

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 January 2016

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 information about two named individuals. The Metropolitan Police Service (the 'MPS') would neither confirm nor deny holding any information by virtue of sections 23(5) (information supplied by, or relating to, bodies dealing with security matters), 24(2) (national security), 40(5) (personal information), 30(3) (investigations and proceedings) and section 31(3) (law enforcement).
2. The Commissioner's decision is that the MPS was entitled to rely on section 23(5) of the FOIA. No steps are required.

Request and response

3. On 6 October 2015, the complainant wrote to the MPS and requested information in the following terms:

"All information held by what was then called Special Branch relating to the following individuals, now deceased:

1. *Naomi Loveday Corbyn (nee Josling) - born 28 May 1915, died October 1987*

2. *David Benjamin Corbyn - born 14 April 1915, died February 1986*”.

4. The MPS responded on 2 November 2015. It refused to confirm or deny whether it holds the requested information citing the following exemptions as its basis for doing so: 23(5), 24(2) and 40(5).
5. Following an internal review the MPS wrote to the complainant on 30 November 2015. It revised its position, adding sections 30(3) and 31(3) to those cited.

Scope of the case

6. The complainant contacted the Commissioner on 16 December 2015 to complain about the way his request for information had been handled. He specified:

“... I have said I would be willing to narrow my request down to material over 50 years old, if they would then be prepared to give a substantive response to my request. I would then withdraw my complaint to you... Before you launch your investigation into my complaint you may wish to check if they would respond positively to this suggestion.

In my opinion the Met's arguments for NCND lack force given the age of the material I have requested. The two individuals named have been dead for nearly 30 years, and any material held is likely to be considerably older than this.

I do not accept that a policy of NCND is required for material of this age, since a statement that they either do or do not hold such material would not be generally regarded as having any implications for comparison with much more recent material, where there actually may be issues under sections 24, 30 or 31.

I am not convinced that either section 23 or section 40 has any genuine and specific relevance to the matter at hand”.

7. He also asked the Commissioner to take into account his comments when asking for an internal review which are as follows:

“In my opinion your response is formulaic and takes no account of the age of any such material that might be held by you. I'm aware of course of the Met's attachment to the s23 & s24 arguments in your email, but whatever their merits or demerits for more recent

matters, I do not accept their validity for old material of the kind requested.

As for section 40, please note that the two people named in my request are both dead, so I do not see the relevance of this.

Furthermore you also have the option of supplying the material requested outside the terms of FOI, if that would be the Met's preference. Therefore please consider this possibility too".

8. The Commissioner can confirm that, as suggested by the complainant above, he has corresponded with the MPS regarding the possibility of limiting his request; the MPS did not change its position. The Commissioner is also unable to comment regarding any potential for disclosure outside of the terms of the FOIA as this would fall outside of his jurisdiction.
9. The Commissioner will consider the application of exemptions below.

Reasons for decision

10. Under section 1(1)(a) of the FOIA, a public authority is obliged to advise an applicant whether or not it holds the requested information. This is known as the "duty to confirm or deny". However, the duty to confirm or deny does not always apply; public authorities may issue a neither confirm nor deny response ("NCND") through reliance on certain exemptions under the FOIA.

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

11. The request clearly stipulates "*information held by ... Special Branch*" so the Commissioner will first consider the application of section 23. This is because, if properly engaged, this will necessarily relate to all information that may, or may not, be held.
12. Section 23(5) excludes the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1).
13. By virtue of 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 section 23(3).

14. This exemption is absolute, meaning that, if engaged, there is no requirement to consider whether the public interest nevertheless favours confirming or denying whether information is held. Although the complainant is of the opinion that the age of the material means that, if any is held, it should now be suitable for disclosure, its age is not a relevant factor when considering this exemption.
15. The test as to whether a disclosure would relate to a security body listed in section 23(3) is decided on the normal civil standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the section 23 exemption would be engaged.
16. 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.
17. In its internal review the MPS gave several detailed examples of previous decision notices and Tribunal decisions relating to its Special Branch and the applicability of section 23 to it. In concluding its arguments, it stated:

"... the function of Special Branch was to undertake covert work to acquire and develop intelligence to protect the public from threats to national security and ICO Decision notices and First-Tier Tribunal Decisions have accepted that "any Special Branch...files dealing with [a specified individual]" will, on the balance of probabilities, relate to or have been supplied by a body specified in section 23(3)¹ and that the exemption from the duty to confirm or deny provided by section 23(5) may be engaged in such cases".

18. The requested information specifies 'Special Branch' as its focus and relates to named individuals. It is therefore patently clear that any information, if 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, as cited by the MPS above, 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.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2011/618086/fs_50315193.pdf

19. In light of the MPS's relationship with the security bodies and the wording of the request, the Commissioner finds that, on the balance 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.
20. 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 subjects named in 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.

Right of appeal

21. 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

22. 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.
23. 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
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Wycliffe House
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