

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 February 2019

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested Security Service-related information from the Home Office ("HO"). The HO advised the complainant that it does not hold the information.
2. The Commissioner's has considered whether, at the time of the request, the information was held by the HO. Her decision is that, on the balance of probabilities, the HO did not hold the requested information. No steps are required.

Request and response

3. On 25 January 2018 the complainant wrote to the HO and made a three part request. As the third part is the only part being considered in this decision notice, this is all that is included below:

"I have three separate applications to make under the Freedom of Information Act 2000 for files under the legal control and responsibility of The Home Office.

...

My third, separate and specification application concerns any information and files held by the Security Service, otherwise known as MI5, concerning anything to do with University of London, Goldsmiths' College, the activities of staff and students, relations with the Soviet Union, membership and activities of staff and students who were members of the Communist Party, and during the 1930s any members of the British Union of Fascists. I am

seeking information and files concerning the period between 1911 and 1989. I respectfully submit that the Home Office is the relevant public body to apply to for this information for this period because prior to Security Service Act 1989, the Security Service did not have a separate legal statutory existence as a security body defined by section 23 of the FOI legislation. MI5/Security Service was legally part of the Home Office jurisdiction and responsibility, and, therefore, the public interest balancing exercise is engaged. Any information held by MI5/Security Service prior to the enactment of the Security Service Act 1989 is, therefore, the legal responsibility of the Home Office. Any such information concerning Goldsmiths' College, its students and staff, and relations with the Soviet Union and the activities of student and staff members of the Communist Party will be of intense historical and public interest in relation to my project to research and write the history of the College".

4. The HO responded on 20 February 2018. It advised:

"... you have sent this request to the Home Office, but you refer to any information and files held by the Security Service. The Home Office does not hold information on behalf of the Security Service, and, as you are aware, the Security Service are not subject to the Freedom of Information Act".

5. On 19 April 2018 the complainant requested an internal review of this part of his request.
6. Following the Commissioner's intervention, the HO provided its internal review on 22 October 2018. It maintained its position.

Scope of the case

7. The complainant initially contacted the Commissioner on 23 September 2018 to complain about the way his request for information had been handled; this was prior to him receiving a response to his request for an internal review.
8. On 8 October 2018 the Commissioner chased a response from the HO; it provided an internal review on 22 October 2018.
9. The complainant then submitted a further complaint to the Commissioner on 29 October 2018. In doing so he referred to:

"... interference with the freedom to receive information drawn down by not only Article 10 of the Human Rights Act, but also under Articles 11, 52 and 47 of the Charter of Fundamental Rights of the European Union.

Historical information collected and retained pertaining to events and activities before 1989 cannot be shielded from public interest consideration by 'absolute statutory exemption.'

The Charter of Fundamental Rights of the European Union states under Article 11 'Freedom of expression and information

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'

The right to receive and impart information without interference by public authority is being breached and abrogated by your refusal to confirm or deny and exclude a public interest balancing exercise on whether the information should be released.

The Charter further states under Article 52:

'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

The Charter is binding in the context of this FOI application. The maintenance of the statutory exemption on so much historical information is wholly disproportionate under Article 47 Right to an effective remedy in that they deny a proper and fair evaluation of a request for information guaranteed as a standing right under the Charter.

There should be a public interest balancing act on information so old and historical and the fact that there has not been means there has been a breach of Article 47.

My other point that the Home Office has statutory responsibility to hear and deal with FOI requests related to the operations of MI5 prior to its statutory constitution by legislation in 1989 also still holds. With the greatest of respect the interpretation of the FOI statute of 2000 that information held prior to this demarcation line is covered by FOIA absolute exemption is misconceived. The statute has clarity of expression and cannot be retrospective on information collected and held by a part of the Home Office not separately recognised in law and specified by its actual status them [sic] under the terms of the FOIA. The Security Service, otherwise known as MI5, did not continue as the Security Service/MI5 after the

1989 legislation. It was originated in law as a statutory security body by the 1989 Act. Previously it had merely been part of the Home Office. A public interest balancing act, must, therefore, apply".

10. On 7 December 2018, during the Commissioner's investigation, the HO provided a more detailed response to the complainant. It maintained that the information requested is not held and explained:

"... I wish to provide you with a supplementary explanation in addition to that which has been provided to you which may allow your complaint to be resolved informally.

It may help if I explain that whilst the Security Service Act 1989 (SSA) put the Security Service on a statutory footing, the Service existed as a separate entity under prerogative powers prior to commencement of the SSA. This is acknowledged in section 1(1) of the SSA itself, which provides that "there shall continue to be a Security Service (in this Act referred to as "the Service") under the authority of the Secretary of State". Therefore, the Security Service has continued in existence as a single and distinct entity for the duration of its history.

The fact that the SSA confirmed that the Service existed (and continues to exist) under the authority of the Secretary of State does not mean that the Service is (or at any time has been) part of any ministerial government department. On the contrary, the Service is a statutory organisation which is legally distinct from any other government department. For the duration of its history prior to the enactment of the SSA, the Service was a distinct organisation established under the Crown. The Service's separate legal existence was explicitly acknowledged in a directive issued on 24 September 1952 by Sir David Maxwell Fyfe, the then Home Secretary, which directed the Director-General of the Service that:

"In your appointment as Director-General of the Security Service you will be responsible to the Home Secretary personally. The Security Service is not, however, a part of the Home Office. On appropriate occasion you will have right of direct access to the Prime Minister."

Just to clarify, the Security Service is not a public authority as defined in section 3(1) and Schedule 1 of the FOIA. Therefore, the general right of access to information contained in section 1 of the FOIA does not apply to information held by the Security Service. In the case of information held by other public authorities (including the Home Office), section 23(1) of the FOIA provides for absolute exemption of information that was "directly or indirectly supplied to

the public authority by, or relates to, any of the bodies specified in subsection (3)". Subsection (3) refers to the Security Service by name.

For the avoidance of doubt, the exemption in section 23(1) is not restricted to information which was supplied by, or relates to, the Security Service in the period after the commencement of the SSA. It covers all information which was supplied by, or relates to, the Service at any time during its history. As is made clear above, the Service has continued to exist as a single and distinct entity for the duration of its history".

11. The Commissioner invited the complainant to submit his views regarding this response. In doing so the complainant argued that, in his view, the HO has statutory responsibility to hear and deal with FOI requests related to the operations of MI5 prior to its statutory constitution by legislation in 1989. Some of his detailed arguments include the following:

"The fact of the matter is that the Secretary of State for the Home Office was legally responsible for the Security Service as it was up until 1989 and the administrative process and constitutional oversight and executive management had to be operated by the government department existing to serve all Home Secretaries up until 1989. A Home Secretary has not operated as a single autonomous individual constitutionally, legally and executively. What Sir David Maxwell Fyfe was stating in very clear terms is that the then Security Service was separate and not part of the open and overt executive operation of the Home Office as a government department. That is not to say that the executive role of the Home Secretary was not operating administratively, legally and constitutionally with the Home Office in terms of its legal and administrative responsibility for the then Security Service.

The directive confirms, and so does your supplementary information that the Security Service did not have statutory constitution and identity prior to SSA 1989. It was a different public body to the Security Service so constituted by that legislation. The legislation in statutory language, as you so helpfully point out, under Section 1(1) of SSA states that there 'shall continue to be a Security Service (in this Act referred to as "the Service") under the authority of the Secretary of State". This very helpfully confirms that the Home Secretary had constitutional and legal responsibility for the Security Service as it was prior to SSA 1989. The use of the word 'continue' confirms and consolidates the concept of continuity in respect of what happened before in the relationship between the Security Service and the Home Secretary dependent on and

operating with a Home Office infrastructure providing the necessary civil service executive administration so to do.

That the Security Service was legally and constitutionally different prior to SSA 1989 to that which it became after SSA 1989 is confirmed and rooted in all aspects of the statutory language and terms of the Freedom of Information Act 2000 (FOIA 2000). This legislation addresses the facticity of government bodies and departments as they were at the time of legislative enactment. If it were any different the statutory construction would be explicit, clear and inconvertibly stated. There is absolutely no reference at all in the FOIA 2000 to the status of information gathered and retained and relating to the Security Service as it existed in non-statutory form and as a different governmental and executive body prior to SSA 1989".

Article 10 of the Human Rights Act

12. The complainant cited interference with his rights under Article 10 of the Human Rights Act 1998 in his complaint to the Commissioner. The Commissioner initially notes that the HO is advising that it does not hold the requested information. In that respect, Article 10 would not be engaged as by stating that the information is not held, the HO is not denying the complainant access to information.
13. In the alternative, even if the information were held, it is the Commissioner's opinion that the complainant's rights under Article 10 would not be infringed. This is because the complainant could alternatively request the information under common law and such a request would satisfy the requirements of Article 10. If a request, formulated in this way, were then refused and the complainant considers that he has been denied access to information in breach of Article 10, a judicial review of that decision would provide an effective remedy.

Charter of Fundamental Rights of the European Union

14. In addition, it is the Commissioner's view that she is not under a specific duty to give effect to any provisions of the Charter of Fundamental Rights of the European Union when making FOIA decisions. Whilst she would accept that its Articles are important concepts for the good of society, and will be a strong factor in the public interest test where relevant, Article 51 of the Charter makes clear that the Charter applies to national bodies *"only when they are implementing Union law"*. As FOIA is domestic law, she does not consider that the Charter applies.
15. The Commissioner will consider below whether or not the HO holds the requested information.

Reasons for decision

Section 1 – general right of access to information

16. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information within the scope of the request, and if so, to have that information communicated to him.
17. Section 1(4) states that the information to be communicated to the applicant under subsection 1(1)(b) is the information in question **held at the time** when the request is received.
18. The complainant is of the opinion that the HO had jurisdiction for the Security Service prior to the Security Service Act 1989 which is why, in his view, he thinks it holds the requested information. When asking for an internal review, he stated:

"I hold to my original argument that as this request concerns information when the legal constitution of the Security Service was within the Home officer [sic] prior to the Security Service Act 1989, you are the proper legal body with locus standi on this matter in relation to the Freedom of Information Act 2000".

19. The HO has advised the complainant that the Security Service was never part of the HO and, therefore, that it does not hold the information requested.
20. The Commissioner would first like to clarify that she must consider the position at the time a request is received by a public authority, as per section 1(4) of the FOIA cited above. It is not necessary for her to consider whether or not the requested information may have been previously held by a public authority – which would generally be more than 30 years ago in this case.
21. The Commissioner is mindful that when she receives a complaint alleging that a public authority has stated incorrectly that it does not hold the requested information, it is seldom possible to prove with absolute certainty whether the requested information is held. In such cases, the Commissioner will apply the normal civil standard of proof in determining the case and will decide on the 'balance of probabilities' whether information is held.
22. Therefore, the Commissioner has sought to determine whether, on the balance of probabilities, the HO holds any recorded information within the scope of the request.

23. The Commissioner will take into account the complainant's evidence and arguments. She will consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.
24. The HO has clearly argued that it does not have, and never has had, 'ownership' of the Security Service. Consequently it does not, and did not at the time of the request, hold the requested information.
25. The complainant is of the opinion that until 1989 the HO did have 'ownership' of the Security Service.
26. Accordingly the Commissioner asked the HO to explain what enquiries it had made in order to reach this position. In response to these enquiries she was provided with the following details.
27. The HO advised that it had liaised with two business areas. The primary area was its Historic Review Team (HRT) which is part of the 'Knowledge & Information Management Unit', having responsibility for information and records management. The second area contacted was the Office for Security & Counter-Terrorism (OSCT). It considered these to be the most relevant areas to contact, stating:

"HRT are considered the primary area because they have responsibility for the Department's compliance with the Public Records Act 1958. In particular, they are responsible for the management of historical files – these are defined as those which are more than 20 years old and would therefore cover in entirety the period specified in the complainant's request. Therefore, if the requested information was to be held, they would be the part of the Home Office most likely to hold it.

... I also contacted the OSCT because they are considered to be the closest policy area of the Home Office most likely to hold the requested information. The reason for this is because the complainant's request referenced the Security Service; and that matters that relate to the Security Service are also likely to involve security, and as security matters are one of OSCT's responsibilities they would be the second most appropriate area to contact".

28. The HO advised that if any information was to be held it would be in a manual / paper form because of the age of the date range (1911-89) specified in the request.

29. The HO advised that both business areas had conducted searches using the terms 'Goldsmith', 'communist', 'communism', 'fascist' and 'fascism', with OSCT making an additional search with the term 'college'.
30. The results of the searches undertaken are below.

HRT search

31. The HO advised the Commissioner as follows:

"HRT manage the Home Office's in-house file-tracking database which holds records of listed files including those that have been destroyed or transferred to another government department, or to The National Archives.

The searches undertaken returned a number of matches – in terms of the titles of files held – but none of these file titles were relevant to the subject-matter. Several of the files were recorded as being destroyed in line with our retention policies but again, the titles of these files did not suggest that they were relevant to the request. With this in mind, no recorded information was ever held relevant to the scope of the complainant's request but was deleted / destroyed.

The scope of the request fell well within the Department's paper era and so it was reasonable to conduct a search of paper records. For this reason, the searches did not encompass information held locally on personal computers used by key officials, nor on networked resources, and neither on emails".

OSCT search

32. The HO advised the Commissioner as follows:

"Because of the age of the material requested and because of the way that this material is stored by this area, this was a paper-based search only. The area confirmed that no material was found and because the scope of the request falls was in the paper era, the searches did not encompass information held locally on personal computers used by key officials, nor on networked resources, and neither on emails".

The Commissioner's view

33. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with

absolute certainty that it holds no relevant information. However, as set out above, the Commissioner is required to make a finding on the balance of probabilities.

34. The complainant's view is that the HO was responsible for the Security Services prior to 1989 and therefore it must hold the information requested. The HO position is that it is not, and never was, responsible for the Security Services so has never held the information. However, the issue for the Commissioner to consider here is not one of who was responsible for what prior to 1989. She must consider, within the terms of the FOIA, whether or not, on the balance of probabilities, the HO held the requested information at the time the request was made.
35. The Commissioner considers that the HO contacted the relevant business areas and that they conducted searches using appropriate terminology to ascertain whether or not any information was held in respect of the request.
36. Based on the explanations provided above the Commissioner is satisfied that, on the balance of probabilities, no recorded information within the scope of the request was held at the time of the request. She is therefore satisfied that the HO has complied with the requirements of section 1 of the FOIA in this case.

Other matters

37. Although they do not form part of this notice the Commissioner wishes to highlight the following matter of concern.

Internal review

38. Part VI of the section 45 Code of Practice states that it is 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. 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 considers 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 take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases, which this request was not.
39. The Commissioner would like to remind the HO that she routinely monitors the performance of public authorities and their compliance with the legislation. Records of procedural breaches are retained to assist the

Commissioner with this process and further remedial work may be required in the future should any patterns of non-compliance emerge.

40. Although she notes that there are sensitivities around this case because of the subject matter, she is nevertheless concerned that it took over six months for an internal review to be completed.

Right of appeal

41. 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

42. 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.
43. 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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