

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 July 2019

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information relating to Security Service files of BBC employees from the Home Office ("HO"). Initially, the HO would neither confirm nor deny holding any information citing section 23(5)(information supplied by, or relating to bodies dealing with security matters) of the FOIA. During the Commissioner's investigation the HO revised its position advising that the requested information is not held.
2. The Commissioner's decision is that, on the civil standard of the balance of probabilities, the HO does not hold the requested information. No steps are required.

Request and response

3. On 8 January 2018, the complainant wrote to the Home Office and requested information in the following terms:

"I would like to make a Freedom of Information Request for the release of the Security Service Files on the following employees of the BBC:

[names redacted]

The absolute exemption provision in the FOI does not apply to these requests because prior to the legal constitution of the Security Service in 1989 by the Security Service Act, legal responsibility for all Security Service archives belonged to and still does belong to the Home Office under the Public Records Act 1958.

Under this legislation I submit there is no justification for continued retention of these files. All five subjects are no longer alive. The reasons for their surveillance relate to events between 60 and 85 years ago. Because all four made a significant contribution to writing, drama, and broadcasting, the public interest in their disclosure trumps any existing purpose in their concealment.

Notwithstanding any position the Home Office has on the above argument, would it be kind enough to pass on my request to the Security Service to consider releasing the content of files on these five people for the purposes of historical and academic research and in the spirit of the Service's generous and helpful release of files relating to key authors, writers and cultural figures of the 20th century."

4. The HO responded on 1 February 2018. It stated that The National Archives (TNA) online catalogue contained an entry under one of the names mentioned within the complainant's request. It advised the complainant that TNA may hold information relevant to the request and that he may wish to contact TNA about this individual.
5. The HO stated that, in respect of the remaining part of the request, it would neither confirm nor deny whether the it holds the information, citing the exemption in section 23(5) of the FOIA.
6. Following an internal review the HO wrote to the complainant on 25 July 2018. It maintained its position.
7. On 16 July 2019, during the Commissioner's investigation and in line with a position it had taken in another case from this complainant, the HO revised its position advising that the information is not held. It stated:

*"On reflection, we consider that in this case, as in the Tribunal case [see paragraph 9 below], the request is in fact seeking **files held by the Security Service** (i.e. the Security Service's **own** files), rather than simply **Security Service files/information** (i.e. any files/information held by the Home Office containing information received from the Security Service, which may or may not encompass information about the named individuals in the request).*

*Having now redefined the request to **files held by the Security Service**,... the appropriate response in this case (as in the Tribunal case) is to confirm that we do not hold any information in scope of the request. The Home Office does not have, and never has had, 'ownership' of the Security Service. Consequently, it does not hold and did not hold at the time of the request, Security Service files (i.e. the Security Service's **own** files)".*

Scope of the case

8. The complainant contacted the Commissioner 23 September 2018 to complain about the way his request for information had been handled.
9. At the time of submitting the present complaint, the complainant made reference to a related request he had made to the HO. A decision notice was subsequently issued in regards to the handling of that complaint (FS50788440) which is currently being appealed to the First-Tier Tribunal¹.
10. During the Commissioner's investigation, on 11 January 2019, the complainant again wrote to the Commissioner with further detailed submissions subsequent to the case and appeal referred to above.
11. The focus of these arguments are:
 - The HO was legally responsible for the Security Service until 1989.
 - The FOIA specifically relates to the Security Service as a security body post 1989 so historical documentation, files and information prior to the Security Services Act 1989 is the responsibility of the HO and is not subject to the absolute exemption in section 23 of the FOIA.
 - The need to provide a legal remedy under Articles 8, 10 and 13 of the European Convention on Human Rights for legitimate academic historical research projects.
 - His Article 10 and 13 rights have been breached under the European Convention on Human Rights.
 - ECtHR case-law should be taken into account in the reading down of Article 10 freedom of expression rights to seek and receive state information.
 - He is entitled to a legal remedy under Article 13 in domestic law.
12. The Commissioner notes these arguments, some of which have been previously commented on in the earlier decision notice referred to above.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614375/fs50788440.pdf>

13. The HO has revised its position at a very late stage in this investigation and the complainant has not been made aware of this. However, as its revised position is in line with its position in the previous complaint referred to above, the Commissioner has used her discretion and proceeded immediately to a decision notice in order to expedite matters. She does not consider that the complainant has been disadvantaged as the arguments for that case and this one are essentially the same.
14. It is however important to note that the matter that the Commissioner is considering in this case is not whether or not the HO would have, or should have, jurisdiction over the requested information. Under the remit of the FOIA, she is considering whether, on the civil standard of the balance of probabilities, the HO holds the requested information.

Reasons for decision

Section 1 – general right of access to information

15. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information within the scope of the request, and if so, to have that information communicated to him.
16. Section 1(4) states that the information to be communicated to the applicant under subsection 1(1)(b) is the information in question **held at the time** when the request is received.
17. The complainant is of the opinion that the HO had jurisdiction for the Security Service prior to the Security Service Act 1989 which is why, in his view, he thinks it holds the requested information.
18. The Commissioner would first like to clarify that she must consider the position at the time a request is received by a public authority, as per section 1(4) of the FOIA cited above. It is not necessary for her to consider whether or not the requested information may have been previously held by a public authority – which would generally be more than 30 years ago in this case.
19. The Commissioner is mindful that when she receives a complaint alleging that a public authority has stated incorrectly that it does not hold the requested information, it is seldom possible to prove with absolute certainty whether the requested information is held. In such cases, the Commissioner will apply the normal civil standard of proof in determining the case and will decide on the 'balance of probabilities' whether information is held.

20. Therefore, the Commissioner has sought to determine whether, on the balance of probabilities, the HO holds any recorded information within the scope of the request.
21. The Commissioner will take into account the complainant's evidence and arguments. She will consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.
22. The HO has clearly argued that it does not have, and never has had, 'ownership' of the Security Service. Consequently it does not, and did not at the time of the request, hold the requested information.
23. The complainant is of the opinion that until 1989 the HO did have 'ownership' of the Security Service.
24. Accordingly the Commissioner asked the HO to explain what enquiries it had made in order to reach this position. In response to these enquiries she was provided with the following details.
25. The HO advised it had:

"... contacted two separate areas within the Home Office and asked them to perform searches: the primary one was the Historic Review Team (HRT); they are part of the Home Office 'Knowledge & Information Management Unit' who are responsible for information and records management in the Department. The second area contacted was the Office for Security & Counter-Terrorism (OSCT).

HRT are considered the primary area because they have responsibility for the Department's compliance with the Public Records Act 1958. In particular, they are responsible for the management of historical files – these are defined as those which are more than 20 years old and would therefore cover the period between 60 and 85 years ago to which the complainant refers in his request. Therefore, if the Home Office held Security Service's own files (which we don't) they would be the part of the Home Office most likely to hold them.

To a lesser extent, I also contacted the OSCT because they are considered to be the closest policy area of the Home Office most likely to hold Security Service's own files, if indeed they were to be held, which they aren't.

Because of the date range (taken to be between the years 1930-60) if the information was to be held by the Home Office (which it isn't) it would be held in manual/paper form, and I have provided a summary of both areas searches below.

HRT search

HRT have access to the Home Office's in-house file-tracking database which holds records of listed files including those that have been destroyed or transferred to another government department, or to The National Archives.

*An electronic search of this database was undertaken to identify any paper records, but no Security Service files were found. Therefore no recorded information – that is, **no files held by the Security Service (i.e. the Security Service' own files)**, as defined in this response - were held by the Home Office and later either deleted or destroyed.*

The period of interest to the complainant fell well within the Department's paper era and so it was reasonable to conduct a search for paper records. For this reason, the searches did not encompass information held locally on personal computers used by key officials, nor on networked resources, and neither on emails.

OSCT search

*Again, because of the age of the material requested and because of the way that this material is stored by this area, this was a search for paper records using an electronic database. The area confirmed that no Security Service files were found – that is, **no files held by the Security Service (i.e. the Security Service' own files)**, as defined in this response. For the same reason as that provided above, the searches did not encompass information held locally on personal computers used by key officials, nor on networked resources, and neither on emails.*

Conclusion

Both searches failed to identify any files held by the Security Services (i.e. the Security Service's own files).

At the time of the request, the Home Office did not (and, for the sake of completeness, has never held either before or since the date of request) Security Service files. Historically the Home Office has never had responsibility for Security Service files – whether pre- or post- the Security Service Act 1989 – confirmed, as a result of the above-mentioned searches. This explains why the Home

Office does not hold any files held by the Security Service, regardless of their subject-matter”.

The Commissioner’s view

26. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out above, the Commissioner is required to make a finding on the balance of probabilities.
27. The complainant’s view is that the HO was responsible for the Security Services prior to 1989 and therefore it must hold the information requested. The HO position is that it is not, and never was, responsible for the Security Services so has never held the information. However, the issue for the Commissioner to consider here is not one of who was responsible for what prior to 1989. She must consider, within the terms of the FOIA, whether or not, on the balance of probabilities, the HO held the requested information at the time the request was made.
28. The Commissioner considers that the HO contacted the relevant business areas and that they conducted searches using appropriate terminology to ascertain whether or not any information was held in respect of the request.
29. Based on the explanations provided above the Commissioner is satisfied that, on the balance of probabilities, no recorded information within the scope of the request was held at the time of the request. She is therefore satisfied that the HO has complied with the requirements of section 1 of the FOIA in this case.

Right of appeal

30. 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

31. 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.
32. 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
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