

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 21 June 2011

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

### Summary

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The complainant asked for information relating to the trade unionist Albert Fava who was deported from Gibraltar in 1948. The public authority refused to confirm or deny whether it held information falling within the scope of the request, citing the exemptions from the duty to confirm or deny provided by sections 23(5) (information relating to, or supplied by security bodies), 24(2) (national security) and 31(3) (law enforcement) of the Act. The Commissioner finds that the exemption provided by section 23(5) was applied correctly and so the public authority is not required to confirm or deny whether it holds the information requested.

### 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.

### The Request

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2. On 26 March 2010 the complainant requested the following information from the Metropolitan Police Service (MPS):

*"I would like to request, under the Freedom of Information Act, any information that the MPS may hold regarding Albert Fava".*

3. On 21 April 2010 the MPS wrote to the complainant citing several exemptions, namely: section 23(5), section 24(2), section 30(3), section 31(3), section 38(2) and section 40(5).
4. Following a request by the complainant for the MPS to review its decision, the MPS wrote to the complainant on 4 June 2010. It told him that it was neither confirming nor denying whether information was held by virtue of section 23(5), section 24(2), section 30(3), section 31(3) and section 40(5). It told the complainant that it was no longer relying on section 38(2).

## **The Investigation**

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### **Scope of the case**

5. The complainant contacted the Commissioner on a number of occasions between 1 and 24 June 2010 to complain about the way his request for information had been handled and on 22 July 2010 the Commissioner responded that his complaint was now under consideration.
6. The complainant told the Commissioner that it was his view that the public authority had failed to provide sufficient reasons to justify refusing to disclose whether or not it held the requested information. He told the Commissioner that the public authority had failed to show the connection between the issue of national security and Albert Fava, who was a prominent trade unionist and figure in the history of Gibraltar who was deported in 1948. The complainant told the Commissioner that his interest in Albert Fava was an historical one and that he was interested in the evidence behind the decision to deport Mr Fava.
7. The complainant further told the Commissioner that he was not seeking personal information about Mr Fava or his family, but that he was interested in completing the public record of the public events. He also told the Commissioner that from his research he was not aware of any criminal or law enforcement investigations into Mr Fava.
8. The Commissioner corresponded with both the complainant and the public authority in order to clarify the scope of his investigation and in so doing was informed by the MPS that it had set aside its reliance on section 30(3) and 40(5). It told the Commissioner that it had considered whether it held information in both its general archives and in its Counter Terrorism Command (Special Branch) files. It told the Commissioner that it did not hold information within the scope of the request in its general archives but that it was refusing to confirm nor deny whether it held any information in Special Branch files within the scope of the request by virtue of section 23(5) and section 24(2). It also

told the Commissioner that it was additionally relying on section 31(3). Accordingly, the scope of the Commissioner's investigation has focussed on the application of these exemptions in relation to any information that, if held, would be held in Special Branch files.

## Analysis

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### Exemptions

#### Section 23

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. The Commissioner has considered a recent relevant Tribunal case<sup>1</sup> and particularly 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 that case 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 a 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.

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<sup>1</sup> The Commissioner of Police of the Metropolis v the Information Commissioner [EA/2010/0063]

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 are likely to 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 the 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 in "*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). Therefore, having confirmed that there is no relevant information held in general files, any information falling within the scope of this request which might be held by the public authority would be exempt under section 23(1). To disclose whether such information is or is not held would itself be a disclosure of exempt information.
16. The conclusion of the Commissioner is, therefore, that the exemption from the duty to confirm or deny provided by section 23(5) and as relied on by the public authority in this case is engaged.
17. Section 2(3) provides that section 23 confers absolute exemption, so no public interest test applies.

## **Section 24(2) and 31(3)**

18. 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.

## **The Decision**

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19. 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 section 1(1)(a).

## **Steps Required**

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20. The Commissioner requires no steps to be taken.

## **Failure to comply**

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21. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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22. 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: 0300 1234504

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)

23. 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.
24. 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 21<sup>st</sup> day of June 2011**

**Signed .....**

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

## Legal Annex

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### General Right of Access

#### **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 2(3) provides that –**

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
  - (i) subsection (1), and
  - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
  - (iii) section 41, and
  - (iv) section 44"

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

Section 23 provides that –

(1) 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).

(2) 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.

(3) 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 24 – National Security**

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- Law enforcement**

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).”