

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 20 January 2011**

**Public Authority:** Metropolitan Police Service  
**Address:** New Scotland Yard  
Broadway  
London  
SW1H 0BG

### Summary

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The complainant requested, from the Metropolitan Police Service, documents compiled by its Special Branch on the BBC in the 1990s. The MPS replied, refusing to confirm or deny whether it holds information relevant to the request, ultimately citing the exemptions in sections 23(5) (information relating to security bodies), section 24(2) (national security) and section 31(3) (law enforcement). The Commissioner finds that section 23(5) is engaged and so the MPS is not required to confirm or deny if it holds information within the scope of the request. He requires no steps to be taken.

### The Commissioner's Role

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1. 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 Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### Background

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2. Within the police service, Special Branches acquire and develop intelligence to help protect the public from national security threats, especially terrorism and other extremist activity. In this way they play

- a role in protecting the public and maintaining order, promoting community safety and cohesion.
3. Until 2006, Special Branch was the Metropolitan Police Service (MPS) unit concerned with national security. It was divided into two Operational Command units, one essentially concerned with counter-terrorist and counter-extremist operations and the other providing security at international ports in the MPS area and protection nationwide to public figures and important foreign visitors who did not come under the aegis of Royal Protection or Diplomatic Protection.
  4. A new MPS unit, Counter Terrorism Command (CTC) was created in 2006. This unit took over the roles and responsibilities of Special Branch and the Anti-Terrorist Branch. CTC is also known as "SO15", an internal police service designation reflecting the fact that it is one of a number of Specialist Operations branches within the Metropolitan Police Service.

## The Request

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5. On 9 March 2009, the complainant wrote to the Metropolitan Police Service (MPS) requesting:  
  
*"complete copies of any and all documents compiled and held by the Special Branch of the Metropolitan Police Service on the British Broadcasting Corporation (BBC) between January 1 1990 and December 31 1999".*
6. The MPS responded on 31 March 2009. In this correspondence, the MPS told the complainant it could neither confirm nor deny (NCND) that it held information relevant to his request. In this respect, it cited the exemptions at section 23(5) (information relating to security bodies), section 24(2) (national security), section 31(3) (law enforcement), section 38(2) (health and safety) and section 40(5) personal information.
7. The complainant requested an internal review on 31 March 2009.
8. The MPS responded on 17 June 2009. In its internal review correspondence, it told the complainant that *"there is no general ban on releasing Special Branch files on high profile organisations and individuals"*. It advised him that each request is dealt with *"on a case-by-case basis"*.

9. The MPS confirmed that it was continuing neither to confirm nor deny whether it held information relevant to the complainant's request. However, it varied its decision in relation to the exemptions cited. It confirmed that it was still relying on the exemptions at sections 23(5), 24(2) and 31(3) but that it was no longer citing the exemptions at sections 38(2) and 40(5). However, it cited an additional exemption, namely section 30(3) (investigations and proceedings).

## The Investigation

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### Scope of the case

10. On 6 July 2009, the complainant contacted the Commissioner to complain about the way his request for information had been handled. In this correspondence, the complainant expressed his belief that there is a public interest "*in knowing how the BBC was subject to Special Branch attention and why this was done*".
11. The complainant referred to a previous Decision Notice, (FS50231561), issued by the Commissioner in connection with a request he had made to the MPS for similar information to that requested in this request.
12. Since the issuing of that Decision Notice, the issue of whether the exemption provided by section 23 applies when a request is made specifically for information relating to Police Special Branch activities has been considered further in cases before the First-tier Tribunal (Information Rights) ("the Tribunal"). The evidence presented in these other cases, some of which was given in closed session (with press, public and non security-cleared personnel excluded) is taken into account in the section 23(5) analysis in this Notice.

### Chronology

13. The Commissioner wrote to the MPS on 8 January 2010 asking it to provide him with further information about its decision to apply the exemptions cited and, in connection with the qualified exemptions, why the public interest favoured the maintenance of those exemptions.
14. The MPS provided the Commissioner with a comprehensive response on 26 February 2010. Further to this correspondence, the MPS telephoned the Commissioner's office to clarify that it was no longer citing the exemption at section 30(3).

15. In line with this, the focus of the Commissioner's investigation in this case has been on whether or not the MPS correctly cited the exemptions at sections 23(5), 24(2) and 31(3) of the Act.

## Analysis

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### Exemptions

16. Under section 1(1)(a) of the Act, any person making a request for information to a public authority is entitled to be informed whether it holds information of the description specified in the request. That duty to confirm or deny is, however, subject to the proviso in section 2(1)(b) that section 1(1)(a) does not apply where any provision in Part II of the Act confers an absolute exemption or where, *"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 public authority holds the information"*.
17. The full text of Section 1(1)(a) can be found in the Legal Annex at the end of this Notice.
18. Where a public authority has relied on an exemption which involves a refusal to confirm or deny whether information is held, the Commissioner must ensure that his Decision Notice does not give any indication as to whether or not information is in fact held by the authority. As a consequence, it is not always possible for the Commissioner to comment in great detail on the reliance by a public authority on the exemption concerned.
19. The general principles governing the Commissioner's approach to neither confirm nor deny cases is set out in his *Freedom of Information Act Awareness Guidance No 21*:
  - where information is or is not held, but falls or would fall within an absolute exemption such as section 23, the public authority should consider in the particular case whether the effect of the exemption in fact relieves it of the duty to confirm or deny;
  - where information is or is not held, but falls or would fall within a class-based qualified exemption such as section 24, the public authority should consider in the particular case whether confirming or denying that the information was held would fall within the relevant class, and also apply the public interest test;

- where information is not held, but would be disclosable if it were held, the public authority must inform the applicant that it does not hold it; and
  - where the existence of the information is already in the public domain a refusal to confirm or deny is not appropriate.
20. Both the MPS and the complainant have referred the Commissioner to examples of disclosure of Special Branch files from the 1960s and 1970s. The Commissioner notes that, rather than being about the BBC, these files relate to the Anti-apartheid Movement and the Campaign for Nuclear Disarmament. In relation to these matters, the MPS has explained to the Commissioner that no prejudice to national security would result from disclosure and disclosure had therefore taken place.
21. The Commissioner is not aware of any previous disclosure to indicate Special Branch interest, or otherwise, in relation to the BBC in the time period specified in this case.

### **Section 23 Information supplied by or relating to bodies dealing with security matters**

22. Under section 23(1), information held by a public authority is exempt from disclosure if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in section 23(3). This subsection, (a copy of which can be found in the Legal Annex at the end of this Notice), lists bodies dealing with security matters, such as the Security Service, the Secret Intelligence Service and the Government Communications Headquarters.
23. This exemption is not based on the content of the information or the likely effect of disclosure. An absolute exemption, it applies to all information supplied by or relating to one of these bodies, even if it does not relate to national security, or would not have a damaging effect if disclosed.
24. Under section 23(5):
- “The duty to confirm or deny does not arise if, or to the extent that, 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 subsection (3).”*
25. The MPS told the complainant, in its initial refusal letter and at the internal review stage, that it was citing both section 23(5) and section

24(2) in relation to his request. In support of this argument, it told the complainant:

*"It is important that a response under the Act does not allow any deduction as to whether or not there is any involvement of a section 23 body. It is equally important to protect the fact of whether or not a body, not listed in section 23, is involved and for that reason the exemption 24(2) is also engaged".*

26. The MPS told the Commissioner that its purpose in citing both exemptions in conjunction is *"to avoid confirming or denying the involvement of a security body or otherwise in respect of the requested information and thus to maintain a position which safeguards national security"*.

#### *The role of Special Branch*

27. The request in this case asks for information held by the MPS Special Branch in respect of the BBC. The MPS has argued that:

*"The present request asks for information relating to an organisation, and has specified that this should focus on information that may be held by the MPS Special Branch"*.

28. The MPS told the Commissioner that:

*"The function of Special Branches 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"*.

29. In this respect, the Commissioner notes that the *Special Branch Guidelines 1995* state one of the roles of the Counter Terrorism Command (CTC) as being *"to assist the British Security Service and Secret Intelligence Service in fulfilling their statutory roles"*.

30. MPS has also argued that, *"in today's security landscape"*, in order to counter any threats of terrorism or domestic extremism the police and any other relevant security body *"must be able to work covertly to obtain intelligence.....to ensure the successful arrest and prosecution of those who commit or plan to commit criminal acts against national security"*.

31. In this respect, it has told the complainant that:

*"The maintenance of the Metropolitan Police Service (MPS) stance to neither confirm nor deny (NCND) the existence of any Special Branch information held relating to the BBC is therefore vital. It is essential because confirming or denying if information is held or not would prejudice the MPS's ability to efficiently and effectively employ or maintain covert policing tactics to safeguard national security";*

and:

*"What is important is that the integrity of intelligence gathering is maintained and protected and this can only be done with the use of the neither confirm nor deny principle".*

*Is the exemption engaged?*

32. In this case, the Commissioner acknowledges that the request is specific with regard to it being for documents compiled and held by MPS Special Branch.
33. At paragraph 12 above, reference is made to relevant Tribunal cases and specifically the question as to whether section 23(5) is engaged in circumstances where a request for information is made to a police force and it is argued that the information requested, if held, would have been supplied by or relate to a security body listed in section 23(3) of the Act. The argument advanced in those cases was that special branches work closely with security bodies and routinely share information with them such that, on the balance of probabilities, any information relating to the work of special branches would relate to, or have been supplied by, a section 23(3) body.
34. Based on the evidence presented at the Tribunal, the Commissioner is now satisfied that this argument is supported by cogent evidence and applies in the circumstances of this case. The relevant evidence had not previously been made available to the Commissioner and so had not influenced earlier decisions. The Commissioner is satisfied 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.
35. The Commissioner accepts, based on the evidence submitted to the Tribunal, that there may be instances where Special Branch information would not relate to a section 23(3) body, although these would be few and far between. 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 public authority holding relevant information that was not related to, or supplied by, a section 23(3) body would undermine its reliance on section 23(5).

36. However, 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 that 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)

37. The approach of the Commissioner on this point is that he accepts the Tribunal's 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).
38. The Commissioner is satisfied on the basis of the evidence presented to the Tribunal that information comprising "all documents compiled and held by the Special Branch" will, on the balance of probabilities, relate to, or have been supplied by, a body specified in section 23(3). Therefore any information falling within the scope of this request which might be held by the public authority would be exempt under section 23. To disclose whether such information is or is not held would itself be a disclosure of exempt information. The conclusion of the Commissioner is, therefore, that the exemption from the duty to confirm or deny provided by section 23(5) is engaged in this case.
39. Section 2(3) provides that section 23 confers absolute exemption so no public interest test applies.
40. As the Commissioner has found the exemption in section 23 engaged, he has not found it necessary to consider the other exemptions which the MPS also cited in this case.



## **The Decision**

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41. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the requirements of the Act on the basis of the exemption provided by section 23(5) which the Commissioner has concluded is engaged.

## **Steps Required**

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42. The Commissioner requires no steps to be taken.

## **Other matters**

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43. Part VI of the section 45 Code of Practice makes it 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. As he has made clear in his 'Good Practice Guidance No 5', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided 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 be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 50 working days for an internal review to be completed, despite the publication of his guidance on the matter. The Commissioner does however note that the authority has apologised to the requester for the length of this delay.

## Right of Appeal

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44. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

**Dated the 20<sup>th</sup> day of January 2011**

**Signed .....**

**Graham Smith  
Deputy Commissioner  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Section 23 Information supplied by, or relating to, bodies dealing with security matters

**Section 23(1)** provides 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 subsection (3).”

**Section 23(2)** provides that –

“A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.”

**Section 23(3)** provides that –

“The bodies referred to in subsections (1) and (2) are-

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (d) the special forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,
- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,
- (k) the National Criminal Intelligence Service, and
- (l) the Service Authority for the National Criminal Intelligence Service.”