

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 5 December 2019

**Public Authority:** Commissioner of the Metropolitan Police Service

**Address:** New Scotland Yard  
Broadway  
London  
SW1H 0BG

### Decision (including any steps ordered)

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1. The complainant has requested Special Branch files about the Partisan Coffee House in Soho from the Metropolitan Police Service (the "MPS"). The MPS refused to confirm or deny whether it holds any 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) (criminal investigations), 31(3) (law enforcement) and 40(5) (personal information) of the FOIA.
2. The Commissioner's decision is that section 23(5) of the FOIA is engaged. No steps are required.

### Background

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3. By way of background, the MPS explained:

*"The venue has been described as 'London's Partisan Coffee House, the 1950s Soho venue that gave birth to many of Britain's leading left wing movements and campaign groups'<sup>1</sup>".*

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<sup>1</sup> <https://www.theguardian.com/politics/2017/apr/22/cafe-cnd-new-left>

4. The MPS also advised the Commissioner:

*"In 2006, the functions of Special Branch were absorbed into MPS Counter Terrorism Command (CTC) also known as S015, which fulfilled its role and today sits under The National Counter Terrorism Policing Headquarters (NCTPHQ).*

*The function of Special Branch is to undertake covert work to acquire and develop intelligence to protect the public from threats to national security, especially terrorism and other extremist activity. Within this remit, the primary focus of Special Branch units is to provide support for the work of the Security Service in carrying out its statutory duties under the Security Service Act 1989 – namely 'the protection of national security and, in particular, protection against threats from terrorism, espionage, sabotage, proliferation of weapons of mass destruction and from actions intended to overthrow or undermine Parliamentary democracy by political, industrial or violent means<sup>2</sup>.*

*The support work provided by Special Branch has been identified as making a crucial contribution to the protection of National Security.*

*Above and beyond support for the Security Service, Special Branch also supports the work of the Secret Intelligence Service in carrying out its statutory duties on support of national security. This body is tasked with collecting intelligence worldwide to support national security and the economic well-being of the UK<sup>3</sup>.*

*The request relates exclusively to Special Branch. Due to the national security remit of Special Branch, information such as individuals, groups and/or locations that are / were of interest to Special Branch, directly or indirectly relates to national security. Furthermore, inferences could be made in relation to security bodies based upon information held or not held by Special Branch".*

## **Request and response**

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5. On 28 June 2019, the complainant wrote to the MPS and made a request for the following information:

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<sup>2</sup> <http://www.legislation.gov.uk/ukpga/1989/5/section/1>

<sup>3</sup> <https://www.sis.gov.uk>

*"Special Branch files on the Partisan Coffee House, 7 Carlisle Street, Soho, 1958-1962".*

6. On 11 July 2019, the MPS responded. It refused to confirm or deny that the requested information was held, citing the following exemptions of the FOIA: 23(5), 24(2), 30(3), 31(3) and 40(5).
7. The complainant requested an internal review on 18 July 2019.
8. The MPS provided an internal review on 14 August 2019 in which it maintained its position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 14 August 2019 to complain about the way his request for information had been handled. As he did not submit any specific grounds of complaint, the Commissioner will consider his request for an internal review to represent his views.
10. The Commissioner will therefore consider the application of exemptions to the request.
11. 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 FOIA. The FOIA is concerned with transparency and provides for the disclosure of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. The FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

### **Reasons for decision**

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#### **Neither confirm nor deny ("NCND")**

12. 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.

13. 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.
14. 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.
15. The MPS has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing five 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.
16. Put simply, the Commissioner must consider whether or not the MPS is entitled to NCND whether it holds any Special Branch files about the Partisan Coffee House in Soho as per the requested information.
17. 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), 31(3) and 40(5) of the FOIA.
18. In refusing the request the MPS advised the complainant as follows:

*"This request attracts a NCND response, as to confirm or deny that information is held prevents disclosure of whether or not there has been any involvement of the security bodies and that national security issues are affected and as such Sections 23(5) and 24(2) of the Act applies. In addition, confirmation or denial that information is held would highlight whether the MPS had an interest in this accommodation; and as such, if an investigation took place, which would therefore identify policing operations. This would hinder the prevention and detection of crime and therefore Sections 30(3) and 31(3) of the Act are engaged. In addition, to confirm or deny that Special Branch held information relating this specific establishment and the people that frequented it, would therefore infer that if information were held, it would also relate to specific individuals, which would be a breach of the Data Protection Act. Therefore, Section 40(5) applies.*

*Please note this response should not be taken to as an indication of whether or not the requested information is held".*

19. When requesting an internal review, the complainant provided the following counter-arguments to the MPS:

*"The invocation of Section 40 is problematic for several reasons. First, the Partisan Coffee House was a public space where individuals had no expectation of privacy. Frankly, it would be perverse for a government agency which may have been monitoring people there to try to conceal that fact by asserting a privacy interest on their behalf.*

*Second, given the dates involved, there is no question that the overwhelming majority of the people who spent time there are now dead. Indeed, virtually all of the prominent individuals known to have frequented the Partisan — including Stuart Hall, Eric Hobsbawm, Doris Lessing, Lindsay Anderson, and Raphael Samuel — are deceased. If there is any sensitive information relating to persons still living, which seems doubtful for the reasons already given, it could be withheld while the bulk of the material is disclosed.*

*Third, Section 40, along with Sections 23, 30, and 31, is subject to the public interest test. The cultural significance of the Partisan and its well-known patrons is undeniable. As a professional historian, I can attest that any Special Branch files describing what happened there would have immense historical value. They would be unique sources for domestic British politics, anticolonial activism, and everyday life in 1950s and 1960s London. An exhibition of photos taken at the Partisan, mounted by the Four Corners Gallery in Bethnal Green in 2017, provides further evidence of the cultural and historical interests in favor of disclosure.*

*Regarding Sections 30 and 31, my request concerns materials which are at least 57 years old and individuals who are either elderly or deceased. There is no plausible harm either to ongoing or future investigations or to investigatory sources and methods. It is no secret that left-wing politics were discussed, advocated, and debated at the Partisan, and if those activities never resulted in criminal charges in the 1950s or 1960s, it is inconceivable that they should do so now. Any specific information referring, e.g., to confidential sources, could be withheld while the rest of the requested material is disclosed.*

*A final point concerns Section 23. I understand that MPS now routinely invokes Section 23 where Special Branch files are concerned but this interpretation of the law is questionable. Section 23 lists fifteen government security agencies by name and neither the Metropolitan Police Service nor Special Branch is among them. If the invocation of Section 23 relies on the exemption for*

*information "directly or indirectly supplied" by one of the listed agencies, information could be withheld in those instances while the rest of the requested material is disclosed. If the invocation of Section 23 relies instead on the exemption for information which "relates to" a security body, I note the following guidance from the Information Commissioner's Office: "there will be a point when the connection between the requested information and a security body is too remote to engage the exemption." Information merely requested by or shared with a security body would seem to meet that definition, especially since the fact of such cooperation could easily be withheld while the rest of the requested information is disclosed".*

20. In completing its internal review, the MPS advised the complainant

*"... it is not the venue that the request relates to but whether Special Branch were or were not monitoring individuals who frequented that location.*

*When considering your request for information concerning political groups, the MPS has to be mindful of the consequences of confirmation or denial of this type of information concerning groups and organisations not only for this request but in general".*

21. It added that the request sought confirmation, or otherwise, that named individuals featured in investigations which were being conducted by the MPS, stressing that the wording of the request pertained to a very specific area of policing.

22. The MPS advised that it needed to use NCND in a consistent manner and provided the complainant with extracts from the Commissioner's guidance<sup>4</sup> to support its rationale.

23. The MPS also explained to the Commissioner that:

*"To confirm or deny whether or not information is held in relation to the Partisan Coffee House, 7 Carlisle Street, Soho, 1958-1962, or in fact any location, organisation or individual, would clearly indicate the nature and scale of police involvement in the area of preventing and detecting crime. This is also the case where organisations and / or individuals may have direct or potential links to matters*

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<sup>4</sup> [https://ico.org.uk/media/for-organisations/documents/1166/when\\_to\\_refuse\\_to\\_confirm\\_or\\_deny\\_section\\_1\\_foi\\_a.pdf](https://ico.org.uk/media/for-organisations/documents/1166/when_to_refuse_to_confirm_or_deny_section_1_foi_a.pdf)



*concerning national security or where they have any form of involvement with or linkage to the security services.*

*It should be recognised that the work that Special Branch conduct is mostly within a very sensitive area of policing and that is why emphasis, albeit on a case-by-case basis, is placed on the impact of confirmation or denial of this type of information in the public domain”.*

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

24. 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)”.*

25. 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 online<sup>5</sup>.

26. 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.

27. 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.

28. The Commissioner’s published guidance<sup>6</sup> on this exemption states that a request must be “*in the territory of national security*” in order for section

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<sup>5</sup> <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

<sup>6</sup> [https://ico.org.uk/media/fororganisations/documents/1182/security\\_bodies\\_section\\_23\\_foi.pdf](https://ico.org.uk/media/fororganisations/documents/1182/security_bodies_section_23_foi.pdf)

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.

29. At internal review, the MPS cited previous decision notices where the Commissioner has accepted that that section 23(5) may be applied to Special Branch work, for example<sup>7</sup>:

*"...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."*

And:

*"... 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."*

30. In its internal review the MPS also drew the complainant's attention to the Commissioner's decision notice FS50788439<sup>8</sup> which, it advised, related to a request which was very similar to the one under consideration here. That request sought confirmation that historical information was held relating to Special Branch monitoring of political groups. It cited the following from that notice:

*"The subject matter being considered in this case concerns any files that may have been specifically generated or held by Special*

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<sup>7</sup> [https://ico.org.uk/media/action-weve-taken/decisionnotices/2012/768126/fs\\_50443643.pdf](https://ico.org.uk/media/action-weve-taken/decisionnotices/2012/768126/fs_50443643.pdf)

<sup>8</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2614086/fs50788439.pdf>



*Branch in respect of staff and students at a specific location who either had involvement with the Communist Party or the British Union of Fascists, or were known to have visited the Soviet Union during a specified time period. In this case, whilst the complainant may be of the view that what he has requested are not matters of 'security' the Commissioner considers it clear that the subject matter of the request is within the area of the work of bodies specified in section 23(3). She also accepts that it is likely that, if the information described in the request did exist, this would have been compiled with input from, or involvement with, the Security Service. Albeit that the information might, in the complainant's view, be 'historical', this is not a relevant factor when considering information being withheld under the exemption at section 23 of the FOIA. 38. 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*

31. The argument from the MPS in respect of this exemption is that the requested information, if held, would be directly or indirectly supplied to it by one of the bodies in sub-section (3). It has explained that it is maintaining a NCND stance because to provide any indications through confirmation or denial that any information is or is not held, would itself constitute the disclosure of exempt information, as any such indications would amount to a statement that relates to a security body or bodies. It advised:

*"The purpose of applying this exemption is to avoid confirming or denying the involvement of a security body and thus to maintain a position which safeguards any activities".*

32. The MPS also argued that the exclusion of the security bodies from the FOIA is significant because, in order for legislators to have taken such a step, it was acknowledged that this is recognised as a key element necessary for the purposes of safeguarding national security. It said that this in itself indicated a recognised public interest in protecting the work of such bodies.
33. The MPS further explained:

*"The ability to monitor, detect and prevent criminal acts in the area of extremist and terrorist activity and the like, is dependent on the ability of Special Branch and the security bodies to share and exchange information and intelligence in the knowledge that such intelligence will be managed by all parties in an appropriately confidential manner. The disclosure of information by the MPS that indicates the involvement or otherwise of security bodies, or the*

*police service, in investigating specific individuals or organisations, in this case by confirming or denying whether the requested information is held would undermine this ability.*

*Furthermore, consistency of responses across a range of similar requests (which focus on different subject matter or varied time periods) is also necessary to maintain the protection of this exempt information.*

*A lack of consistency would potentially allow exempt information, intelligence relating to the security bodies and operational intelligence to enter the public domain over a period of time. The cumulative effect of releasing one individual piece at a time, information identifying who is or is not of interest to the security bodies, will prejudice the ability of the MPS Special Branch to work with these security bodies in their stated roles to protect national security.*

*Responses which do not maintain the consistent approach form a pattern, which would also potentially allow the identification of those who have been or are of interest to the security bodies. This causes prejudice to national security by allowing those who are intent on causing harm to learn more about the nature and extent of MPS Special Branch and security body interest to ascertain the extent to which they were (or were not) the subject of interest or investigation and to take action to avoid the attention of authorities”.*

34. 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.
35. 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)*

36. 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).
37. The subject matter being considered in this case concerns any files that may have been specifically generated or held by Special Branch in respect of the Partisan Coffee House in Soho during a specified time period.
38. In this case, the complainant has referred above to the public interest in respect of section 23. However, this is not something which is taken into consideration here as section 23 is an absolute exemption and no such test is necessary if the exemption is properly engaged.
39. Furthermore, he makes reference to the information that has been requested and whether or not it can be properly withheld in its entirety under section 23. However, the Commissioner is considering here whether or not the MPS is required to confirm or deny whether it actually holds any information, rather than the disclosure of any information which may, or may not, be held. Accordingly, she only needs to consider whether or not the requested information, if held, would be in the area of work of bodies specified in section 23(3). If it is, then the MPS is entitled to rely on section 23, which is an absolute exemption and requires no public interest test.
40. The Commissioner notes that the request relates specifically to Special Branch files. Furthermore, she accepts that, due to the national security remit of Special Branch, 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.
41. 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.
42. 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.

## Right of appeal

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43. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

44. 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.
45. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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