

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 December 2011

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

Summary

The complainant asked the Metropolitan Police Service (MPS) for a copy of its 1970 investigation file into the Batang Kali massacre which took place in Malaya in December 1948. The MPS refused the request on the basis of the exemptions contained in the following sections of Act: 30(1)(a)(i), 30(1)(b), 31(1)(a) and (b), 38(1)(a) and (b) and 40(2) and 44(1)(a). During the course of the Commissioner's investigation the MPS confirmed that the only exemptions it was seeking to rely on were those contained at sections 30(1)(a)(i), 30(1)(b), 40(2) and 41(1). The Commissioner has concluded that the requested information is exempt from disclosure on the basis of section 30(1)(a)(i) and that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

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.

Background

2. This case focuses on an incident known as the Batang Kali massacre which took place in Malaya (now Malaysia) in December 1948 during British military operations against native and Chinese communists during the Malayan Emergency.

3. Soldiers from the Scots Guards shot dead 24 villagers before setting fire to the village known as Batang Kali. There was a local (and apparently cursory) investigation into the incident in 1949 that concluded that the villagers had been shot whilst trying to escape the custody of British troops.
4. However, in 1970 *The People* newspaper published material including new statements sworn under oath taken from four of the troops at Batang Kali which said that the villagers had not been trying to escape. Rather the soldiers had been given orders to execute the villagers and later coached to say that the shootings had happened during a mass escape attempt.
5. In direct response to this and other similar articles, the then Secretary of State for Defence invited the Director of Public Prosecutions (DPP) to consider the allegations. The DPP asked Scotland Yard to undertake inquiries and later in 1970 the Metropolitan Police Service (MPS) began its investigation of the killings. This investigation involved taking witness statements from the soldiers involved, along with the journalists at *The People* who had first reported the story.
6. Following the change of government in June 1970, the DPP ordered the investigation to be dropped – despite the MPS not having completed its inquiries - because the DPP believed that there was an insufficient prospect of obtaining adequate evidence to support a criminal prosecution.
7. Although the incident continued to gain some press attention both in the UK, and more notably in Malaysia, the next significant development was in January 2009 when the Foreign and Commonwealth Office rejected calls from activists for a public inquiry into the incident citing the lack of any new evidence.
8. In response to this decision, the solicitors Bindmans, acting on behalf of the victims' families, lodged a judicial review (JR) application with the Administrative Court. The JR – which was submitted prior to the request relevant to this case and has yet to be determined – seeks to obtain a review of the decision of the government not hold a public inquiry into the massacre.

The Request

9. The complainant submitted the following request to the MPS on 27 April 2010:

'I would like to see any and all papers you hold from 1970 relating to the investigation into Malayan "Batang Kali" massacre'.

10. The MPS contacted the complainant on 25 May 2010 and explained that it considered the exemptions contained at sections 30, 31 and 38 to apply but it needed further time to consider the public interest in relation to these exemptions.
11. The MPS contacted the complainant again on 24 June 2010 and on 26 July 2010 and informed the complainant that it still needed further time to consider the public interest test in respect of these exemptions.
12. On 10 August 2010 the MPS provided the complainant with a substantive response to his request. The response confirmed that the MPS held one file relating to the 1970 investigation and that it considered this information to be exempt from disclosure on the basis of sections 30(1)(a)(i), 30(1)(b), 31(1)(a) to (c), 38(1)(a) and (b), 40(2) and 44(1)(a). For the qualified exemptions the MPS confirmed that it had concluded that the public interest favoured maintaining the exemptions.
13. The complainant contacted the MPS on 3 September 2010 and asked for an internal review of this decision.
14. The MPS informed the complainant of the outcome of the internal review on 14 October 2010; the review upheld the application of all of the exemptions with the exception of sections 31(1)(c) and 44(1)(a) which the MPS explained it was no longer seeking to rely on.

The Investigation

Scope of the case

15. On 27 November 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant made a number of points to support his position and the Commissioner has included in these in the relevant section of the Analysis below.

Chronology

16. The Commissioner contacted the MPS on 9 March 2011 and asked it to provide him with a copy of the requested information and submissions to support its application of the various exemptions relied upon withhold this information.

17. On 18 May 2011 the MPS provided the complainant with copies of the three testimonials provided to *The People* newspaper in 1970 which, although falling within the scope of the request, were also in the public domain by virtue of the fact that they can be found at The National Archives.
18. The MPS provided the Commissioner with a copy of the requested information on 20 May 2011 and on 10 June 2011 provided the Commissioner with detailed submissions to support its decision to withhold this information. (This information consists of numerous statements taken during the course of the 1970 MPS investigation.) In this latter letter the MPS confirmed that the only exemptions it was now seeking to rely on were those contained at sections 30(1)(a)(i), 30(1)(b), 40(2) and 41(1). In December 2011 the MPS provided the Commissioner with further submissions to support its position that the requested information was not a historical record as defined by section 62 of the Act.

Analysis

Exemptions

Section 30 – investigations and proceedings

19. Sections 30(1)(a)(i) and (b) state that:

‘Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

(i) whether a person should be charged with an offence, or

(ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct’.

20. Section 30 is a class-based exemption. Therefore in order for it to be engaged there is no need for a public authority to demonstrate any level of prejudice should the requested information be disclosed, simply

that the information is held for the purposes specified in the relevant part of the exemption which has been cited.

21. The exemptions cited by the MPS can only be relied upon by public authorities with the powers to conduct investigations of the kind specified in this subsection. The exemption can only apply to information which is held for a specific or particular investigation, not for investigations in general. The phrase 'at any time' means that information is exempt under section 30(1) if it relates to an ongoing, closed or abandoned investigation. It extends to information that has been obtained prior to an investigation commencing, if it is subsequently used for this purpose.
22. In this case the Commissioner is satisfied that the investigation in question was a criminal one into the alleged murders at Batang Kali in 1948. As the public authority is a police force, the Commissioner is satisfied that it has the powers to conduct investigations of this kind.
23. However, section 63 of the Act states that information contained in a historical record cannot be exempt from disclosure by virtue of section 30(1). Section 62 provides the following definition of a historical record:
 - '(1) – For the purposes of this Part, a record becomes a "historical record" at the end of the period of thirty years beginning with the year following that in which it was created.
 - (2) Where records created at different dates are for administrative purposes kept together in one file or other assembly, all records in that file or other assembly are to be treated for the purposes of this Part as having been created when the latest of those records was created'.
24. The MPS explained to the Commissioner that it believed that the requested information did not constitute a historical record for the following reasons:
25. Firstly, the MPS explained that it had been able to establish that the original investigative file and associated documents relating to the 1970 investigation were stored in a registered file consisting of two parts. The MPS' records show that since 2003 part one of the file had been missing and extensive searches (prior to this particular request being submitted) to locate this part have proved fruitless. (The withheld information constitutes part two of this file; part one of the file would have contained the senior investigating officer's report). However, using its records management system the MPS had been able to establish that parts one and two of the file were sent to 'SO1', which was the abbreviation for the 'murder investigation command'

department on 1 March 2003. However, the MPS explained that since part one of the file, which would have contained a minute sheet with covering actions associated with the file, cannot be located the purpose of the transfer of the file can only be assumed. Nevertheless, the MPS is confident that the evidence within the file was reviewed because of the content of the existing part of the file and the nature of the unit requesting it, i.e. murder investigations.

26. Secondly, during the latter stages of the Commissioner's investigation the MPS provided him with two faxes. These faxes were sent by the MPS to third parties and date from 1996; they clearly relate to enquires about the Batang Kali incident. (In providing these faxes to the Commissioner, the MPS noted that they had only very recently come into the MPS' possession. That is to say they had not been located by searches of the MPS' own records).
27. Thirdly, the MPS also argued that the fact that the information held in respect of the 1970 investigation constitutes an integral part of the ongoing JR process means that section 62(2) is also engaged.
28. The Commissioner has considered the MPS' submissions and is prepared to accept that in the circumstances of this case the withheld information does not constitute a historical record and thus is exempt from disclosure on the basis of section 30(1)(a)(i). He has reached this conclusion based upon the content of the faxes dating from 1996 and the likelihood that in early 2003 the file was reviewed and further records created and added to part one of the file.
29. However, section 30(1)(a)(i) is a qualified exemption. Therefore, the Commissioner must consider the public interest test set out at section 2(2)(b) of the Act and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

30. The MPS advanced the following four arguments:
31. Firstly, it noted that although this matter was closed without having been completed and without there having been a prosecution or conviction, there is a possibility that the disclosure of information could still prejudice a future investigation in the Batang Kali massacre. This is because should new evidence come to light an investigation may be re-opened. While it is acknowledged that there is no current intention to re-open the case, the basic principle remains as the possibility of new evidence coming to light is possible in all closed or unresolved matters.

32. Secondly, it argued that disclosure could restrict the flow of information to the MPS in future in respect of other cases as potential sources of information may be discouraged from coming forward if they anticipate that the information that they provide could later be disclosed in response to requests made under the Act. This would, in itself, prejudice the ability of the police to investigate future cases, with a corresponding impact on the ability of the police to prevent and detect crime. This is because the information relates primarily to evidence drawn from identifiable witnesses, but against whom no charge was brought. The implication of disclosure here is that information relating to specific individuals, which has been provided to the police purely for the purposes of criminal investigation, may be widely disclosed for entirely different purposes outside the environment of the criminal justice process, despite the fact that in this instance no charges were brought, and no conviction obtained.
33. Thirdly, it argued that given the structured and confidential manner in which the JR process is managed, it believed that disclosure of information at this juncture under the Act would be likely to be prejudicial to the decision making process of the JR, particularly so if disclosure were to lead to media hype and speculation.
34. Fourthly, it argued that should the JR decide in favour of holding a public inquiry it believed disclosure of the information under the Act at the time of the request could prejudice such an inquiry. This was because should potential witness have their statements disclosed, even if redacted, prior to any formal inquiry there is a potential for these statements to be reported on, paraphrased, commented on or subjected to detailed scrutiny in the media. The consequence of such media speculation would be likely to have a prejudicial effect on the willingness of a witness to attend, and without the cooperation of witnesses' a public inquiry would be rendered incapable of performing the function it was set up to do.

Public interest arguments in favour of disclosing the requested information

35. The MPS acknowledged that this case had been the subject of much debate between interested parties in the UK, mainly the media and not surprisingly, those connected with the families of the deceased in Malaysia and the topic remains one of public interest judging by the material on the internet. Therefore disclosure would go some way to correct rumour and speculation and bring into the open the facts as recounted by those directly connected with the incident.
36. The complainant argued that the MPS had made the wrong judgment in withholding the information under section 30 because he believed

that disclosure of papers based on interviews would not reveal any special police tactics or methodology and that there was no possibility of another criminal investigation.

Balance of the public interest arguments

37. When considering the application of any of the exemptions contained in s30(1), the Commissioner believes that consideration should only be given to protecting what is inherent in those exemptions – the effective investigation and prosecution of crime - which requires the following:
- the protection of witnesses and informers to ensure people are not deterred from making statements or reports by fear it might be publicised;
 - the maintenance of independence of the judicial and prosecution processes;
 - preservation of the criminal court as the sole forum for determining guilt;
 - allowing the investigating body space to determine the course of an investigation; and
 - information that deals with specialist techniques.
38. With the above underpinning the consideration of 30(1), when weighing up the public interest in relation to the exemption the following factors (amongst others) should be considered:
- the stage or stages reached in any particular investigation or criminal proceedings;
 - whether and to what extent the information has already been released into the public domain;
 - the significance or sensitivity of the information; and
 - the age of the information.
39. In the Commissioner's opinion the third and fourth public interest arguments identified by the MPS in favour of withholding the information – i.e. prejudice to the JR and to any potential public inquiry– are not relevant to the public interest under section 30(1). This is because they are not part of the process of investigating and prosecuting crime: The JR is looking at the decision not to hold a public inquiry; this is not itself a criminal matter. The remedies which the Court may grant in a JR case are at most civil remedies; they are not to do with criminal prosecution. The term 'public inquiry' covers different types of inquiries but the general point is that a public inquiry is not a criminal investigation either. While its findings may lead to criminal proceedings being instituted, the inquiry itself is not part of those proceedings. Therefore the Commissioner has not taken into

account these two arguments in his consideration of the public interest test.

40. Turning to the first two arguments advanced by the MPS, it is clear that these are directly relevant to the consideration of the exemption. In relation to the first argument the MPS has emphasised that in its opinion it is unrealistic for the Commissioner to judge this factor purely on whether the police can produce clear evidence that further witnesses will come forward because determining if, and when, further witness will come forward is not an exact science and cannot be predicted with any degree of certainty. The Commissioner respects this point of view but in relation to the specific circumstances of this case he notes that the original investigation was halted some 40 years before this request was submitted and moreover the incident in question took place over 60 years before the request was submitted. Given this passage of time the Commissioner believes that this significantly reduces the weight that should be attributed to this factor. Moreover, the Commissioner notes that the MPS has itself acknowledged that the possibility of the investigation re-opening is remote. Nevertheless the Commissioner does recognise that in the particular circumstances of this case there is an identified means by which further potentially new evidence may (although not necessarily) come to light, namely the ongoing JR which adds some weight to this argument. Furthermore, the Commissioner also recognises that the content of the withheld information constitutes a number of detailed witness statements of those involved in the incident and thus should the MPS' investigation in the Batang Kali incident ever re-open, disclosure of the withheld information could arguably be particularly sensitive to any future investigation. Finally, the Commissioner notes that although some information, including the testimonials given to *The People* newspaper, are in the public domain, the witness statements given to the MPS are not.
41. The Commissioner is however prepared to give more weight to the MPS' second argument. The Commissioner accepts the basic premise of the argument that some potential sources of information are more likely to be discouraged from coming forward if the police were to release the information identifying witnesses and details they have provided in their case. The Commissioner also recognises that if the flow of information to the police were impeded, it would harm their ability to investigate future cases. The fact that the withheld information in this case constitutes numerous – and in some places detailed - witness statements given by identifiable individuals adds weight to this factor. (The Commissioner accepts that it would be difficult to disclose the information in way in which the identities of the individuals was obscured). Furthermore, the Commissioner does not believe that the age of the information should particularly reduce the

weight of this factor. Although a significant period of time has passed since the witness statements were given to the MPS, the Commissioner accepts that it is reasonable to argue that individuals in other cases involving serious allegations may be put off giving statements to the police if they knew that they would be disclosed under the Act, even if that disclosure took place many decades after the statements were first given. The Commissioner has reached this opinion given the sensitive nature of the statements, i.e. they relate to allegations of murder, and moreover some of witnesses are still alive.

42. With regard to the arguments in favour of disclosure, given the seriousness of the Batang Kali incident and the controversies that surround it, the Commissioner believes that there is a strong public interest in disclosure of information which would shed further light on what happened in December 1948, particularly given the allegations of a 'cover-up' in respect of actions which could amount to war crimes. Furthermore, given that the MPS' 1970 investigation was halted on the basis that no prosecution was likely to succeed, disclosure of the withheld information could also shed light onto the validity of that decision. Moreover, dependent on the outcome of the judicial review, disclosure of the requested information may be one of a limited number of ways in which the victims' families and others interested in the subject may secure some clarification as to what happened at Batang Kali. As the MPS itself noted disclosure would place into the public domain the accounts of those directly involved in the incident. However, having considered the content of the withheld information carefully the Commissioner believes that the degree to which disclosure of the withheld information would genuinely inform the public debate on the events at Batang Kali, and in particular offer clarity with regard to what actually happened, is limited.
43. In conclusion, the Commissioner has decided that the public interest in maintaining the exemption narrowly outweighs the public interest in disclosure. He has reached this conclusion for two key reasons: Firstly, because of the danger of restricting the flow of information to the police in respect of future investigations, including any possible further investigation of this incident, if witness statements from a murder investigation were disclosed; and secondly, whilst he fully recognises the compelling public interest in establishing exactly what happened at Batang Kali in December 1948, the Commissioner believes that disclosure of withheld information would only serve this interest to a relatively limited degree.
44. In light of the Commissioner's findings in respect of section 30(1)(a)(i) he has not gone to consider the MPS' reliance on sections 40(2) and 41 to also withhold the requested information.

Procedural Requirements

45. Under section 17(3) a public authority may extend the time for compliance where it is necessary to do so in order to properly consider the public interest although this section requires that any such consideration must still be completed 'within such time as is reasonable in the circumstances'.
46. The term reasonable is not defined in the Act but the Commissioner has issued guidance where he has made it clear that in no case should a public authority take more than 40 working days to deal with a request.¹ In this case the MPS took significantly longer than 40 working days to reach a decision in respect of the balance of the public interest test which, in the context of his guidance, the Commissioner's does not consider to be a reasonable time period. The MPS therefore breached section 17(3) of the Act.

The Decision

47. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - The requested information is exempt from disclosure on the basis of section 30(1)(a)(i) and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.
48. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - The MPS breached section 17(3) by not completing its consideration of the public interest test within a reasonable time period.

¹ [Freedom of Information Good Practice Guidance No. 4](#)

Right of Appeal

49. 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.

Website: www.informationtribunal.gov.uk

50. 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.
51. 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

Gerrard Tracey
Principal Policy Adviser
Information Commissioner's Office
Wycliffe House
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SK9 5AF

Legal Annex

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"

Refusal of Request

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(2) states –

"Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 2. that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 3. that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

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."

Investigations and proceedings conducted by public authorities.

Section 30(1) provides that –

"Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
 - i. whether a person should be charged with an offence, or
 - ii. whether a person charged with an offence is guilty of it,
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
- (c) any criminal proceedings which the authority has power to conduct."

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."

Health and safety

Section 38(1) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual."

Personal information

Section 40(2) provides that –

"Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied."

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Information provided in confidence.

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Prohibitions on disclosure

Section 44(1) provides that –

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”