

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 November 2018

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 information about any contact between the National Domestic Extremism and Disorder Intelligence Unit (NDEDIU) and the National Trust from the Metropolitan Police Service (the "MPS"). The MPS would neither confirm nor deny ("NCND") holding the requested information, citing sections 23(5) (information supplied by, or relating to, bodies dealing with security matters), 24(2) (national security), 31(3) (law enforcement) and 40(5) (personal information) of the FOIA.
2. The Commissioner's decision is that section 23(5) is engaged. No steps are required.

Background

3. According to the National Police Chiefs' Council website¹:

"In January 2011 the Chief Constables' Council, the senior decision-making body for the now replaced Association of Chief Police Officers (ACPO), ratified the decision for the Metropolitan Police Service (MPS) to become the lead force for the National Domestic Extremism and Disorder Intelligence Unit (NDEDIU)."

¹ <https://www.npcc.police.uk/NationalPolicing/NDEDIU/AboutNDEDIU.aspx>

The NDEDIU remains a national policing unit, under lead force governance arrangements and sits under the Specialist Operations business group of the MPS.

It was created following a merger of the National Public Order Intelligence Unit (NPOIU), the National Domestic Extremism Team (NDET) and the National Extremism Tactical Coordination Unit (NETCU).

The NDEU supports all police forces to help reduce the criminal threat from domestic extremism across the UK. It works to promote a single and co-ordinated police response by providing tactical advice to the police service alongside information and guidance to industry and government.

One of the key responsibilities of the NDEDIU is to provide intelligence on domestic extremism and strategic public order issues in the UK. Police will always engage to facilitate peaceful protest, prevent disorder and minimise disruption to local communities. Where individuals cross over into criminality and violence, the police will act swiftly and decisively to uphold the law”.

4. The MPS has also advised that the NDEDIU:

“... supports all police forces to help reduce the threat from domestic extremism. MI5 describe Domestic Extremism² as individuals or groups that carry out criminal acts in pursuit of a larger agenda, such as “right-wing extremists”. They may seek to change legislation or influence domestic policy and try to achieve this outside of the normal democratic process”.

Request and response

5. On 18 May 2018, the complainant made the following information request via the “What do they know?” website³:

“I'm writing to request information about contact between the National Domestic Extremism and Disorder Intelligence Unit (NDEDIU) and the conservation charity National Trust. Under the Freedom of Information Act 2000, please provide:

² <https://www.mi5.gov.uk/terrorism>

³https://www.whatdotheyknow.com/request/contact_between_ndediu_and_the_n

- Copies of any written (electronic or physical) contact between the two parties from 1 April 2017 to 31 March 2018.
- Details of non-electronic (phone call) contact between the two parties from 1 April 2017 to 31 March 2018”.

6. On 13 July 2018, following an extension to the time limit in which it considered the public interest, the MPS responded. It refused to confirm or deny holding the requested information. It cited sections 23(5), 24(2), 31(3) and 40(5) of the FOIA as its basis for doing so.
7. Following an internal review the MPS wrote to the complainant on 21 August 2018. It maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 11 September 2018 to complain about the way his request for information had been handled. He explained that his request related to trail hunting and hunting packs and, in his view, that hunting and the anti-hunting movement is not a matter of national security.
9. The complainant also stated that any personal data could be redacted before documents were released. Therefore, the citing of section 40(5) (personal information) has been removed from the scope of the investigation.
10. The Commissioner will consider the exemptions cited below.

Reasons for decision

Neither confirm nor deny

11. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose sensitive or potentially damaging information that falls under an exemption. In these circumstances, the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.
12. The decision to use a NCND response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.

13. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
14. The MPS has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety citing four different exemptions. The issue that the Commissioner has to consider is not one of the disclosure of any requested information that may be held, it is purely the issue of whether or not the MPS is entitled to NCND whether it holds any information of the type requested by the complainant.
15. Put simply, the Commissioner must consider whether or not the MPS is entitled to NCND whether it holds any information about any contact between the NDEDIU and the National Trust.
16. The MPS has said that the information described in the request, if it was held, would be fully exempt from the duty to confirm or deny by virtue of sections 23(5), 24(2), 31(3) and 40(5) of the FOIA.
17. In refusing the request the MPS advised the complainant as follows:

"This request attracts a NCND response as to confirm or deny that any written or phone call contact (as specified in your request) has occurred between NDEDIU and The National Trust could undermine the safeguarding of national security issues and identify the focus of police activity, which would compromise law enforcement and as such Section 24(2) and 31(3) of the Act applies. In addition, confirmation or denial that information is held prevents disclosure of whether or not there has been any involvement of the security bodies, engaging Section 23(5) of the Act. Finally, any correspondence, if held, would contain the names of individuals and confirmation of this would be disclosing personal information. Therefore, Section 40(5) of the Act applies".

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

18. Section 23(1) of the 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)".

19. 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.

20. The full list of bodies specified in section 23(3) can be viewed online⁴.
21. Section 23(5) is engaged if the wording of the request suggests that any information falling within its scope would be within the class described in this section. There is no requirement to go on to consider what the results of confirming or denying may be, nor whether confirmation or denial would be in the public interest, as section 23(5) is an absolute exemption and not subject to the public interest test set out in section 2 of the FOIA.
22. Furthermore, the Commissioner considers 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.
23. The Commissioner's published guidance⁵ on this exemption states that a request must be "*in the territory of national security*" in order for 23(5) to be relevant. This means there has to be a realistic possibility that a security body would be involved in the issue that the request relates to. There also has to be a realistic possibility that, if a security body was involved, the public authority that the request is addressed to would hold information relating to its involvement.
24. In engaging this exemption the MPS explained its position as follows:

"In ICO Decision Notice FS50443643⁶ the Commissioner commented '...it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies' operations, section 23(5) is likely to apply. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request,

⁴ <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

⁵ https://ico.org.uk/media/for-organisations/documents/1182/security_bodies_section_23_foi.pdf

⁶ https://ico.org.uk/media/action-weve-taken/decision-notices/2012/768126/fs_50443643.pdf

the subject area to which the request relates and the actual wording of the request.'

Furthermore, in FS50443643 the Commissioner's opinion was that 'the exemption contained at section 23(5) should be interpreted so that it is only necessary for a public authority to show that either confirmation or denial as to whether the 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. Whether or not a security body is interested or involved in a particular issue is in itself information relating to a security body.'

With these considerations in mind, the review is satisfied that section 23(5) is appropriately engaged ...".

25. The MPS further explained to the Commissioner that:

"It is important to note that [the complainant] is specifically requesting information that relates to the 'NDEDIU' which relates to hunting and trail hunting. As explained earlier the NDEDIU'S key responsibility is to provide intelligence on domestic extremism, which would relate to groups or individuals who commit or plan to commit serious criminal activity motivated by a political or ideological viewpoint. Hunting as described in the Collins' English dictionary, as the "chasing and killing of wild animals by people or other animals, for food or as a sport". Many individuals and or groups are opposed to hunting. Anti-hunters who object to the practice of hunting often seek anti-hunting legislation and sometimes take on acts of civil disobedience such as hunt sabotage, which in many instances have resulted in disturbances and arrests made by police. In the first instance, the information being requested by [the complainant] may not appear relevant however due to the remit of the NDEDIU the MPS would have to neither confirm nor deny".

26. 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 public authority that fell within the scope of the request would have been supplied to it by a section 23(3) body and, therefore, that 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)*

27. The approach of the Commissioner on this point is that she 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).
28. In this case, the Commissioner considers it clear that the subject matter of the request (specifically, any contact involving the NDEDIU as opposed to general contact with the National Trust) means that any information which may be held within that particular unit is likely to only be held if it relates to domestic extremism as this is a specified role of the NDEDIU (ie if it did not relate to this type of activity then it would not be held within this unit as it would fall outside of its remit). Accordingly, the Commissioner also accepts that any information which may be held in the unit would be in an area of the work which would be of interest to bodies specified in section 23(3) and it is likely that, if the information described in the request did exist, this would have been compiled with input from, or involvement with, the Security Service.
29. The Commissioner accepts that, on the balance of probabilities, any information held by the MPS falling within the scope of the complainant's request would relate to, or have been supplied by, a body or bodies listed in section 23(3). Her conclusion is therefore that section 23(5) is engaged.
30. In light of her findings in respect of 23(5), the Commissioner has not gone on to consider the MPS's reliance on the other exemptions cited.

Right of appeal

31. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

32. 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.
33. 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

Carolyn Howes
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