

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 December 2019

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 Special Branch files about the Movement for Colonial Freedom and the Kenya Provisional Committee from the Metropolitan Police Service (the "MPS"). The MPS refused to confirm or deny whether it holds any information, citing 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) (criminal investigations), 31(3) (law enforcement) and 40(5) (personal information) of the FOIA.
2. The Commissioner's decision is that section 23(5) of the FOIA is engaged. No steps are required.

Background

3. By way of background, the MPS has explained to the Commissioner:

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

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 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'¹.

The support work provided by Special Branch has been identified as making a crucial contribution to the protection of National Security. 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 UK²".

4. The School of Oriental and African Studies Archives, University of London, holds information about the Movement for Colonial Freedom and the Kenya Provisional Committee³. According to its website:

"The Movement for Colonial Freedom (MCF) was founded in 1954. Its aim was to campaign in Britain for the freedom of colonial subjects from political and economic domination, and to unify the activities of smaller organisations that were concerned with these issues. It was an amalgamation of the British Branch of the Congress Against Imperialism, the Central Africa Committee, the Kenya Committee and the Seretse Khama Defence Committee ... The MCF was run from a succession of offices in central London ..."

Request and response

5. On 3 April 2019, the complainant wrote to the MPS and made a request for the following information:

"Special Branch files on the Movement for Colonial Freedom and the Kenya Provisional Committee, 1950-1960".

¹ <http://www.legislation.gov.uk/ukpga/1989/5/section/1>

² <https://www.sis.gov.uk>

³ <https://archiveshub.jisc.ac.uk/search/archives/100082dc-a3cc-3d57-94f8-0e7c4aac4926>

6. On 24 May 2019, the MPS responded. It refused to confirm or deny that the requested information was held, citing the following exemptions of the FOIA: 23(5), 24(2), 27(4), 30(3), 31(3) and 40(5).
7. The complainant requested an internal review on 4 June 2019.
8. The MPS provided an internal review on 3 July 2019 in which it maintained its position.

Scope of the case

9. The complainant contacted the Commissioner on 11 July 2019 to complain about the way his request for information had been handled. As he did not submit any specific grounds of complaint, the Commissioner advised that she would consider his request for an internal review to represent his views.
10. The Commissioner will therefore consider the application of exemptions to the request.
11. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. The FOIA is concerned with transparency and provides for the disclosure of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. The FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

Reasons for decision

Neither confirm nor deny ("NCND")

12. Section 1(1)(a) of the 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 exempt information. In these circumstances, section 2(1) of the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.
13. 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 for NCND in most cases, will be

theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.

14. 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.
15. 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 solely the issue of whether or not the MPS is entitled to NCND whether it holds any information of the type requested by the complainant.
16. Put simply, the Commissioner must consider whether or not the MPS is entitled to NCND whether it holds any Special Branch files about the Movement for Colonial Freedom and/or the Kenya Provisional Committee as per the requested information.
17. 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.
18. In refusing the request the MPS advised the complainant as follows:

"This request attracts a NCND response, as to confirm or deny that information is held prevents disclosure of whether or not there has been any involvement of the security bodies and that national security issues are affected and as such Sections 23(5) and 24(2) of the Act applies. In addition, confirmation or denial that information is held would highlight whether the MPS had an interest in this committee and therefore its members; and as such, if an overseas investigation took place, which would therefore identify policing operations. This would hinder the prevention and detection of crime and could upset international relations and therefore Sections 27(4), 30(3) and 31(3) of the Act are engaged. In addition, to confirm or deny that Special Branch held information relating this Committee, would therefore infer that information were held on its members and as such specific individuals and this would be a breach of the Data Protection Act. Therefore, Section 40(5) applies.

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

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

"... MI5 has already released files detailing its surveillance on the Movement for Colonial Freedom and the Kenya Provisional Committee. See, e.g., the following files in the National Archives: KV 2543-2552, KV 2/3046, KV 2/4045, KV 2/4055-4058. Although MPS is not necessarily bound by MI5's determination of "national security" under Sections 23 and 24, the prior release of files covering the same subjects casts doubt on the possibility of national security damage from additional disclosure.

... Section 27(4). Although the response to my request refers to "overseas investigations," both organizations were based in London, its members were overwhelmingly British nationals resident in the United Kingdom, and its activities were focused on political activity in the United Kingdom. In addition, I would be happy to modify my request to exclude any material specific to "overseas investigations."

... Sections 30(3) and 31(3). The response to my request states that "confirmation or denial that information is held would highlight whether the MPS had an interest in this committee and therefore its members." However, documents in the MI5 files listed already below confirm that Special Branch was, indeed, investigating these organizations and its members. In addition, at least one other file in the National Archives (DPP 2/2603) confirms that the Special Branch was investigating members of these organizations. The duty to confirm — relevant to Sections 23(5) and 40(5) as well — is therefore a moot issue. Because of the Special Branch documents contained in these files, furthermore, it seems likely that MPS would have had approve their public release, again calling into question the assertion of "national security" under Sections 23 and 24 as well as the criminal investigation provisions of Sections 30 and 31.

... Section 30, which is subject to the public interest test. My request covers materials which are at least 60 years old and concern the activities of political groups which have never been criminally charged; one of them, the Kenya Provisional Committee, ceased to exist after 1960 at the latest. The possibility of damage to ongoing or future investigations is remote, to say the least. The possibility of damage to sources and methods, likewise remote at this late date, is made even less likely by the prior release of the files listed above.

As a professional historian, I can attest that any Special Branch files on these organizations would have immense historical significance.

They would be uniquely valuable sources on domestic British politics and anticolonial activism in the 1950s (to say nothing of the public interest in understanding police surveillance of domestic political activity).

Finally, the invocation of Section 40 is problematic for several reasons. One is the prior disclosure of files listed above. Another is the fact that members of the Movement for Colonial Freedom and the Kenya Provisional Committee made no secret of their membership in these organizations; they held public meetings, signed petitions, signed pamphlets, and so on. If Special Branch investigated members purely on the basis of their membership — perhaps improperly — MPS cannot then use the "criminal offence data" exemption to conceal the fact of an investigation. It is relevant in this connection that the government in 1954 and again in 1956 issued legal guidance holding that political activities by members of the two organizations could not be considered criminal: see LO 2/231 and DPP 2/2603 in the National Archives".

20. In completing its internal review, the MPS advised the complainant that it needed to use NCND in a consistent manner and provided him with extracts from the Commissioner's guidance⁴ to support its rationale.

21. The MPS also explained to the Commissioner that:

"To confirm or deny whether or not information is held related to files generated by MPS Special Branch on the Movement for Colonial Freedom, the Kenyan Provisional Committee, or in fact any organisation or individual, would clearly indicate the nature and scale of police involvement in the area of preventing and detecting crime. This is also the case where organisations and / or individuals may have direct or potential links to matters concerning national security or where they have any form of involvement with or linkage to the security services.

It should be recognised that the work that Special Branch conduct is mostly within a very sensitive area of policing and that is why emphasis, albeit on a case-by-case basis, is placed on the impact of confirmation or denial of this type of information in the public domain".

⁴ https://ico.org.uk/media/for-organisations/documents/1166/when_to_refuse_to_confirm_or_deny_section_1_foia.pdf

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

22. 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)".

23. Section 23(5) of the FOIA 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. The full list of bodies specified in section 23(3) FOIA can be viewed online⁵.
24. Section 23(5) FOIA 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(3) of the FOIA.
25. 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.
26. The Commissioner's published guidance⁶ on this exemption states that a request must be "*in the territory of national security*" in order for section 23(5) of the FOIA 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.

⁵ <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

⁶ https://ico.org.uk/media/fororganisations/documents/1182/security_bodies_section_23_foi.pdf

27. At internal review the MPS cited previous decision notices where the Commissioner has accepted that that section 23(5) may be applied to Special Branch work, for example⁷:

"...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."

And:

"... 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."

28. In its internal review the MPS further advised that it had been guided by the Commissioner's decision notice FS505866170⁸ which states:

"The requested information specifies 'Special Branch files' as its focus. It is therefore patently clear that any information held would directly relate to Special Branch work. The Commissioner is satisfied that there is a close working relationship between the MPS's Special Branch and the security bodies and ... the Commissioner has previously stated that he is satisfied that (except on rare occasions) such work will necessarily involve close working with security bodies and regular sharing of information and intelligence.

In light of the MPS's relationship with the security bodies and the wording of the request, the Commissioner finds that, on the balance

⁷ https://ico.org.uk/media/action-weve-taken/decisionnotices/2012/768126/fs_50443643.pdf

⁸ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043590/fs_50566170.pdf

of probabilities, the requested information, if held, would relate to or have been supplied by one or more bodies identified in section 23(3) FOIA.

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 of this request. The need for the MPS to adopt a position on a consistent basis is of vital importance in considering the application of an NCND exemption and he is satisfied that section 23(3) is engaged. The Commissioner has not therefore needed to consider the application of the other exemptions cited”.

29. In respect of the complainant saying that there is information in the public domain confirming MI5 surveillance of the two organisations, the MPS advised him that although there is information in the public domain acknowledging the membership of specific individuals in certain groups that this:

“... does not automatically infer that all or any of these groups and organisations that they belonged to were of interest to MI5 or any other security body”.

30. The MPS has explained that the request relates exclusively to Special Branch, which means that, due to the national security remit of Special Branch: *“information such as groups and / or individuals who are / were of interest to Special Branch, directly or indirectly relates to national security”.* It also added that inferences could be made in relation to security bodies based upon information held or not held by Special Branch.
31. 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) FOIA 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) of the FOIA.
32. As referred to by the MPS above, 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) FOIA body and, therefore, that section 23(5) FOIA 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)

33. The approach of the Commissioner on this point is that she accepts the Tribunal's view that the balance of probabilities is the correct test to apply. This means that for section 23(5) of the FOIA to be engaged, the evidence must suggest to a sufficient degree of likelihood as provided by the balance of probabilities (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).
34. The subject matter being considered in this case concerns any files that may have been specifically generated or held by Special Branch in respect of the Movement for Colonial Freedom and the Kenya Provisional Committee during a specified time period.
35. In this case, the complainant has argued MI5 has already released files on this subject matter and that documents in these files confirm that Special Branch was investigating these organisations and its members. Whilst the complainant is therefore of the view that the duty to confirm or deny is a "moot issue" because of the Special Branch documents he says have been disclosed, this is not something which the Commissioner can take into consideration. The Commissioner only needs to consider whether or not the requested information, if held, would be in the area of work of bodies specified in section 23(3). If it is, then the MPS is entitled to rely on section 23, which is an absolute exemption and requires no public interest test.
36. The Commissioner notes that the documents the complainant says he has located were not disclosed by the MPS, rather, they are Security Service disclosures. Therefore, the way in which the complainant says he has been able to locate them, provides strong evidence to uphold the MPS's view that such information, if it were held, would indeed relate to the Security Service, as the documentation which the complainant says evidences Special Branch involvement is contained within the disclosed Security Service files.
37. The Commissioner therefore 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) of the FOIA. Her conclusion is therefore that section 23(5) of the FOIA is engaged.

Reference: FS50857615



38. In light of her findings in respect of 23(5) of the FOIA, the Commissioner has not gone on to consider the MPS's reliance on the other exemptions cited.

Right of appeal

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@justice.gov.uk

Website: 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

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