

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 August 2016

**Public Authority:** 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 has requested any information held by the Metropolitan Police Service (the "MPS") about the arrest, trial and imprisonment of Hemant Lakhani who died in prison in 2013. The MPS refused to confirm or deny that it held the requested information citing sections 23(5) (supplied by, or relating to, bodies dealing with security matters), 24(2) (national security), 27(4) (international relations), 30(3) (investigations and proceedings), 31(3) (law enforcement) and 40(5) (personal data) of the FOIA. The Commissioner's decision is that the MPS was entitled to rely on sections 23(5) and 24(2). No steps are required.

#### Request and response

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2. On 29 November 2015, the complainant wrote to the MPS and requested information in the following terms:

*"I would like documents concerning the arrest, trial and imprisonment of British citizen, Hemant Lakhani (1935-2013). Mr. Lakhani was a British citizen who was arrested in a FBI terrorist sting operation in August 2003, his trial took place in March-April 2005 in New Jersey and he was subsequently found guilty and imprisoned. He died in prison sometime in June, 2013.*

*I understand that at some point during the investigation, Scotland Yard helped the FBI at some point during the case. This would have been during the period of 2001-03".*

3. The MPS responded on 23 December 2015. It refused to confirm or deny that it held the requested information citing sections 23(5), 24(2), 27(4), 30(3), 31(3) and 40(5) of the FOIA.
4. Following an internal review the MPS wrote to the complainant on 8 January 2016. It maintained its position.

### Scope of the case

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5. The complainant contacted the Commissioner on 29 February 2016 to complain about the way his request for information had been handled.
6. The Commissioner advised the complainant that the focus of her investigation would be to determine whether the MPS handled his request in accordance with the FOIA. Specifically, she would look at whether it was entitled to neither confirm nor deny holding any information by virtue of the exemptions cited.

### Reasons for decision

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7. Under section 1(1)(a) of the FOIA, a public authority is obliged to advise an applicant whether or not it holds the requested information. This is known as the "duty to confirm or deny". However, the duty to confirm or deny does not always apply and authorities may refuse to confirm or deny through reliance on certain exemptions under the FOIA.
8. The MPS advised that the exemptions at sections 23(5) and / or 24(2) would cover any information that may be held so their application has been considered first.
9. The MPS explained why it had adopted a neither confirm nor deny ("NCND") stance, stressing that it had done so only after considering a number of factors. The factors considered included the following:
  - a. Has there been any previous public disclosure about the subject of the request?
  - b. If so, is the disclosure relevant to the request in this instance?
  - c. What time period does the request capture?
  - d. Are there any unique factors specific to the subject of the request that require consideration?
  - e. Following on from the previous point, is there a particular public interest in confirming or denying or in disclosure in the specific case?

- f. Do these circumstances combine to create a situation in which disclosure is possible *without* causing prejudice to national security?

10. It went on to explain that:

*"Confirmation or denial is often, but not exclusively, possible when the time period captured by the request is sufficiently historic, and when the circumstances have also changed sufficiently that this confirmation or denial will not reveal indications of more recent or current MPS Special Branch/CTC or security body interest or activity. The incident involving Mr. Lakhani is, in policing terms recent.*

*It is crucial to note that any such departures from the neither confirm nor deny approach (NCND) are considered on a case-by-case basis, and cannot be viewed as setting a precedent for confirmation or denial in unrelated cases.*

*There are cases where a risk would be created by confirmation or denial either due to the nature of the subject of the request, or because the factors above are not engaged. The NCND must therefore be applied in order to obscure the identification of those requests where an NCND would be necessary to protect current or longer-standing MPS Special Branch/CTC and/or security body interest.*

*In the present case however, whilst there has indeed been news items and the suggestion of involvement of UK law enforcement, this speculation in regard to the MPS has not been confirmed."*

11. In requesting an internal review, the complainant disputed the citing of sections 23 and 24 on the following grounds:

*"As far as I'm aware, MI5 and MI6 did not have major involvement into the investigation of Hemant Lakhani's activities and this was considered more a police matter".*

And,

*"As far I'm aware, Hemant Lakhani's activities were not considered a national security issue but a criminal activity. It was the FBI who initiated the investigation and given his role in what was a controlled FBI operation from start to finish, I am unsure how his fraudulent attempts to defraud the bureau could have jeopardized British national security.*

*Given the investigation took place over ten years ago, any information that would be released now given this investigation would be unlikely to reveal intelligence that would compromise UK-US criminal investigations currently and in the future".*

12. The Commissioner notes that the complainant's comments relating to these exemptions both start with the phrase: "As far as I am aware...". This would therefore indicate to the Commissioner that there is nothing currently in the public domain which could substantiate either way the involvement of any section 23 body, or any other issues which may potentially relate to national security in the UK.

**Section 23 – information supplied by, or relating to, bodies dealing with security matters & section 24 – national security**

13. Information relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). Information which does not fall under section 23(1) is exempt from disclosure under section 24(1), if exemption is required for the purpose of safeguarding national security.
14. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) or 24(1) respectively.
15. The MPS considers that both sections 23(5) and 24(2) are engaged in this case. The Commissioner does not consider the exemptions at section 23(5) and 24(2) to be mutually exclusive and he accepts that they can be relied upon independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security.
16. By virtue of section 23(5) the duty to confirm or deny does not arise where 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 section 23(3).
17. This exemption is absolute, meaning that, if engaged, there is no requirement to consider whether the public interest nevertheless favours confirming or denying whether information is held.
18. The test as to whether a disclosure would relate to a security body listed in section 23(3) 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 section 23 exemption would be engaged.

19. From the above 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, the subject area to which the request relates and the actual wording of the request.
20. The MPS explained that if it were to give any indication through confirmation or denial that the requested information is held, this would itself constitute the disclosure of exempt information. It added:

*"This is because such an indication would, on the balance of probability, amount to a statement that relates to a security body or bodies. The case against Mr. Lakhani revolved around an illegal trade / sale of arms connected to terrorism, which means that if held by the MPS, information concerning this case would likely be held by MPS SO15 Command made up of the old MPS Special Branch SO12 and Anti-terrorism Command SO13. Previous Tribunal's and the ICO have recognised that if information were held by what was MPS Special Branch or now, MPS Counter Terrorism Command on the balance of probability, the information would relate to one of the bodies prescribed by Section 23(3)".*

21. There is clearly a close relationship between the MPS and the security bodies and it is inevitable that it works closely with security bodies in carrying out its role. In his request the complainant himself states that Mr Lakhani was arrested in an: "*FBI terrorist sting operation*". Therefore, in respect of the MPS's role and the subject matter being requested, the Commissioner finds that, on the balance of probabilities, any information the MPS may hold about Mr Lakhani could well involve the FBI and this in turn would logically support the potential involvement of one or more of the bodies identified in section 23(3) of the FOIA. The Commissioner is therefore satisfied that, on the balance of probabilities, the requested information, if held, could relate to or have been supplied by one or more bodies identified in section 23(3) FOIA. She therefore finds that section 23(5) is engaged.
22. By virtue of section 24(2) the duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.
23. With regard to section 24(2), the Commissioner again considers that this exemption should be interpreted so that it is only necessary for a public authority to show that either a confirmation or a denial of whether requested information is held would be likely to harm national security.

The Commissioner interprets the phrase 'required' in the context of this exemption as 'reasonably necessary'. In effect this means that there has to be a risk of harm to national security for the exemption to be relied upon, but there is no need for a public authority to prove that there is a specific, direct or imminent threat.

24. In relation to the application of section 24(2) the Commissioner notes that the First-tier Tribunal has indicated that only a consistent use of an NCND response on matters of national security can secure its proper purpose. Therefore, in considering whether the exemption is engaged, and the balance of the public interest, regard has to be given to the need to adopt a consistent NCND position and not simply to the consequences of confirming whether the specific requested information in this case is held or not.
25. The MPS has advised that as the situation engages section 23(5), it has therefore also found it necessary to apply section 24(2), (in line with the Baker Tribunal decision EA/2006/0045<sup>1</sup>) to protect against the disclosure of information that indicates or relates to the involvement or otherwise of a security body.
26. The MPS went on to explain that:

*"... the public authority, who works in partnership with the exempt body, becomes the potential 'weak link' in a necessarily covert process. Using intelligence to determine whether threats to national security are real or unsubstantiated is part of the work of MPS Special Branch/CTC, and the ability to collect and analyse this material and make an assessment of its value and significance is a key function of their role. Any or all of these actions may be performed in partnership with a security body.*

*It is in order to maintain the integrity of this process that a neither confirm nor deny response is required for the purpose of safeguarding national security. This is because not only would failure to neither confirm nor deny disclose exempt information relating to one or more of the security bodies, but also because the consequence of such a disclosure serves to impair the effectiveness of the partnership relationship.*

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<sup>1</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i24/Baker.pdf>

*The ability to monitor, detect and prevent criminal acts in the area of terrorist or extremist activity is dependent on the ability of MPS Special Branch/CTC and the security bodies to share and exchange information and intelligence in the knowledge that such intelligence will be managed by all parties in an appropriately confidential manner. The disclosure of information by the MPS that indicates the involvement or otherwise of security bodies, or the police service, in investigating specific individuals or organisations - in this case by confirming or denying whether the requested information is held - would undermine this ability".*

27. The general approach of the Commissioner is that she accepts that withholding information in order to ensure the protection of national security can extend, in some circumstances, to ensuring that matters which are of interest to the security bodies are not revealed because exposing the involvement of security bodies could, in itself, jeopardise national security. Moreover, it is not simply the consequences of revealing whether information is held in respect of a particular request that is relevant to the assessment as to whether the application of the exemption is required for the purposes of safeguarding national security, but the consequences of maintaining a consistent approach to the application of section 24(2).
28. On this occasion the Commissioner is satisfied that complying with the requirements of section 1(1)(a) would be likely to reveal whether or not the security bodies were interested in the subject matter which is the focus of this request. The need for a public authority to adopt a position on a consistent basis is of vital importance in considering the application of an NCND exemption. For the reasons set out above, the Commissioner is satisfied that the MPS is entitled to rely on sections 23(5) and 24(2) in the circumstances of this case.
29. Section 23(5) provides an absolute exemption, but section 24(2) is qualified. Therefore the Commissioner is required to consider whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the MPS holds relevant information.

### **Public interest arguments in favour of confirming or denying that information is held**

30. The MPS has acknowledged that confirmation or denial that information exists relevant to the request would lead to a better informed public. It has also accepted that the public are entitled to know how public funds are spent especially with regards to safeguarding national security.

## **Public interest arguments in favour of maintaining the refusal to confirm or deny that information is held**

31. The MPS has argued that confirmation or denial as to whether it holds any information relevant to the request would allow inferences to be made about the nature and extent of national security related activities which may or may not have taken place in this area. This in turn could enable terrorists or organised criminal groups to take steps to counter intelligence, and as such, confirmation or denial would be damaging to national security.

## **Balance of the public interest arguments**

32. The Commissioner recognises that there is a substantial inherent public interest in safeguarding national security. Although section 24(2) is qualified, she believes that there would need to be truly exceptional circumstances in order to override national security considerations which justify the exclusion from the duty to confirm or deny that information is held.
33. The Commissioner accepts the principle of consistency needs to be maintained which means that an NCND stance can be applied relatively simply to a request to the MPS, based on its subject matter and the potential association of MPS Special Branch/CTC, covering a range of individuals or organisations. An inconsistent application of the NCND across such responses could allow inferences to be drawn about subject matters of interest to its Special Branch/CTC, and, because of the acknowledged relationship between the MPS and the security bodies, this would also lead to inferences or conclusions being drawn that a security body was involved in one case, but not another. She accepts that there is a need to maintain the covert nature of investigations concerning matters of national security, and allowing such inferences to be drawn would prejudice the ability of both MPS and the security bodies to effectively perform their statutory roles.
34. The Commissioner also accepts that a lack of consistency would potentially allow exempt information to enter the public domain over a period of time. The cumulative effect of releasing information in this way would risk identifying the sort of person / subject matter that is or is not of interest to the security bodies. In turn, this could prejudice the ability of the MPS to work with security bodies in their stated roles to protect national security. The MPS has argued, and the Commissioner accepts:

*"Responses which do not maintain the consistent approach form a pattern which would also potentially allow the identification of those who have been or are of interest to the security bodies. This causes prejudice to national security by allowing those who are intent on*



*causing harm to learn more about the nature and extent of MPS Special Branch/CTC and security body interest - to ascertain the extent to which they were (or were not) the subject of investigation – and to take action to avoid the attention of the authorities”.*

35. As also argued by the MPS, the importance of its response to this request does not just relate to what a straightforward confirm or deny response may reveal about the specific individual in question here, but what it would reveal about other individuals and organisations if compared to future requests. The Commissioner agrees that without consistent application of the NCND principle, individuals would have the capacity to identify and utilise intelligence that could assist them in undertaking activities which threaten national security. If they are able to gather information which reveal those areas which are of interest to security bodies, it also then becomes possible for individuals who wish to avoid detection to take steps to avoid their activities becoming known. Conversely, if it can be ascertained which matters are not of interest, this may well be likely to give potential offenders the confidence to pursue related aims without fear of discovery. The Commissioner accepts that this evidences a strong public interest in maintaining the section 24(2) exemption in this case.
36. The Commissioner considers that the public interest in safeguarding national security is of such weight that it can only be outweighed in exceptional circumstances. She also places significant weight on the requirement to maintain consistency when applying a neither confirm nor deny response in these circumstances.
37. Taking all the above into account, the Commissioner accepts that in this case, the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether or not the MPS holds the requested information. She therefore finds that the public interest in maintaining the exemption at section 24(2) outweighs the public interest in complying with the duty imposed by section 1(1)(a).
38. In view of this, the Commissioner has not found it necessary to consider the application of the other exemptions cited.

## Right of appeal

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39. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

40. 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.
41. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**