

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 November 2018

**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 information about the National Front from the Metropolitan Police Service (the "MPS"). The MPS would neither confirm or deny ("NCND") whether it holds any information and cited the exemptions at sections 23(5) (information 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 information) of the FOIA. The Commissioner's decision is that the MPS was entitled to rely on section 23(5). No steps are required.

### Request and response

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2. On 10 January 2018 the complainant wrote to the MPS and requested information in the following terms:

*"I am sending this request under the Freedom of Information Act to ask for the following information:*

*All information held by what was then called Special Branch relating to the National Front, for the following years:*

- a) 1974
- b) 1975
- c) 1983

*I am aware of the policy which has normally been adopted in recent years by the Metropolitan Police in relation to FOI requests relating to the work of Special Branch and FOIA section 23. However this policy can no longer be maintained in the same way, in the light of the recent decision of the Upper Tribunal in (1) Corderoy & (2) Ahmed v (1) IC, (2) A-G & (3) CO [2017] UKUT 495 (AAC) - see*

*[https://assets.publishing.service.gov.uk/media/5a4b689a40f0b64cb\\_c261756/GI\\_0428\\_2017-00.pdf](https://assets.publishing.service.gov.uk/media/5a4b689a40f0b64cb_c261756/GI_0428_2017-00.pdf) .*

*In my opinion the information I have requested could be "disaggregated" (using the terminology of the UKUT decision) from material which is genuinely covered by section 23. It is therefore not exempt from disclosure for that reason.*

*If you are encountering practical difficulties with complying with this request, please contact me as soon as possible (in line with your section 16 duty to advise and assist requesters) so that we can discuss the matter and if necessary I can modify the request.*

*I would like the information to be emailed to me at ...*

*If you are able to supply some of this information more quickly than other items, please supply each item as soon as it becomes available.*

*If it is necessary for any reason to redact any information, please redact the minimum necessary and send me the rest of the document(s), explaining the legal grounds for each redaction".*

3. On 12 February 2018, following an extension to the time limit in which it considered the public interest, the MPS responded (albeit that this was not received by the complainant until it was re-sent on 22 March 2018). It refused to confirm or deny holding the requested information citing the following exemptions of the FOIA: 23(5), 24(2), 27(4), 30(3), 31(3) and 40(5).
4. Following an internal review the MPS wrote to the complainant on 25 May 2018. It maintained its position.

### **Scope of the case**

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5. The complainant contacted the Commissioner on 15 June 2018 to complain about the way his request for information had been handled. He commented that, in his view, there was no evidence to justify the "implausible claim that any harm to the public interest would result from

*stating that SB monitored the NF [National Front] at that time (over thirty years ago)".*

6. The Commissioner will consider the MPS's NCND position below in respect of the exemptions cited.

## **Reasons for decision**

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### **Neither confirm nor deny**

7. 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.
8. 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.
9. 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.
10. The MPS has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety citing six different exemptions. The issue that the Commissioner has to consider is not one of 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.
11. Put simply, the Commissioner must consider whether or not the MPS is entitled to NCND whether it holds any Special Branch files about the National Front for the three years stated.
12. The MPS has said that the information described in the request, if it was held, would be fully exempt from disclosure by virtue of sections 23(5), 24(2), 27(4), 30(3), 31(3) and 40(5) of the FOIA.
13. In refusing the request the MPS advised the complainant as follows:

*"This request attracts a NCND response, as to confirm or deny that Special Branch (SB) files are held in relation to the National Front for the periods 1974, 1975 and 1983 prevents disclosure of whether or not there has been any involvement of the security bodies and as such Sections 23(5) of the Act applies.*

*A neither confirm or deny response is necessary because if the MPS states that no information is held for one request about an individual or group but then exempts for another, requestors will obviously deduce what subjects or groups police currently have or had an interest in. By neither confirming nor denying that information is held prevents identification of particular areas of interest, disclosure of whether or not an investigation had taken place, its purpose, how and where information might have been gathered from and the type of people that may or may not be concerned. This could undermine National Security, any future investigations as it would enable targeted individuals or groups to become aware of police interest and such a confirmation would be a disclosure of personal information. This would help subjects avoid detection, and inhibit the prevention and detection of crime. Therefore, Sections 24(2), 27(4), 30(3), 31(3) and 40(5) of the Act are engaged.*

*Please note this response should not be taken to as an indication of whether or not the requested information is held".*

14. When requesting an internal review the complainant provided the following counter-arguments to the MPS:

*"First of all, the fact that the National Front was an organisation of interest to Special Branch during the relevant periods is already well established in the public domain. It was reported on extensively for example in the BBC TV series True Spies, broadcast in 2002. If you are not familiar with this programme, you can find a transcript here:*

*[http://news.bbc.co.uk/nol/shared/spl/hi/programmes/true\\_spies/transcripts/truespies\\_prog2.txt](http://news.bbc.co.uk/nol/shared/spl/hi/programmes/true_spies/transcripts/truespies_prog2.txt)*

*As you will see, Special Branch officers took part in this series.*

*In the light of this, a NCND response makes no sense whatsoever and cannot be justified.*

*Furthermore, picking up on some of the specific arguments in the refusal notice, I add the following points.*

*In terms of section 23, I note that the refusal notice provides no argumentation at all in relation to the recent Upper Tribunal decision I referred to. This reinforces my view that in light of the UT decision section 23 cannot be used to justify a NCND response.*

*As for the exemptions involving the public interest test, I do not accept in any way that it would harm the public interest to disclose whether the NF was of interest to Special Branch over 30 years ago. Apart from the facts that this claim is implausible in the first place and entirely unsupported by any evidence, it is clearly wrong, in that (as already noted) the position that the NF was being monitored by SB is already in the public domain (with the cooperation of SB officers), there is no evidence that any of this harm occurred, and even if any did then it has already happened.*

*The refusal notice states that NCND is the necessary response because otherwise "requestors will obviously deduce what subjects or groups police currently have or had an interest in". The reference to "currently" is absurd. No one can deduce any such thing from who was or was not investigated or monitored over 30 years ago. There is no harm to the public interest in disclosing who the Police had an interest in back in the 1970s/1980s. The information I have requested is all over 30 years old. It would reveal absolutely nothing about the current disposition or operations or tactics of MPS officers.*

*Furthermore I do not accept that section 40 is relevant to the NCND response, since indicating that an organisation was of interest in some way does not imply that all its members were of interest. It therefore in itself does not imply information about individuals. And on the other hand if it did imply this, then that implication is already in the public domain for the reasons already stated. I should also point out that the then party leader John Tyndall is now dead, as indeed are many of the party's activists from that time, and so in their case section 40 clearly would not apply. (I would accept that any relevant records you do hold might contain personal information which should be redacted from any disclosure, but that is not a reason for an NCND response)".*

15. In completing its internal review the MPS advised the complainant as follows:

*"The BBC documentary, 'True Spies,' which you refer to has the accounts of ex MPS officers, however it is not a MPS confirmation of Special Branch interest in the National Front. The comments made by these ex officers were made in a personal capacity as outlined in the press lines below:*

*"We assisted the BBC with its research on the subject, which is closely linked with the operational history of Special Branch. A number of ex-officers approached the Met asking for advice as to whether they should contribute, which we gave them. It is incumbent on them not to do anything that could compromise operational security. However, ex-officers are private individuals and the final decision as to whether to give interviews is up to them".*"

16. In responding to the points the complainant had made about the recent Upper Tribunal case it said:

*"The ICO Commissioner summarised the use of Section 23(1) in this case by stating:*

*62. Returning to what we regard as the central question we have concluded that although we accept that the Disaggregated Information was and is of interest to security bodies for their statutory purposes and, as a matter of ordinary language, can be said to relate to them, Parliament did not intend such information to be covered by the absolute section 23 exemption. The reasons for this are that (i) the interest of the security bodies in such information is shared by Parliament and the public because it relates and is confined to the legality of Government policy, and so (ii) such information falls obviously within the qualified exemptions in sections 35 and 42 as being legal advice on the formulation of Government policy.*

*The Review considers that the Upper Tribunal decision you have referenced is not relevant to your request for information as it relates to an exceptional case which is not reliant on a neither confirm nor deny stance but to the application of exemption under Section 23(1) - 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). The Review considers that a precedent has not been set in this case".*

#### *The Upper Tribunal Case*

17. The Upper Tribunal ("UT") case which has been cited by the complainant related to three requests for information made by two people concerning a precision airstrike carried out in Syria. The First Appellant made a request for correspondence and communications relating to the approval of the drone strike. The Second Appellant made two requests for the "legal advice" which the Prime Minister referred to when making his announcement to Parliament on the strike. In all three cases the public

authority confirmed that information was held but refused to disclose it citing, amongst other exemptions, section 23(1) of the FOIA.

18. The UT considered disaggregation of the information requested so that it could be considered outside the remit of the absolute exemption afforded by section 23(1). The UT concluded that it could be disaggregated saying: "*...although we accept that the Disaggregated Information was and is of interest to security bodies for their statutory purposes and as a matter of ordinary language can be said to relate to them, Parliament did not intend such information to be covered by the absolute section 23 exemption*". (Instead it concluded that the requested information fell: "*obviously within the qualified exemptions in sections 35 and 42 as being legal advice on the formulation of government policy*").
19. However, in the case here, the question does not relate specifically to information which the MPS has confirmed, or denied, holding, rather it concerns the MPS maintaining an entitlement to NCND whether it actually holds any information based on the exemptions cited – which includes section 23. Therefore, in the Commissioner's view, the UT case referred to by the complainant is not relevant in this particular case as it is not possible to disaggregate information without confirming or denying its existence in the first place.

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

20. 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)".*

21. 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.
22. The full list of bodies specified in section 23(3) can be viewed online<sup>1</sup>.

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

23. 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 disclosure of the confirmation or denial 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.
24. 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.
25. The Commissioner's published guidance<sup>2</sup> 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.
26. In engaging this exemption the MPS explained its position as follows:

*"To provide any indications through confirmation or denial that any information is or is not held, would itself constitute the disclosure of exempt information, as such any indications would amount to a statement that relates to a security body or bodies. The purpose of applying this exemption is to avoid confirming or denying the involvement of a security body and thus to maintain a position which safeguards any activities.*

*It has been established at Information Tribunal [EA/2010/0008] and reinforced in a later decision notice issued by the ICO FS50258193, "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"*

[https://ico.org.uk/media/action-weve-taken/decision-notices/2011/594104/fs\\_50258193.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2011/594104/fs_50258193.pdf)

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1182/security\\_bodies\\_section\\_23\\_foi.pdf](https://ico.org.uk/media/for-organisations/documents/1182/security_bodies_section_23_foi.pdf)



*... the information held would relate to one of the bodies in sub-section (3) i.e the Security Service.*

*As mentioned previously, owing to the very sensitive area of policing that Special Branch operates within, often in conjunction with other Section 23 bodies, it is vital that this exemption is utilised.*

*To further explain the relevance of section 23(5) in this case, the following sections discuss the roles of Special Branch and the security bodies, and the relationship between them.*

*In 2006 the functions of Special Branch were absorbed into a unit called the Counter Terrorism Command (CTC) also known as S015, which fulfilled its role and today sits under The National Counter Terrorism Policing Headquarters (NCTPHQ).*

#### *The role of Special Branch*

*The function of Special Branch is to undertake covert work to acquire and develop intelligence to protect the public from threats to national security, especially terrorism and other extremist activity. Within this remit, the primary focus of Special Branch units is to provide support for the work of the Security Service. This close working or partnership relationship is clearly articulated in the 2004 Home Office Guidelines on Special Branch work which state:*

*"In particular, Special Branches assist the Security Service in carrying out its statutory duties under the Security Service Act 1989 – namely the protection of national security and, in particular, protection against threats from terrorism, espionage, sabotage, proliferation of weapons of mass destruction and from actions intended to overthrow or undermine Parliamentary democracy by political, industrial or violent means. This "close-cooperation" has been identified as making "a crucial contribution to the protection of national security".*

*<https://www.gov.scot/Resource/Doc/47171/0025036.pdf>*

*Above and beyond support for the Security Service, Special Branch "also supports the work of the Secret Intelligence Service in carrying out its statutory duties on support of national security". This body is tasked with collecting intelligence worldwide to support national security and the economic well-being of the UK.*

#### *The role of the security bodies*

*The request exclusively relates to Special Branch. Due to the national security remit of Special Branch, information such as*

*individuals/groups who are/were of interest to Special Branch directly or indirectly to national security. Furthermore, inferences could be made in relation to security bodies based upon information held or not held by Special Branch.*

*[Name redacted]'s request specifically asks for information regarding a group or target of Special Branch interests which indirectly relates to a section 23 body due to the close working relationship between Special Branch and the security services (the purpose of Special Branch is to support the work of the security services and to maintain public order). The security services considers documents for release to the national archives that are 50+ years old because of the inferences that can be made in relation to groups that may be of interest today. To release Special Branch files less than 50 years old would undermine the policy of section 23 bodies".*

27. The argument from the MPS in respect of this exemption is, therefore, that if the information specified in the request did exist, it is very likely that it would have come from, or be related to, a section 23(3) body, namely the Security Service. 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 MPS holding relevant information that was not related to, or supplied by, a section 23(3) body would undermine its reliance on section 23(5).

28. 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, 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)*

29. 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).

30. In this case, the Commissioner considers it clear that the subject matter of the request – involvement with the National Front – is within the area

of the work of bodies specified in section 23(3). She also accepts that 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.

31. 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.
32. 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**

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33. 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)

34. 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.

35. 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**  
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**SK9 5AF**