Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0078
Information Commissioner's Ref: FS50106800

Heard at Field House, London, EC4
On 11 and 12 February 2009

Decision Promulgated
30 March 2009

BEFORE

DEPUTY CHAIRMAN

David Marks QC

and

LAY MEMBERS

Suzanne Cosgrave
Dave Sivers

Between

THE METROPOLITAN POLICE

Appellant

and

INFORMATION COMMISSIONER

Respondent

Subject matter:

Section 30(2) Freedom of Information Act 2000: matters of public interest in relation to lists of informants held by Appellant in the late 19th Century and early 20th Century – exceptional nature of public interest in preventing disclosure of informants' names, past, present and future - redaction

JUDGMENT

The Tribunal substitutes the following Decision Notice for the original Decision Notice issued by the Information Commissioner in relation to this appeal under Reference No. FS50106800, namely:

1. The Tribunal requests the Appellant as a public authority to disclose to the requester, Mr Alex Butterworth, the information contained in the following documents or written materials, namely:

   (1) Metropolitan Police Ledgers headed "Special Account", volumes 1-3 (1888-1894, 1894-1901, 1901-1912);

   (2) Chief Constable's CID Register: "Special Branch" (1888-1892)

   save that all proper names and/or family names relating to individual parties or other persons be redacted therefrom.

2. The said information in satisfaction of his request i.e. up to 1905 and set out in 1 is to be produced within 28 days of the promulgation of the Tribunal's Decision in relation to the appeal bearing reference EA/2008/0078 unless time is extended by express permission of the Tribunal.

Reasons for Decision

General

1. This appeal was opened Wednesday, 11 February 2009 on the basis that the appellant public authority, namely the Metropolitan Police (known as the MPS for the purposes of this appeal) were seeking to appeal against a Decision Notice dated 20 August 2008 bearing the reference number FS50106800, but on narrower grounds than those articulated in its original Grounds of Appeal, as well as those set out in its supporting skeleton argument. At the conclusion of a day's argument, the Information Commissioner as the Respondent ("the Commissioner") for reasons

more fully set out below, accepted that largely in the light of the evidence and the other materials which had been heard and considered by the parties and by the Tribunal, the appeal should be allowed in part, and an amended form of Decision Notice in the form set out above be issued by the Tribunal by way of substituted Notice.

2. The parties have asked the Tribunal to set out in a shorter form than it otherwise would have done the facts and matters which have now led to the issuance of the amended Notice. The Tribunal regards the ambit of its powers and duties under section 58 of the Freedom of Information Act 2000 (FOIA) which governs the position in the event that a Decision Notice is not in accordance with the law as wide enough for it to provide reasons in the way it has been invited to do by the parties.

The background facts

3. By letter dated 25 July 2005, a Mr Alex Butterworth, who, it seems, is an historian and writer, wrote to the MPS asking for sight of three specific items of information which comprised the two items of information set out in the Decision Notice set out above plus one other ledger since disclosed. He stated that he was writing a study and history on and about a number of European anarchists active in the late 1880s and 1890s and wanted sight of the materials referred to. He said that the material held by Special Branch, which of course is part of the MPS, could be crucial to his research. In October 2006, Special Branch (also known as SO12) was transferred to the MPS's newly created Counter Terrorism Command (also known as SO15). There is, therefore, strictly speaking no longer a MPS unit called Special Branch. However, when Mr Butterworth made his request, Special Branch was still in existence, and reference will be made to it in the remainder of this judgment.

4. He referred, amongst other things, to a doctoral thesis on the Special Branch's policing of Fenian terrorism by Dr L Clutterbuck. That thesis, it appears, is held in the British Library where, subject to the payment of a fee, it is publicly available. A copy is also held, it seems, at the University of Portsmouth. As will be seen, Dr Clutterbuck is a retired Special Branch officer. The Tribunal was shown excerpts of Dr Clutterbuck's thesis and reference will be made to these below.

5. Mr Butterworth stated his preference for accessing the information namely that he wished to attend to view the material at the MPS's premises. The MPS asked him to sign a form of written undertaking not to disclose "certain information" from the MPS's records "*although general information and a description of the documents is permitted*." In addition, copies were not to be taken or made.

6. Mr Butterworth took the view that since the records he was seeking were so old and since he had seen reference to some informants' names in Dr Clutterbuck's thesis, he required access without the need to sign any form of undertaking in the way requested.

7. In due course, the MPS refused access in the way that Mr Butterworth was seeking. It relied on a number of exemptions in FOIA, namely section 31 (law enforcement) and section 38 (health and safety). Reliance on the latter was based on the fact that descendants of informants might be put at risk if names were released.

8. In its exchanges with the Commissioner, the MPS confirmed that Dr Clutterbuck, by 2007 at least, had retired from the MPS. He is a former Special Branch officer. The MPS confirmed, however, that the thesis had been reviewed: although there are references to informants in the ledger which forms part of the requested subject matter, there were "*no copies of the ledgers themselves*" in the words of the MPS. That, in the Tribunal's view, was a justifiable observation for the reasons which will be set out in brief below.

9. In a formal expanded response to the Commissioner, the MPS then relied further on section 24 of FOIA which deals with national security. That section is no longer in issue even for the purposes of the consensual approach made in the Notice of Appeal. The MPS claimed that if the MPS were to release details of previous informants, future and present, modern day informants, who are now known as Covert Human Intelligence Sources (CHIS's), would be "deterred". The response added: "*Informants expect their identities to be protected indefinitely. If we are unable to reassure them of total [**anonymity**] because of possible release under the Freedom of Information Act, the MPS will not be able to recruit future or sustain current informants. This is not in the public interest as the MPS relies on CHIS's to inform on current or future threats. If the information was withheld die [**presumably***

***due**] to fear of identities being revealed, the public will be put in danger as informants not only provide the police but other government departments with extremely valuable intelligence. In this present climate of an unprecedented threat from extremists, the MPS relies on informants to give us an insight into motives and criminal activities that are happening in those closed worlds. Agreeing to become an agent or informant is a major step of trust often involving the informant taking physical risk, in betrayal of his own country, family, colleagues and sometimes in feelings of shame or guilt. It is difficult to persuade potential agents to take this step and they have to be reassured that no one will ever know what they have done. We believe it is important and that nothing should be done to undermine the confidence of current and potential agents around security and intelligence services keeping identities secret. It would be a major deterrent to some potential agents if they thought their role might be revealed even long after the event.*"

10. The reason the Tribunal sets out the above passage at some length is that it forms the cornerstone of the MPS's contentions and evidence during the appeal where reliance was placed on section 30(2) of FOIA which deals with the question of investigations conducted by public authorities and the qualified exemption attaching to such activities.

11. The Tribunal pauses here to note that it has had the benefit of inspecting the materials which are in issue. As the formal exchanges between the parties confirm, the first item, namely the Ledgers, list in large part only surnames which may well be pseudonyms and payment amounts. As the MPS confirmed, there is "no discernible structure to this list" nor any method of determining which payments were to informants. The MPS also confirmed there were, and are, no supporting documents that have survived to shed light on the list of the names of the entries. In particular, it was claimed the Ledgers were not selected for permanent preservation when a previous review had been carried out. The second item, the CID Register, was described quite properly in the Tribunal's view as a "*simple register containing a few words citing a name (usually a police officer), a short case title and a reference number to some form of correspondence*" that has not survived the period in question. The Tribunal feels some sympathy with the MPS's contention and comment that it is difficult to see what the Register would add to a

"detailed, coherent" historical perspective of Special Branch. Nonetheless, the Tribunal accepts, as it has done on many occasions, that although on its face information sought to be disclosed might not be said to be immediately informative, that is not to say that the person making the request or some other informed observer might not extract or infer a great deal of useful knowledge from its content.

12. This represents perhaps a useful juncture to revert to the 20 pages or so of extracts shown to the Tribunal from Dr Clutterbuck's thesis which were put in evidence. The title of the thesis is "An Accident of History? : The Evolution of Counter Terrorism Methodology in the Metropolitan Police, 1829-1901, With Particular Reference to the Influence of Extreme Irish Nationalist Activity". The extracts from Volumes One and Two which were provided did not set out or contain any list of informants as such with particular references to names and identities; they either comment on the fact that they had been informants, admittedly with occasional references to other related publications on or about the subject of the thesis, or they recognise with varying degrees of detail the lengthy adherence by the MPS and associated security agencies to the policy that informants' names should never be released or at least identified in publicly released records. Admittedly, there are occasional references to individual names, but it is not clear whether some of those names are pseudonyms. In any event, the individuals referred to are clearly long since dead. Furthermore, as the author himself points out, it may well have been that release of the names might, had the same been effected earlier, have been in circumstances where the individuals involved might otherwise have approved the release, although clearly such a conclusion was entirely speculative. Nonetheless, the overall impression given by the thesis is that it is, above all, a wide-ranging historical research into Victorian policing methods, and not in any sense a detailed view of individual informants and their activities with the police in the relevant period.

The Decision Notice

13. The Decision Notice is dated 20 August 2008. It dealt with the MPS's reliance on the exemptions set out in sections 21, 31 and 38 of FOIA. The Notice noted at paragraph 33 that the Ledgers had come to light in, it was thought, 2001 and accessed by Dr Clutterbuck in 2003. They were not selected for permanent preservation and normally therefore would have been destroyed. The matter is

apparently to be reviewed in 2011. It was also noted in particular that the National Archives did not, as at August 2008 at least, on the whole regard them as being worthy of retention.

14. Reference was made to section 30(2) of FOIA at paragraph 54 and following of the Notice. That section need not be set out in any great detail but provides an exemption, albeit a qualified one, if the information is held by a public authority and if it was obtained or recorded by the authority for the purposes of its function relating to investigations which the public authority has a duty to carry out and/or conduct with a view to bringing criminal charges or investigations relating to criminal proceedings generally. Equally, there is no need to refer to section 31(2) of FOIA. The two sections are mutually exclusive. Reliance was placed in the appeal on the former section. The fact that it is a qualified exemption means that a balance has to be struck as is normal in such cases between the relative competing public interests in favour of maintaining the exemption on the one hand, and in favour of disclosure on the other.

15. The Commissioner conducted that exercise and quite properly drew attention to a number of key factors that need to be considered and kept in mind when the public interest test is being applied. In particular, there had to be considered the severity of any harm identified and the likelihood of the harm arising. Next, there had to be considered the frequency of any harm arising, followed by the information that is in the public domain, followed by the content of the information, coupled with the age of the information.

16. The Commissioner recognised the public interest already referred to in the quoted passage in paragraph 9 above. However, in the light of the fact principally that, in his view, “some” of the information had already been accessed by others (i.e. in part a reference to Dr Clutterbuck, although there were isolated instances of other cases of access) and the fact that the information sought was extremely old, the arguments in favour of maintaining the exemption did not, in the Commissioner’s view, prevail. The Notice therefore directed that the material sought be made available for inspection.

The evidence

17. The formal evidence prepared by the MPS for the appeal consisted of three relatively short witness statements. All three witnesses greatly expanded the evidence they gave at the hearing. The first witness was Yvette Arnold. She is currently Head of Intelligence Management and Operations Support, being part of Special Branch. Overall, she confirmed that it was the policy of Special Branch to protect the identity of the informants beyond their lifetime, whatever the age of the material, for the fear of compromising the trust and safety of existing and potential agents. She addressed the procedures which were in place at the time of Dr Clutterbuck's investigations and at the time of Mr Butterworth's request. In effect, she confirmed that it was Special Branch's policy to refer any such request to the acting Head of the Special Branch, normally of Commander status, as at the time of the request. She claimed that she was not always privy either to the facts of the request being made or to the fact that access had been granted in any particular case.

18. She did however exhibit documentation which endorsed the existence of the policy of non-disclosure referred to above. This material had been in part redacted. The Tribunal asked for, and was shown, the redacted material. The Tribunal was and remains entirely satisfied that the policy referred to by Ms Arnold and already referred to, represented a policy which was in place well before as well as at the time of the request which is here in question. Moreover the redacted material made it abundantly clear that the policy was one which operated and continues to operate throughout the structure of all security-related services in this country and beyond the confines of Special Branch and the MPS, precisely for the reasons which were articulated by the witnesses and by the correspondence which is referred to above.

19. The second witness was Detective Superintendent Julian McKinney. Since late 2005 he has been the Head of Covert Functions and as such he is the Authorising Officer for all CHIS's. His role and responsibilities are regulated under the Regulation of Investigatory Powers Act 2000. The Tribunal does not feel it is necessary to say anything more about that statute save that it sets what Detective Superintendent McKinney called the legal standard required, when considered together with the applicable case law. Detective Superintendent McKinney, in his

extended evidence which again went beyond the confines of his witness statement, forcefully and eloquently explained that the policy regarding informants' names or identities was vital to the efficacy of the system whereby CHIS's were employed. He said that the policy regarding the need to retain the secrecy of informants' identities and names was as critical as it has even been, if not more so. This was so particularly in the light of the events in New York with regard to the Twin Towers and the 7 July 2005 London bombings; the request in this case immediately post-dated the latter event (made 25 July 2005). He therefore confirmed that the need to ensure that informants were reassured about non-disclosure was as strong then as it has even been. He stressed in particular that the rules and systems regarding the preservation of the identity of informants currently in force, were not surprisingly, extremely stringent. In effect, destruction of this information occurred at the earliest possible practical moment, which information in any event would only be held by the individual officer or officers dealing with that particular informant. Any other reference to the informant would be done by other means insofar as any recording of that informant's identity was necessary. Destruction would occur, he confirmed, as and when necessary and on a case by case basis. There would not be any question of retaining any such information for a longer period than was absolutely necessary.

20. The third and final witness was a former Commander of and within Special Branch, namely Mr Roger Pearce. He retired in June 2003 after 30 years' service. Prior to his retirement from the MPS, he was formerly responsible for allowing access to the records retained by Special Branch on a case by case basis. He confirmed the importance of the non-disclosure principles which had been articulated by the previous witness. He added in a colourful, yet extremely expressive manner, that the groups from which informants were drawn were generally subject to an atmosphere of "absolute paranoia". This strengthened the need to ensure that the necessary element of trust and confidence existed between a handler and the informant.

Findings

21. The Tribunal has no hesitation in endorsing the acceptance by the Commissioner that the effect of the totality of the evidence considered during the appeal,

particularly the effect of the redacted material referred to and the strength of the evidence put forward by the last two witnesses, confirmed the overriding if not exceptional public interest in play in favour of maintaining the exemption set out in section 30(2)(a) and (b) of FOIA. The Tribunal is therefore firmly of the view that the substituted Decision Notice as set out above at the outset of this judgment represents the overwhelming importance of the longstanding policy adopted by the MPS that informants can be assured that their names and identities will not be disclosed even after they die. It follows that redaction of all the names in the requested material should be carried out. This should therefore be sufficient to protect adequately the policy to which reference has been made.

Further observations

22. As discussed with the parties at the conclusion of the appeal, there remain a number of other observations which the Tribunal feels are appropriate.

23. First, the Tribunal is of the view that the form of undertaking which was proffered to Mr Butterworth was, and if proffered again today, would be in all the circumstances as matters have emerged, inappropriate. If a relevant exemption is engaged and if it is determined by the public authority and endorsed by the Commissioner or by the Tribunal, that the exemption is subject to a particularly strong public interest in relation to maintaining exemption, there can be no scope for what is in effect a form of waiver.

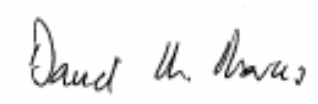
24. Next, and revisiting some of the evidence which emerged during the hearing, the witnesses jointly admitted that in the past there had been little, if any, consistency in the way in which the MPS and in particular, Special Branch, had first addressed the request for access and thereafter allowed access to its files and records. These occasions were as set out above, extremely isolated. It is enough to refer to the case of Dr Clutterbuck himself. It is clearly incumbent on the MPS, and in particular Special Branch, to ensure it establishes and/or strengthens any criteria such as they presently are which apply, first when a request is made for access and thereafter when, on the basis that access is permitted, which access is in fact effected. These matters raise issues such as vetting which go well beyond the confines of this appeal.

25. Finally, this is one case where it might have been appropriate for the Commissioner to consider calling as a witness the complainant himself. Mr Butterworth, in his correspondence, referred to the fact that he had been given extensive access to the type of information he was seeking in this case from similar agencies in Europe and elsewhere. It was not clear, to the Tribunal at least, that such information included informants' names or identities. This was clearly a crucial issue. The overall position with regard to joinder is addressed in the Tribunal's Practice Notes, in particular at section 2. There can and should be no bar to the Tribunal being asked if necessary to consider making an order for joinder where appropriate. Alternatively, the complainant can in appropriate cases provide his or her views and/or evidence in letter form, although the Tribunal fully recognises that it is inappropriate for the Commissioner to seek to adduce evidence from non-parties in a Decision Notice. In the latter case, it is clearly the most appropriate course for the Tribunal to consider making a Joinder Order of its own motion.

Conclusion

26. For all these reasons, the Tribunal makes the substituted Notice as set out at the outset of this judgment.

Signed:



Deputy Chairman

Date: 30 March 2009