

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 May 2014

Public Authority: Commissioner of the Metropolitan Police Service

Address: New Scotland Yard
Broadway
London
SW1H 0BG

Decision (including any steps ordered)

1. The complainant has requested copies of Special Branch Annual Reports from 1938 to 1946. Having initially withheld the requested information under various exemptions, during the course of the Commissioner's investigation the Metropolitan Police Service (the "MPS") cited section 23(1) (information supplied by, or relating to, bodies dealing with security matters). The Commissioner accepts that that this exemption is engaged and the MPS is therefore entitled to withhold the information; he does however find a procedural breach.

Request and response

2. Following earlier correspondence outside the terms of the FOIA, on 15 July 2013 the following request was made under the terms of the FOIA:

"Together with a former colleague from Met. Special Branch I am endeavouring to write a history of M.P.S.B. from 1883 to 2006, when it was disbanded. To date we have completed our task up to 1939, but it is becoming increasingly difficult to write a meaningful history without recourse to some of the Branch's records. We are not seeking highly classified material but it would be most helpful to us if we could have sight of the Annual Reports from 1938 to 1946

– that is to say the period covering WW2 plus an overlap of one year on either side. These reports were sent to, among others, the Home Secretary, his P.U.S, the Commissioner, the A.C.C., the Security Service. Having assisted in compiling these reports we are aware they are quite bulky documents and, if our request is granted, we are quite prepared to read them at a place convenient to the MPFS”.

3. Following extensions to consider the public interest, the MPS responded on 11 September 2013. It confirmed that it held the requested information but advised that it was exempt from disclosure by virtue of sections 31(1) (law enforcement) and 40(2) (personal information). It also neither confirmed nor denied holding any further information citing sections 23(5) (information supplied by, or relating to, bodies dealing with security matters) and 24(2) (national security) of the FOIA.
4. Following an internal review the MPS wrote to the complainant on 29 January 2014. It varied the exemptions being relied on by revising section 24(2) to 24(1), the effect of which was to confirm that it held information that it believed to be covered by that exemption.
5. During the Commissioner’s investigation the MPS revised its position again. It advised that it was now solely relying on section 23(1) and advised the complainant accordingly. By citing section 23(1), the MPS confirmed that it held information falling within the class specified in that subsection.

Scope of the case

6. The complainant wrote to the Commissioner on 31 January 2014 to complain about the way his request for information had been handled. He asked him to consider timeliness and the withholding of the information requested.
7. The Commissioner has considered these below.

Reasons for decision

Section 10 – time for compliance

Section 17 – refusal of request

8. Section 10(1) of the FOIA provides that a public authority should comply with section 1(1) within 20 working days. Section 1(1)(a) initially

requires a public authority in receipt of a request to confirm whether it holds the requested information.

9. The request was submitted on 15 July 2013 and the MPS confirmed its receipt on 17 July 2013. On 12 August 2013 the MPS advised the complainant that it needed further time to consider the public interest and cited sections 31 and 40 as its basis for doing so. On 9 September 2013 it wrote again, advising that it needed further time.
10. On 11 September 2013 the MPS issued its refusal notice.
11. Section 17(3) of the FOIA allows a public authority to provide its public interest determination in a separate notice "*within such time as is reasonable in the circumstances*". The Commissioner has issued guidance on this point¹ which includes the following:

"...our view is that an authority should take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days."

12. In this case the Commissioner notes that the public authority has marginally exceeded the 40 working days to consider the public interest test. No reasons were given for the delay. The Commissioner considers this merits criticism.
13. The Commissioner finds that the public authority has breached section 17(3) of FOIA because it did not provide the complainant with its public interest determination within such time as was reasonable.

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

14. Section 23(1) states:

"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)".

¹http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/time-for-compliance-foia-guidance.pdf

15. To successfully engage the exemption at section 23(1), a public authority must be able to demonstrate that the relevant information was *directly or indirectly* supplied to it by, or *relates to* any of the bodies listed at section 23(3); the bodies listed in section 23(3) includes the Security Service. This means that if the requested information falls within this class it is absolutely exempt from disclosure under the FOIA. This exemption is not subject to a balance of public interests test.
16. As cited by the MPS to the Commissioner, he has previously determined in his decision notice reference FS50258193² 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..."

17. The MPS also drew the Commissioner's attention to that part of the request which states: *"These reports were sent to, among others, the Home Secretary, his P.U.S, the Commissioner, the A.C.C., **the Security Service**"*. The relationship between the Annual Reports which are the subject of this request and the Security Service is therefore already clearly known by the complainant from his own personal experience.
18. Having been notified of the MPS's revised position in respect of section 23(1), the complainant advised the Commissioner:

"[We] are not seeking access to any highly classified data subject ... and the curt response from the Metropolitan Police is heavily redolent of reliance on a carte blanche exemption section without any sensible consideration of the nature and merits of the request for access to the Papers.

Notwithstanding the time this has taken for the Metropolitan Police to come up with yet another revised decision for refusing access I would have thought that some acknowledgement of the merits of this application would have been prudent and would help to allay the strong suspicion that the Metropolitan Police are determined to refuse access to the Papers sought no matter how reasonable and genuine the request".

² http://www.ico.org.uk/~media/documents/decisionnotices/2011/fs_50258193.pdf

19. The Commissioner also notes the complainant's concerns about the age of the information and his perception of a lack of harm in disclosure because of this, as well as his reference to earlier correspondence in which he states that the MPS recognised that there was both a public and commercial interest in allowing access to the material. Unfortunately none of these points are relevant in relation to this exemption. This is because section 23(1) does not refer to any harm resulting through disclosure and neither is it subject to a balance of public interests test, where such views could be considered.
20. As it is a class-based and absolute exemption, the only question for the Commissioner is whether the requested information falls within the description of information covered by section 23(1).
21. On this occasion, the Commissioner has not viewed the withheld information. Instead a senior official of the MPS has written to him and stated that the information to which this exemption had been applied does either relate to, or was supplied by, one of the bodies specified in section 23(3). The Commissioner is prepared, in limited circumstances, to accept the assurance of a senior official that information withheld under section 23(1) has indeed been supplied by or is related to security bodies specified in section 23(3). He will only do so where the official occupies a position in relation to the security bodies which allows them genuinely to validate the provenance of the information, and where the official is independent of the public authority's process for dealing with freedom of information requests. The Commissioner is satisfied that the author of this letter occupies such a position within the MPS.
22. Accordingly, the Commissioner accepts that, in the circumstances of this case, the assurance he received from the senior official at the MPS regarding the nature of the withheld information, coupled with his own knowledge and experience gained from investigating previous complaints arising from requests for Special Branch records, is sufficient. He agrees that the withheld information relates to a body listed in section 23(3) for all of the reasons provided by the public authority. The Commissioner therefore accepts that a sufficient explanation as to the nature of the withheld information has been given for him to be satisfied that section 23(1) is engaged.
23. The Commissioner therefore finds that the withheld information is exempt from disclosure on the basis of section 23(1) because it was supplied by, or relates to, a body listed at section 23(3).

Other matters

24. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

Internal review

25. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his '*Good Practice Guidance No 5*', the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
26. The Commissioner does not consider this case to be 'exceptional', so is concerned that it took over four months for an internal review to be completed. This delay has been recorded for monitoring purposes.

Other concerns raised by the complainant

27. Within his complaint to the Commissioner, the complainant draws attention to the fact that the authors of the book for which this information is sought are "*two respected former senior officers of MPSB*", and that they have "*received wide support for their project from former senior Metropolitan Police and Special Branch Officers*". He also advised that they are happy to agree to any conditions required by the MPS, for example, to forego access to highly classified material, to have names redacted, to have supervised access to the material and for the MPS to be allowed to comment on the book prior to publication.
28. Unfortunately, such caveats are not within the jurisdiction of the Commissioner as he can only consider unfettered disclosure to the world at large. Any such agreement between the requester and the MPS would necessarily fall outside the terms of the FOIA and would therefore need to be managed independently of this legislation.

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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

30. 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.
31. 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
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SK9 5AF