
11. 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 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.
12. 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).
13. 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 MPS 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)
14. 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).

15. The Commissioner is satisfied on the basis of the evidence presented to the Tribunal that information comprising "*any Special Branch files concerned 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 MPS 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.
16. As this conclusion has been reached on section 23(5), it is not strictly necessary to go on to also consider the other exemptions cited by the MPS. However, as the MPS also relied on section 24(2), he has gone on to consider that exemption.

Section 24

17. Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security. Consideration of this exemption is a two-stage process. First the exemption must be engaged due to the requirement of national security and, secondly, this exemption is qualified by the public interest, which means that the confirmation or denial must be provided if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
18. The Commissioner has already accepted when finding that section 23(5) is engaged that revealing whether or not information is held within the scope of the request would reveal information relating to the role of the security bodies. The Commissioner also accepts that disclosure that touches on the work of the security bodies would consequentially undermine national security. For that reason section 24(2) is also engaged as exemption from the duty to confirm or deny is required for the purposes of national security.
19. Turning to the balance of the public interest, the question here is whether the public interest in safeguarding national security is outweighed by the public interest in disclosure of the confirmation or denial. Clearly, the public interest in safeguarding national security carries very great weight. In order for the public interest to favour provision of the confirmation or denial, it will be necessary for there to be public interest factors in favour of this of at least equally significant weight.
20. The view of the Commissioner is that there is a valid public interest in confirmation or denial in response to this request. Cyril Smith was a

long standing MP and a very prominent public figure. Allegations have been aired about him that are very serious in nature and questions have been raised as to why no action was taken about these whilst he was alive. Confirmation or denial in response to the request would add to public knowledge as to the extent to which Cyril Smith came to the attention of the police during his lifetime. Given his status as a public figure and the seriousness of the allegations that have been made, the Commissioner considers there to be a significant and legitimate public interest in the provision of the confirmation or denial.

21. The Commissioner considers it to be clearly the case, however, that this public interest does not match the weight of the public interest in safeguarding national security. This means that his conclusion is that the public interest in the maintenance of the exemption provided by section 24(2) outweighs the public interest in disclosure of the confirmation or denial. The MPS is not, therefore, required to disclose the confirmation or denial.

Right of appeal

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: GRC@hmcts.gsi.gov.uk

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

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
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