

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 December 2019

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 any information held about the British Spartacist League from the Metropolitan Police Service (the "MPS"). The MPS would neither confirm nor deny ("NCND") holding the requested information, citing the exemptions at sections 23(5) (information supplied by, or relating to, bodies dealing with security matters), 24(2) (national security), 30(3) (investigations and proceedings) and 31(3) (law enforcement) of the FOIA.
2. The Commissioner's decision is that the MPS was entitled to rely on section 23(5) to NCND whether or not it holds the requested information. No steps are required.

Background

3. The Commissioner understands the British Spartacist League to have formed in 1978, as a fusion between the London Spartacist Group and the Trotskyist Faction.

Request and response

4. On 6 February 2019, the complainant wrote to the MPS via the "*What do they know?*" website and requested information in the following terms:

"Can you disclose any information you hold on the British Spartacist League please?"

5. On 5 April 2019, following an extension to the time limit in which it considered the public interest, the MPS responded (with a letter dated 26 March 2019). It refused to confirm or deny holding the requested information and cited the following exemptions of the FOIA: 23(5), 24(2), 30(3) and 31(3).
6. On 25 April 2019, the complainant requested an internal review.
7. The MPS provided an internal review on 8 May 2019 (with a letter dated 1 May 2019), in which it maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 18 June 2019 to complain about the way his request for information had been handled. His grounds of complaint were as follows:

"MPS are using the NCND defence for not releasing the information [sic] I requested relating to the British Spartacist League. My position [sic] is that NCND should not apply in this case..."

The main reason given that the request is refused is the MPS' duty to maintain a 'neither confirm nor deny' stance in respect of political and / or undercover policing. However, this stance is not appropriate in this case.

This is because the Undercover Policing Inquiry has already confirmed that The British Spartacist League was monitored / infiltrated by the Special Demonstration Squad. (see¹:). ... Thus, there is now official confirmation and as such the NCND stance is no longer appropriate.

Further, I also draw your attention to the judgement in DIL and others v Commissioner of Police of the Metropolis. This stated that where officers had been officially confirmed as undercover officers, it would be impossible to continue the NCND stance in those cases.

¹<https://eur03.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.ucpi.org.uk%2Fcover-names%2F&data=01%7C01%7Cacknowledgement%40ico.org.uk%7C3c4fafef0ab64c82b48808d6f41fdfea%7C501293238fab4000adc1c4cfefba21e6%7C1&sdata=6a%2B9htPJx3przQzOEHIGVA1S%2F%2BC2rgVdNBbEOLuNfgw%3D&reserved=0>

Therefore, to maintain a NCND stance in respect of records held (or not) on The British Spartacist League whose monitoring has already been confirmed by a government inquiry, cannot be thought to be reasonable or proportionate by this reasoning”.

9. The Commissioner will therefore consider whether the MPS is entitled to NCND holding the requested information based on the exemptions cited.

Reasons for decision

Neither confirm nor deny (“NCND”)

10. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in the request. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose sensitive or potentially exempt information. In these circumstances, section 2(1) of the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.
11. The decision to use a NCND response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
12. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
13. The MPS has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing four different exemptions. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not the MPS is entitled to NCND whether it holds any information of the type requested by the complainant.
14. Put simply, in this case the Commissioner must consider whether or not the MPS is entitled to NCND whether it holds any information about the British Spartacist League.
15. The MPS has said that the information described in the request, if it was held, would be fully exempt from disclosure by virtue of sections 23(5), 24(2), 30(3) and 31(3) of the FOIA.

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

16. Section 23(1) of the FOIA states 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 sub-section (3)".

17. Section 23(5) of the FOIA 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. The full list of bodies specified in section 23(3) FOIA can be viewed online².

18. Section 23(5) FOIA is engaged if the wording of the request suggests that any information falling within its scope would be within the class described in this section. There is no requirement to go on to consider what the results of disclosure of the confirmation or denial may be, nor whether confirmation or denial would be in the public interest, as section 23(5) is an absolute exemption and not subject to the public interest test set out in section 2(3) of the FOIA.

19. Furthermore, the Commissioner considers that the phrase 'relates to' should be interpreted broadly. Such an interpretation has been accepted by the First-tier Tribunal (Information Rights) in a number of different decisions.

20. The Commissioner's published guidance³ on this exemption states that a request must be "*in the territory of national security*" in order for section 23(5) of the FOIA to be relevant. This means there has to be a realistic possibility that a security body would be involved in the issue that the request relates to. There also has to be a realistic possibility that, if a security body was involved, the public authority that the request is addressed to would hold information relating to its involvement.

21. In its internal review, the MPS advised the complainant as follows:

² <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

³ https://ico.org.uk/media/fororganisations/documents/1182/security_bodies_section_23_foi.pdf

"With respect to the application of this exemption, Section 23(5) provides '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).' The full list of bodies specified in section 23(3) can be viewed by way of this link⁴.

In ICO Decision Notice FS50443643⁵ the Commissioner commented '...it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies' operations, section 23(5) is likely to apply. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions. 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.'

Furthermore, in FS50443643 the Commissioner's opinion was that 'the exemption contained at section 23(5) should be interpreted so that it is only necessary for a public authority to show that either confirmation or denial as to whether the requested information is held would involve the disclosure of information relating to a security body. It is not necessary for a public authority to demonstrate that both responses would disclose such information. Whether or not a security body is interested or involved in a particular issue is in itself information relating to a security body.'

With these considerations in mind, the review is satisfied that section 23(5) is appropriately engaged in regards to your request".

22. In raising his complaint with the Commissioner, the complainant's views are cited in paragraph 7 above. The Commissioner initially notes that, by following the link he provided, reference is made to one MPS officer allegedly being connected to the "The Spartacist League of Britain"⁶.

⁴ <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

⁵ https://ico.org.uk/media/action-weve-taken/decision-notices/2012/768126/fs_50443643.pdf

⁶ https://www.ucpi.org.uk/infiltrated_group/spartacist-league-of-britain/

23. As this information is clearly in the public domain as part of an official inquiry, the Commissioner put his views directly to the MPS for it to respond to as part of her investigation. The MPS advised her as follows:

"The Undercover Policing Inquiry's (UCPI) strategic review dated May 2018⁷ stated:

'50. The Inquiry is publishing cover names on a rolling basis where they are not the subject of a restriction order and has set up a 'cover names' table, updated when names are published. The Inquiry also publishes the names of the main groups that an undercover officer has been deployed into. To date the Inquiry has published more than 50 groups on its website.'

A footnote relating to the above paragraph states:

'The details given of groups/areas of deployment are provisional, and are provided to enable members of the public to identify whether they may have known officers who were deployed undercover and to prevent cases of mistaken identity. They are not intended to be a comprehensive list of groups with which the officer may have interacted, and do not constitute a factual finding by the Chairman that any group was or was not targeted. These are matters which remain under investigation.'

The same wording was present on the UCPI's cover names page prior to a redesign of the website. As the naming of 'groups/areas of deployment' by the UCPI are 'provisional' and 'do not constitute a finding of fact', this cannot be equated to 'confirmation' nor can it be assumed that information is 'held on' any groups named by the UCPI. Contrary to what is stated by the applicant, the UCPI website expressly indicates that the information published on their website is not 'a factual finding by the Chairman that any group was or was not targeted'.

The applicant also refers to the judgement in DIL and Ors vs. the Commissioner of the Police of the Metropolis.

However, it is of note that the request is not asking the MPS to confirm or deny whether an individual is, or was, an undercover police officer (UCO) and the MPS responses to date have made no comment either way on this point. The request is instead asking for

⁷ https://www.ucpi.org.uk/wp-content/uploads/2018/06/20180510-strategic_review.pdf

any information held by the MPS on a named group. Even if it were the case that a UCO infiltrated a specific group between 1979-1983, an NCND stance is applicable to the request due to the broad remit of the MPS and it doesn't necessarily follow that the MPS would hold information on such groups.

To the extent that there is a legitimate public interest in a confirmation or denial statement, due to its potential relevance to undercover policing, the existence of the UCPI highlights the potential for the public interest to be served via other means. The UCPI was announced on 06/03/2014 and has been considering a number of preliminary issues at length with a view to commencing public hearing in June 2020. The length of time taken thus far to consider preliminary issues may be indicative of the complexities associated with undercover policing, such that it may be unrealistic to fully consider all of the relevant case circumstances within the statutory FOIA timescales”.

24. 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 MPS holding relevant information that was not related to, or supplied by, a section 23(3) body would undermine its reliance on section 23(5) of the FOIA.
25. 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) FOIA body and, therefore, that section 23(5) FOIA 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)
26. The approach of the Commissioner on this point is that she accepts the Tribunal's view that the balance of probabilities is the correct test to apply. This means that for section 23(5) of the FOIA to be engaged, the evidence must suggest to a sufficient degree of likelihood as provided by the balance of probabilities (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).
27. The subject matter being considered in this case concerns any information that may be held in respect of the British Spartacist League. Clearly there is some potential for the MPS to hold information based on

the details listed on the UCPI website, as was also cited by the complainant. In this regard, the MPS advised the Commissioner:

"The subsequent reference to the UCPI by the applicant suggests that the focus of the current request relates to historic issues associated with undercover policing within the MPS Special Branch and/or Counter-Terrorism Command which is in the territory of national security".

28. According to the UCPI website, were any of the requested information held, it would relate to activities undertaken by an officer working for the Special Demonstration Squad ("SDS"). It provides his undercover name but not his actual name and says he was allegedly 'active' from 1979 – 1983. It also explains that: *"The SDS was a covert unit that existed within the Metropolitan Police Service between 1968 and 2008"*.
29. The Commissioner notes that the request relates specifically to a group which may be of interest to the UCPI on the basis that an undercover officer from the SDS may have infiltrated the group known as the British Spartacist League. As the SDS was part of MPS's Special Branch, she is also satisfied that any undercover work which may have been undertaken by an SDS officer would be in the remit of Special Branch work.
30. Furthermore, she accepts that, due to the national security remit of Special Branch, related information such as individuals, groups and/or locations that are / were of interest to Special Branch, directly or indirectly relates to national security. Therefore, such information, if it were held, would be likely to relate to the Security Service.
31. The Commissioner therefore accepts that, on the balance of probabilities, any information held by the MPS falling within the scope of the complainant's request would relate to, or have been supplied by, a body or bodies listed in section 23(3) of the FOIA. Her conclusion is therefore that section 23(5) of the FOIA is engaged.
32. In light of her findings in respect of 23(5) of the FOIA, the Commissioner has not gone on to consider the MPS's reliance on the other exemptions cited.

Other matters

33. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Information Notice

34. As the MPS failed to respond to the Commissioner's enquiries in a timely manner it was necessary for her to issue an Information Notice in this case, formally requiring a response.
35. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft Openness by Design strategy⁸ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy⁹.

⁸ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁹ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

36. 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

37. 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.
38. 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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Wycliffe House
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