

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 January 2011

Public Authority: Chief Constable of Greater Manchester Police
Address: Chester House
Boyer St
Manchester
M16 0RE

Summary

The complainant requested information held by Special Branch that related to the BBC and that dated from the 1990s. The public authority refused to confirm or deny whether it held information falling within the scope of this request, citing the exemptions provided by the following sections of the Act: 23(5) (information supplied by, or relating to, security bodies), 24(2) (national security) and 31(3) (prejudice to law enforcement). The Commissioner finds that section 23(5) is engaged and so the public authority is not required to confirm or deny if it holds information within the scope of the request. However, the Commissioner also finds that the public authority failed to comply with sections 17(1) and 17(3)(a) in its handling of the request.

The Commissioner's Role

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.

The Request

2. The complainant made the following information request on 15 October 2009:

"...complete copies of any and all documents compiled and held by the Special Branch of the Greater Manchester Police Service on the British Broadcasting Corporation (BBC) between January 1 1990 and December 31 1999."

3. After a delay, the public authority responded substantively to this request on 1 December 2009. The public authority refused to confirm or deny whether it held information falling within the scope of the request and cited the exemptions provided by sections 23(5) (information supplied by, or relating to, security bodies), 24(2) (national security) and 31(3) (prejudice to law enforcement). This response included little detail as to why the exemptions cited were believed to be engaged, or, in relation to sections 24(2) and 31(3), why the balance of the public interest was believed to favour the maintenance of these exemptions.
4. The complainant responded on 29 December 2009 and asked the public authority to carry out an internal review. The complainant suggested that disclosure would be in the public interest and that the stance of the public authority was inconsistent with previous disclosures that had revealed that Special Branch monitoring of, for example, the Anti-Apartheid Movement and the Campaign for Nuclear Disarmament had taken place.
5. The public authority responded with the outcome of the internal review on 9 March 2010. The conclusion of this review was that the refusal to confirm or deny under the exemptions provided by sections 23(5), 24(2) and 31(3) was upheld. This response gave no indication of the reasoning for this conclusion of the review.

The Investigation

Scope of the case

6. The complainant contacted the Commissioner in connection with the refusal of the request above on 12 March 2010. The complainant referred to a previous Decision Notice issued by the Commissioner in connection with a request he had made to the Metropolitan Police Service (the "MPS") for similar information to that requested in this case¹. In that case the MPS had also refused to confirm or deny whether it held information falling within the scope of the complainant's request. The conclusion of the Decision Notice had been that the exemptions

1

http://www.ico.gov.uk/upload/documents/decisionnotices/2010/fs_50231561.pdf

cited were not engaged and the MPS was required to provide to the complainant confirmation or denial as to whether information falling within the scope of this request was held. The complainant suggested that the same issues applied here.

7. Since the issuing of that previous 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

8. The Commissioner contacted the public authority in connection with this case on 9 July 2010. Reference was made to an ongoing closely related case also concerning Greater Manchester Police (FS50275046) in connection with which the public authority had already submitted its arguments. The public authority was advised that it should submit any further arguments it wished within twenty working days and that if it did not reply within this period this case would be progressed on the basis of the arguments that the public authority had advanced in the linked case. The public authority did not respond.

Analysis

Exemptions

Section 23(5)

9. 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.
10. At paragraph 7 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.

11. 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, 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.
12. 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).
13. 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)

14. The approach of the Commissioner on this point is that he 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).
15. 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.

16. Section 2(3) provides that section 23 confers absolute exemption, so no public interest test applies.

Sections 24(2) and 31(3)

17. As the Commissioner has found that section 23(5) is engaged, it has not been necessary to go on to consider the other exemptions cited by the public authority.

Procedural Requirements

Section 17

18. In failing to respond to the request with a refusal notice within twenty working days of receipt, the public authority did not comply with the requirement of section 17(1).
19. In failing to adequately explain why the exemptions cited were believed to be engaged, or, in relation to sections 24(2) and 31(3), why the balance of the public interest was believed to favour the maintenance of these exemptions, the public authority did not comply with the requirements of sections 17(1)(c) and 17(3)(a).

The Decision

20. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it applied the exemption from the duty to confirm or deny provided by section 23(5) correctly. However, the Commissioner also finds that the public authority failed to comply with the procedural requirements of sections 17(1) and 17(3)(a) in its handling of the request.

Other matters

21. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. As referred to

above at paragraph 5, when giving the outcome of the internal review, the public authority gave no reasoning for concluding that the refusal of the request should be upheld. Paragraph 39 of the section 45 Code of Practice states the following:

"The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue."

22. The internal review response from the public authority did not reflect that a reconsideration of the request conforming to the description above took place. The Commissioner would advise the public authority that a response giving the outcome to an internal review should state the reasoning for why the initial refusal was upheld and should reflect that there has been a genuine reconsideration of the request.
23. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to respond with the outcome of the review within 20 working days. Neither did the public authority respond within 40 working days. The public authority should ensure that internal reviews are carried out promptly in future.

Right of Appeal

24. 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.

Website: 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.

25. 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 20th day of January 2011

Signed

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

Legal Annex

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, 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 authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

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.”

Section 23(5) provides that –

“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).”

Section 24(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.”

Section 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.”

Section 31(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).”