IN THE FIRST-TIER TRIBUNAL **Case No. EA/2010/0183**

GENERAL REGULATORY CHAMBER

[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS502932249

Dated:	**1st November 2010**
Appellant:	**Trevor Marriott**
Respondent:	**The Information Commissioner**
Additional Party:	**Commissioner of Police for the Metropolis**
Heard at:	**Field House**
Date of hearing:	**10, 11 and 12 May 2011**
Date of decision:	**4 July 2011**
Date of Review:	**31 August 2011**

Before

CHRIS RYAN

(Judge)

and

HENRY FITZHUGH

ROSALIND TATAM

Attendances:

The Appellant in person

For the Respondent: Ben Hooper

For the Additional Party: Robin Hopkins

Subject matter:

National security s.24

Investigations and proceedings conducted by public authorities s.30

Public interest test s.2

Cases:

DEFRA v Information Commissioner and Simon Birkett [2011] UKUT 39 (AAC)

All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and MOD [2011] UKUT 153 (AAC).

Chief Constable of the Greater Manchester Police v McNally [2002] EWCA Civ 14

Frank-Steiner v the Data Controller of the Secret Intelligence Service, IPT/06/81/CH

Metropolitan Police v Information Commissioner EA/2008/0078

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed

REASONS FOR DECISION

The decision includes amendments to paragraph 20 introduced as the result of applications for review and permission to appeal filed by the Appellant on 20th and 26th July 2011 and ruled on by the Tribunal in a Ruling dated 31st August 2011.

Summary of our conclusions

1. We have decided that the Additional Party, (commonly called the Metropolitan Police and referred to in this decision by the initials "MPS") was not obliged to disclose to the Appellant ("Mr Marriott") certain of its late 19th century records, under section 1 of the Freedom of Information Act 2000 ("FOIA"). We were unanimous in our decision that the records fell within the scope of the exemption provided by FOIA section 30(2) (information held for the purposes of an inquiry). That is a qualified exemption, so that the information would still have to be disclosed unless the public interest in maintaining the exemption outweighed the public interest in disclosure (FOIA section 2(2)(b)). On that point we were divided, with two members concluding that it did and one that it did not. The result of that majority decision is that the records need not be disclosed. It is not therefore necessary for us to consider whether or not the second exemption claimed, under FOIA section 24 (national security), was engaged.

Background Information

2. The records in question came to light in the last 15 years among the archives of the Special Branch. The Special Branch no longer exists under that name but was an operational section of the MPS for many years. In 2006 it was merged into the Counter Terrorism Command, which still forms part of the MPS.

3. The records cover a period between the late 1880's and the early 1900's and consist of:
    a. Three volumes of ledgers entitled "Special Account" (the "Ledgers"), recording, and reconciling to cash balances, a large number of relatively small cash payments made between 1888 and 1912. Each entry shows the date the payment was made, followed by a short indication of its purpose, in most cases no more than a single name followed by the sum of £1 or £1 10s 0d. In a few other cases the entry takes the form of a statement such as "Irish Daily Independent 66p" or "American papers voucher 15 p"; and
    b. A large register entitled "Chief Constable's CID Register: Special Branch" and recording the location, within a now lost filing system, of a very substantial quantity of miscellaneous information recorded between 1888 and 1892 (the "Register"). The entries are in alphabetical order by reference to the name of a person, location or organisation. The name is followed by an indication of the information recorded against it and a code number believed to indicate the number of the relevant file and the box or other container in which it was stored. So typical entries might read:

Name	Subject	Reference to correspondence	Folio in correspondence register
Columbia Institute	Meeting of Irish National Foresters at	3931/3	374
[Surname, Christian name]	Attending noisy meeting of Socialists	3214/142	385
[Surname, Christian name]	Writing to convict [surname]	4081	

4. We have inspected both the Ledgers and the Register, in unredacted form, and have concluded that many of the entries in the Ledgers may well record payments made to police informants, each of whom is identified by a single word name, and that a considerable number of the Register entries also relate to the activities of police informants, some of whom are identified by a name. We could not discern if the names were surnames or pseudonyms, although in at least one case, the name was definitely a pseudonym.

5. At some time around 2005 an historical researcher called Felicity Lowde was allowed access to the Ledgers and the Register under a confidentiality undertaking. In apparent breach of the undertaking she photographed some pages of the Ledgers and subsequently published them on her personal website as part of an historical review of the attempts to bring to justice the perpetrator (or perpetrators) of the gruesome murders in the East End of London in the later 19th century, commonly described as the Jack the Ripper murders. Ms Lowde's review included commentary on the role played by police informants, which is cross referenced to some of the

copy ledger pages. The material continues to be available on the internet today.

6. In 2002 a Mr Lindsay Clutterbuck wrote a doctoral thesis entitled “An Accident of History?: The Evolution of Counter Terrorism Methodology in the Metropolitan Police, 1829 -1901”. It dealt, in particular, with Irish terrorist activities at the time and drew heavily on the Ledgers and the Register as evidence of the way in which the Special Branch operated in its early years. It included the names of police informants, or suspected informants, as well as some detail of their likely activities. At the time he wrote the thesis Mr Clutterbuck was a serving police officer who spent much of his career within Special Branch, rising to the rank of Acting Detective Superintendent. He retired in 2006.

7. In 2003 Mr Clutterbuck was involved in internal correspondence with certain of his colleagues about the possible release of the Ledgers and the Register to the National Archives and the relaxation of what is described in one of the memoranda as “the forever rule”. There is some dispute between the parties as to whether individual’s names would have been redacted before release and whether a relaxation of the rule was ever introduced. In the event the National Archives came to the conclusion that neither the Ledgers nor the Register were worthy of being included in the National Archives.

8. In 2005 a Mr Alex Butterworth made a request under FOIA for the MPS to disclose various items of information, including the Ledgers and the Register, for historical research into the activities of certain anarchist groups in the late 1880’s. He was offered limited access on terms of confidentiality, which he rejected. Unrestricted access was refused on various grounds, including FOIA section 30 (information held for the purpose of investigations), on the basis that the Ledgers and the Register contained the names of police informants. It was said that modern day informants would be deterred from assisting the

MPS if they perceived a risk of their identities being disclosed at any time in the future.

9. Mr Butterworth complained to the Information Commissioner who ultimately issued a Decision Notice in August 2008 (FS50106800) directing disclosure. That decision was varied on appeal to this Tribunal (at that time it was called the Information Tribunal). The decision (the "Butterworth Decision") was published in March 2009 and has the reference EA/2008/0078. It concluded that the Ledgers and the Register should be released, provided that all proper names and/or all family names relating to individuals were redacted. In the course of the hearing the Information Commissioner, having heard the evidence of several MPS witnesses detailing the damage they anticipated disclosure of informant names would cause to the informant programme, accepted that there was a strong public interest in maintaining the secrecy of those names. A key passage of the decision, at paragraph 21, read:

> *"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 MPS 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* [redacting names] *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."*

10. Mr Butterworth did not take part in that Appeal, despite his apparent wish to have done so.

Mr Marriott's request for information and complaint to the Information Commissioner

11. At the time of the Butterworth Decision in March 2009 Mr Marriott had outstanding an FOIA request to the MPS referring to information in the Ledgers or the Register. He supplemented it with further requests between June and August 2009. We do not need to detail them all because their overall effect was to request the disclosure of some or all of the Ledgers and the Register in unredacted form. The MPS relied on the Butterworth Decision in rejecting the request and in seeking to persuade the Information Commissioner that no further disclosure should be made, after Mr Marriott had complained to the Information Commissioner about that rejection. It based its case, as before, on FOIA section 30. The Information Commissioner agreed and decided, in a Decision Notice dated 1 November 2010 that the MPS had applied the exemption correctly and was not therefore obliged to disclose unredacted copies.

The Appeal

12. Mr Marriott filed an appeal against the Decision Notice on 4 November 2010 and, following an unsuccessful application to have it dismissed summarily on the basis of the Butterworth Decision, it proceeded to a hearing with the MPS joined as an Additional Party.

13. At the outset Mr Marriott appeared to accept that the section 30 exemption was engaged and concentrated on seeking to establish that the public interest in maintaining that exemption did not outweigh the public interest in disclosure. However, he subsequently challenged the engagement of the exemption and we heard argument from all parties on the correct interpretation of the section.

14. A similarly late change, with very much less justification, was sought to be made by the MPS. On the afternoon before the hearing was due to start it submitted that the information in dispute was also exempt under FOIA section 24 because one of the security organisations shared the MPS's concerns about the effect of the release of names. The identity of the security organisation was disclosed to the Tribunal in closed evidence but the reasons for its concern were made available in open evidence. Counsel for the MPS, Mr Hopkins, argued that the effect of the decision of the Upper Tribunal in *DEFRA v Information Commissioner and Simon Birkett* [2011] UKUT 39 (AAC) was that we had no discretion on whether or not to allow a public authority to introduce an additional exemption in order to justify its refusal to disclose information, although we retained our case management powers to determine how the case, in its expanded form, could be presented. The possible disadvantages of permitting late changes of this nature have been set out in paragraphs 38 to 44 of the later decision of the Upper Tribunal in *All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and MOD* [2011] UKUT 153 (AAC). We believe that the circumstances of this case highlight the disadvantages of an interpretation of the law that would give what the Upper Tribunal in that case described as *"an indefeasible right in the public authority to raise whatever exemption it thought fit whenever it wanted to…"* A litigant in person, facing a three day hearing in which he was to be opposed by an impressive legal team assembled by the MPS, was presented with a new case to answer with no time to prepare his counter arguments. Mr Hopkins (who, to be fair, was suitably apologetic on his client's behalf) argued that the change was in fact a very small one, amounting to no more than a statement that another organisation agreed with the MPS view on the impact of disclosure on informant programmes. We would nevertheless have had no hesitation in rejecting the application to be allowed to rely on section 24 had we a discretion in the matter; it was unjustified and unfair on

Mr Marriott. However, we were persuaded that the views set out in the *APPG* decision were obiter and that we were therefore bound by the *DEFRA* decision. Mr Hooper, counsel for the Information Commissioner, explained that, although the *DEFRA* decision was being appealed, he agreed with Mr Hopkins that, pending the outcome of that appeal, we had no discretion and had to allow the MPS to rely on section 23.

15. In the event, we have decided that, having determined that the information in dispute may be withheld under section 30, it is not necessary for us to decide whether or not it would also have been correct to withhold it under section 24. Accordingly, the issues that we must address in our decision are:
    a. Whether FOIA section 30(2) was engaged; and, if it was
    b. Whether the public interest in maintaining that exemption outweighed the public interest in disclosure.

    We set out the law applying to those issues in paragraphs 17 and 20 below, before dealing with issue a. in paragraphs 21 and 22 and issue b. in paragraphs 23 to 47. Our conclusion is set out in paragraph 48.

16. Before proceeding to the substance of the Appeal we add some explanation of the logistics of the hearing. As mentioned above we inspected the originals of the Ledgers and the Register. We did this on the afternoon of the day before the hearing. We also had unredacted extracts included in a closed bundle. Other parts of the evidence were also included in the closed bundle and parts of the hearing were conducted on a closed basis. In addition one witness, witness D, provided a witness statement that was wholly open save for the identity of the witness which, it was said, needed to be withheld in order to permit him to carry out his normal duties. When it came to cross examination of this witness he produced proof of identity only to the members of the panel and the witness box was screened so that he could be seen only by them. We are grateful to

Mr Marriott for his patience in the face of these, unfortunately inevitable, disruptions to the presentation of his appeal.

The Relevant Law

17. FOIA section 1 sets out the general obligation of a public authority to disclose information if requested in the following terms

> *(1)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.*

That obligation is modified by section 2, which provides, in relevant part:

> *(1)…*
>
> *(2)In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—*
>
> > *(a)the information is exempt information by virtue of a provision conferring absolute exemption, or*
> >
> > *(b)in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

Under section 2 (3) both the section 24 and section 30 exemptions relied on by the MPS in this Appeal are categorised as qualified exemptions.

Section 24 provides an exemption headed "*National Security" to the effect that information is* exempt if non disclosure is required for the purpose of safeguarding national security..

18. Section 30 provides an exemption headed *"Investigations and proceedings conducted by public authorities"* and provides, in relevant part, as follows:

> *(1)…*
>
> *(2)Information held by a public authority is exempt information if—*
>
> > *(a) it was obtained or recorded by the authority for the purposes of its functions relating to—*
> >
> > > *(I) investigations falling within subsection (1)(a) or (b),*
> >
> > > *(ii) criminal proceedings which the authority has power to conduct,*
> >
> > > *(iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or*
> >
> > > *(iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and*
> >
> > *(b) it relates to the obtaining of information from confidential sources.*

19. On an appeal to this Tribunal the scope of our powers is set out in section 58 in the following terms:

> *"(1) If on an appeal … the Tribunal considers—*
>
> > *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
> >
> > *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based".

Is the exemption engaged?

20. Mr Marriott argued that the connection between an investigation, or investigations, carried out by the MPS, on the one hand, and the content of the Ledgers and the Register, on the other, was too remote for section 30(2) to apply. As regards section 30(2)(a) it is certainly, difficult to forge a link to a particular investigation but, as Mr Hopkins argued, the subsection uses the broad expression "for the purpose of its functions relating to …" so that we need only decide whether the records were created as part of the performance by the MPS of its duties to investigate crime. We consider that, reading subsection (2) with subsection (1), to which it cross refers, it is clear that they were. As regards section 30(2)(b) it is difficult to be sure, so long after the disputed information was recorded, that all of it certainly "20 Mr Marriott argued that the connection between an investigation, or investigations, carried out by the MPS, on the one hand, and the content of the Ledgers and the Register, on the other, was too remote for section 30(2) to apply. As regards section 30(2)(a) it is certainly, difficult to forge a link to a particular investigation but, as Mr Hopkins argued, the subsection uses the broad expression "for the purpose of its functions relating to …" so that we need only decide whether the records were created as part of the performance by the MPS of its duties to investigate crime. We consider that, reading subsection (2) with subsection (1), to which it cross refers, it is clear that they were. As regards section 30(2)(b) it is difficult to be sure, so long after the disputed information was recorded, that all of it certainly related to

the obtaining of information from confidential sources but we are satisfied, on a balance of probabilities, that the greatest part of it did.

21. We are accordingly satisfied that the requirements of both section 30(2)(a)and (b) are satisfied. The exemption is therefore engaged and we proceed to consider the public interest balance under section 2(2)(b)

The public interest balance

22. The effect of FOIA section 2(2)(b) is that disclosure will only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure. If the interests are evenly balanced, therefore, disclosure must be made. The MPS and the Information Commissioner argued that the public interest in seeing the disputed information is so meagre that it does not come near to equalling the very substantial public interest in maintaining the anonymity of informants in perpetuity. Mr Marriott argued that there was substantial public interest in making the disputed information available to historians, as well as the public at large, and that after 120 years the risk of damage to informant programmes had diluted to such an extent that the public interest in disclosure was not outweighed by the public interest in maintaining the exemption.

23. Mr Marriott included in his submissions a number of criticisms of the Butterworth Decision and of the circumstances in which it came to be made, without Mr Butterworth's attendance. His evidence and skeleton argument (but not, to be fair, his submissions during the hearing) included criticism of the Information Commissioner for having been too ready to follow the Butterworth Decision, in those circumstances, when reaching the decision that has given rise to this Appeal. Our role is to determine the case in hand, based on the evidence and submissions placed before us. It is not to review, or to act as an appeal court from, the Butterworth Decision. Much of the

material we have seen was no doubt also placed before the tribunal panel which made the Butterworth Decision. But we are not bound by the conclusions reached. We have therefore looked at the case afresh, based on the materials that have been presented to us and the arguments addressed, in order to discharge the task imposed on us by FOIA section 58.

24. Mr Marriott also argued that it was unfair that other researchers had been given access to the Disputed Information on terms of confidentiality and that he had not. The question of fairness in this context is not an issue that arises under FOIA, although inconsistency in a public authority's approach might in some circumstances throw doubt on the public interest factors relied on to justify withholding information. We do not think it does in this case because the apparent decision of the MPS to discontinue the practice of disclosure in confidence was understandable in the light of the Lowdes publication and the introduction of a freedom of information regime under the FOIA.

Evidence

25. With those preliminaries dealt with we now turn to the evidence we received. It was very substantial and we summarise it in the following paragraphs.

26. Mr Marriott filed a 44 page witness statement. It has to be said that much of it was pure argument, rather than factual evidence. In combination with material coming to light during Mr Marriott's cross examination it covered the following matters:

    a. Mr Marriott is a former police officer familiar with the procedures for handling informants. During the course of cross examination he made it clear that he left the police force at the end of the 1980's, but he refuted the allegation that his

information on informant handling was therefore out-dated. His witness statement explained that he continued to be involved with the criminal law through his role as an adviser, accredited by the Law Society, to attend police stations on behalf of solicitors to advise people in custody. He said that this brought him into conduct with individuals who may become, or may be invited to become, police informants.

b. Since 2002 Mr Marriott has been researching the Jack the Ripper murders and believes, on the basis of his expertise as a former police officer and his abilities as an historian, that he might well be able to tease out from the Ledgers and the Register valuable evidence and/or profitable new lines of enquiry. His belief has been strengthened by his inspection of the redacted versions disclosed under the Butterworth Decision, together with his study of the Clutterbuck thesis and the release to him of two unredacted entries having direct relevance to the Jack the Ripper investigation. He is also confident that, contrary to what MPS had told him, he would be able to differentiate between entries that concerned informants and those that did not.

c. The evidence suggested that other agencies, such as MI5 and MI6, have applied a more liberal policy on the disclosure of historical records than the MPS is asserting in this Appeal. Mr Marriott characterised this is a “100 year” policy and exhibited copies of the internal correspondence, mentioned above, in which the then Acting Detective Superintendent Clutterbuck suggested to his colleagues that a 100 year rule should be adopted by the MPS. Mr Marriott went on to assert that such a change was approved by a Commander Black and may have been adopted by the MPS. However, the material relied on did not fully support either the existence of a 100 year policy within other agencies or the commitment by MPS officers to do

anything more than to consider the possibility of adopting a less restrictive policy.

d. The Clutterbuck thesis has been available to researchers for some time and, in Mr Marriott's view, is widely known among historians. The evidence included a detailed analysis to show the extent to which informant details obtained from the Ledgers and the Register has been made available to the public as a result. The thesis also includes an acknowledgement of the help provided to the author by the MPS which, Mr Marriott asserted, is in contrast with the assertion by the MPS that disclosure of informant details was not approved.

e. The circumstances in which, as mentioned above, Ms Lowde gained access to, and subsequently published extracts from, the Ledgers. There is some evidence of other researchers having been given access to the Ledgers and the Register, although this was generally non-specific as to both their existence and the terms on which access may have been allowed.

f. The events surrounding Mr Marriott's various information requests and the Butterworth Decision, including the circumstances in which the hearing in that case went ahead without Mr Butterworth being involved.

g. Mr Marriott exhibited two items of material he had obtained from the National Archives. The first was an unredacted copy of a register of over 100 informants used by the Royal Irish Constabulary between 1887 and 1891 (at a time when the whole of the island of Ireland formed part of the United Kingdom) including information about their activities. Each one is identified by a name, but it seems clear that some at least were pseudonyms. The second item was a file entitled "Activities of named paid informants against Irish secret

societies 1892 – 1910" which included letters and other materials mentioning a number of informants.

h. Mr Marriott also relied on other exhibited materials which he said was further evidence of other countries having released into the public domain information about the activities of informants during different era.

i. The formalities that must now be complied with under the Regulation of Investigatory Powers Act 2000 when dealing with informants (or Covert Human Intelligence Source, as they are now officially called) include the agreement that each informant must sign, which shows his/her full name and pseudonym. This would obviously reveal the identity of the informant to anyone obtaining access to them. Mr Marriott suggested that these arrangements create a risk of exposure (a risk that the MPS witnesses did not accept, given the stringent controls on access which they said exist) and stated that this should operate as a greater deterrent to potential informants than the risk of a freedom of information disclosure 120 years into the future. He suggested that the risks are increased by, among other things, the availability of modern electronic communication facilities and the power of a court in certain circumstances to require the prosecution to disclose details of an informant if it wishes to continue to pursue a case.

j. Mr Marriott exhibited a number of copy media reports and website forum comments, which he said suggested that informant identities do sometimes become available and that informants, or suspected informants, face very considerable danger if this happens. He pointed out in particular that one of the reports states that a civilian employed at a police station, and having access to the police computer system, had been charged in connection with the release of informant details. He concluded by expressing the view that the MPS is not able

to give an informant a reliable guarantee of anonymity in either the short or long term.

27. Simon D Wood signed a witness statement in support of Mr Marriott's case explaining that he was an historian and researcher who had been asked by Mr Marriott to see if he could trace the descendants, alive today, of certain individuals referred to as informants in the Clutterbuck thesis. He concluded that he could not establish a consistent chain of identification from public records and expressed the view that even the most determined person, intent on tracing the present-day descendants of a late Victorian period informant, based solely upon information derived from the Ledgers and/or the Register, would have an impossible task. Mr Wood was not cross examined on his evidence although his final deduction was not accepted by one of the MPS witnesses and the comprehensiveness and reliability of his investigation was challenged in argument.

28. Phillip James Carter also supported Mr Marriott's case with a witness statement recording the outcome of a request that Mr Marriott asked him to send to the National Archives, which Mr Marriott believes demonstrates that the MPS was content to submit the Ledgers and the Register to the National Archives for possible preservation there for public access. Mr Carter was not cross examined.

29. The same issue, the ultimate rejection of the Ledgers and the Register by the National Archive, was dealt with in a witness statement signed on behalf of the MPS by Yvette Arnold the Head of Intelligence Management and Operations Support section within the Counter Terrorism Command in the MPS. Ms Arnold held the equivalent post in the Special Branch from 1992 until it was merged into the current body in 2006. Her evidence covered the following:

a. She referred throughout to a CHIS (Covert Human Intelligence Resource), rather than an informant. As did all the MPS witnesses.

b. Ms Arnold explained the process by which old materials may be submitted to the National Archives if they are of sufficient historical interest in either open or closed form. The closed form procedure is followed if the materials have ongoing security or intelligence sensitivity, in which event they will be retained by the MPS (under section 3 (4) of the Public Records Act 1958) and periodically re-considered for transfer in open form. Under cross examination by Mr Marriott she was certain that if the National Archives had decided that the Ledgers and the Register should be preserved by them they would only have been handed over once all information likely to identify an informant had been redacted.

c. Ms Arnold was not aware that Mr Clutterbuck had accessed the Ledgers and the Register or even that they existed in the Special Branch file store at the time. Her permission for their use was not sought and, if sought, would not have been given without approval from the Commander of Special Branch. But Mr Clutterbuck, as a security cleared senior officer would have been able to gain access to records from the file store without her knowledge.

d. Ms Arnold commented on the internal correspondence on which Mr Marriott relies to support his argument that in 2003 Mr Clutterbuck proposed, and the then Commander of Special Branch approved, a change of policy to permit disclosure of informant information after 100 years. She explained that, from her perspective the result was, not a relaxation of the old policy, but confirmation that, should she be asked for access to such information in the future, she should seek senior management approval.

e. As to the disclosure of parts of the Ledgers by Ms Lowdes, Ms Arnold was unable to be specific about who granted access or the circumstances surrounding either the inspection of the information or its subsequent publication without permission.

30. The MPS's second witness was Detective Superintendent Julian McKinney the Head of Covert Functions within the Counter Terrorism Command of the MPS (the body into which the Special Branch was merged).

a. D/S McKinney explained the current regime for authorising and using informants, including the requirement to preserve their security and welfare, which he believed applied to both current and past informants.

b. He stressed the importance of informants in helping the MPS to counter international terrorism. This requires them to have access to, and have the confidence of, those in the community they inhabit. It followed that, if exposed, both the informant and his or her family would be in danger, including future generations.

c. Informants are concerned with the safety of their family, and the preservation of their reputation, well after they die. In D/S McKinney's experience they are "paranoid" about their identity being disclosed and he believed that, were they to find out that some time after their death their activities would be released to the public, they would be reluctant to co-operate, or to continue to co-operate, with the police. He thought that this would apply with particular force to those in communities from countries going through conflict, because their activities would be treated as particularly treacherous and the ramifications could extend down many generations. Under cross examination he gave the Irish republican groups as an example. He suggested that they would be glad to see their demand for absolute loyalty being reinforced by demonstrating

that punishment for treachery as long as 120 years in the past could still be imposed on an informant's descendant today. He believed that the publication of unredacted versions of the disputed information would increase the risk of this happening because, unlike Mr Wood's attempts, based solely on public records, those seeking revenge might have other information to enable the necessary connection to be made.

d. D/S McKinney did not believe that he could, with confidence, separate informant detail in the Ledgers and the Register from other information. He thought that Mr Marriott was wrong on this and that, in any event, it was better to take a cautious approach because of the risks involved if the analysis proved to be inadequate.

e. He explained that the reason why Ms Lowde and Mr Clutterbuck were not prosecuted for releasing informant information without authority was that this would have had the effect of drawing attention to their research. He believed that the information is not readily accessible and only represented a portion of the total informant detail contained in the Ledgers and the Register.

f. As to the media reports of informant exposure relied on by Mr Marriott, D/S McKinney dismissed some as representing conspiracy theorists. For the rest, he suggested that the undoubted damage to informant confidence resulting from inadvertent disclosure would increase significantly if it became apparent that the MPS was releasing information officially. He did not think that the paranoia would be reduced by the explanation that disclosure was not voluntary, but under direction from a tribunal.

g. Under cross examination by Mr Marriott D/S McKinney staunchly defended the need to be able to give informants and potential informants an assurance that their identities would be

protected for ever with no relaxation, even after many years, other than on the very rare occasions when justice would otherwise be undermined and, for example, an informant was required to give evidence. He stressed the enormous disruption to the lives of an informant and his or her family when, as a result of that occurring, they have to be put into a witness protection programme. He also commented on the cost of maintaining such a programme.

h. It was suggested to D/S McKinney in cross examination that the written terms that are currently given to potential informants did not reflect the policy that he had explained, in that they did not spell out that confidentiality would be maintained without limit of time, but simply states "Your identity will be protected". However, he maintained that the purpose of the document was to clarify the general basis of the co-operation and was not intended to operate as a fully negotiated, detailed contract.

i. D/S McKinney was also asked, in cross examination and by the panel, whether he knew of any detrimental impact on informant programmes either side of the border in Ireland resulting from the disclosure of informant details as evidenced by the material exhibited to Mr Marriott's witness statement (see paragraph 27 g. above). He had not heard of any such difficulty but said that he had not researched the point.

31. Mr Roger Pearce a retired MPS Commander signed an open witness statement on behalf of the MPS. A separate closed witness statement added a small amount of detail relating to some aspects of Mr Pearce's service. He was cross examined on the open witness statement.

a. Mr Pearce supported the views expressed by D/S McKinney as to the harm the informant programme would suffer if the disputed information were to be disclosed, due to what he

described as informants' "constant and absolute paranoia of discovery". From his experience of combating Irish extremism he concluded that, just as the police protect informants in perpetuity so the terrorist organisations will hunt them down in perpetuity. He said that the result in some communities was that great-grandsons and later generations would be at risk if their great-grandfathers were ever exposed as informants.

b. Mr Pearce did not think that the possibility that some of the names in the disputed information may be pseudonyms would reduce the impact on informant recruitment.

c. Mr Pearce also explained that, contrary to Mr Marriott's belief, the policy of never disclosing informant detail was not modified and explained that his contribution to the internal correspondence on the point did not represent agreement to such a change, as had been alleged.

32. Witness D gave evidence in the circumstances explained in paragraph 16 above. He is a Detective Inspector with experience of dealing with informants as both a handler and controller and currently works in a unit which has primary responsibility for all informant-related matters across the MPS. D also supported D/S McKinley on the danger of disclosure of the Disputed Information undermining the whole informant system. He supported this view from his own experience, including the questions he had to respond to from anxious informants after the MPS previously supplied information on the annual expenditure on informant programmes. He stressed that the perception that it was the MPS itself that had disclosed informant names, no matter how historical the information, would create an insurmountable obstacle to his efforts to retain and recruit future informants. He believed that the most likely consequence of identification would be death or serious injury and that release of the disputed information would be seen as a deliberate "outing" of informants.

The public interest in favour of disclosure

33. The public interest in favour of disclosure was said by Mr Marriott to lie in the general historical significance of what he considered to be very valuable materials, as well as its potential impact on his own quest to discover more about the identity of the individual or individuals responsible for the Jack the Ripper murders. The MPS and the Information Commissioner sought to emphasise the second aspect of Mr Marriott's argument and to characterise it as no more than an individual's personal wish to solve a mystery which, although of evident interest to many members of the public, is not a matter of significant public interest so long after the events. However, we think that, despite Mr Marriott's clear personal focus on Jack the Ripper, the contents of the Ledgers and the Register clearly did have value to Mr Clutterbuck who drew a number of conclusions from them in his thesis and identified possible lines for further enquiry. We also place some, but significantly less, weight on a letter exhibited to Mr Marriott's witness statement written to him by the same Mr Butterworth who featured in the Butterworth Decision. This stressed the historical significance of the Ledgers and the Register in his view. That is at variance with the evidence that those running the National Archives concluded that they were not worthy of selection for permanent preservation, but is consistent with the acknowledgement by the MPS both in correspondence and in Mr Hopkins' closing submissions, that there was some public interest in disclosure, albeit that it was characterised by Mr Hopkins as being no more than "meagre".

34. We conclude that there is public interest in disclosing the identity of those named in the Ledgers and the Register, but the weight to be given to it in the balancing exercise we are required to undertake is not overwhelming.

The public interest in maintaining the exemption

35. It will be apparent from the summary of the MPS evidence above that the public interest in maintaining the exemption lies in:

    a. the importance of informants to public safety and the prevention and detection of fraud, crime and acts of terrorism; and

    b. the risk that disclosure would act as a deterrent to informants or those contemplating becoming an informant.

36. Mr Marriott presented arguments and evidence suggesting that the loss of informant intelligence would not be catastrophic, that informant anonymity is sometimes compromised and that those handling informants are not able to provide a secure guarantee that it will be maintained. However, we accept that informants constitute a major source of vital intelligence for the purposes of crime prevention and detection and that it is of crucial importance that their anonymity is maintained. We understand, too, that informants will be very concerned about any disclosure that seems likely (in reality or in their perception) to put anonymity at risk. We were impressed by the coherent and forceful presentation by all the MPS witnesses, of their intense desire to protect and retain the confidence of informants, of the difficulties they face whenever a disclosure occurs which informants perceive as undermining the reliability of the anonymity guarantee, and of their concern that no future disclosure should increase those difficulties.

37. We also conclude that Mr Marriott did not establish that the policy on informant anonymity was replaced at some stage by what he described as a “100 year rule” – the internal correspondence on which he relied did not show this and the evidence of the MPS witnesses on the point was clear and credible. We do not accept, either, that a “100 year rule” has been adopted by the security

services, as Mr Marriott claimed. On the contrary we conclude that the policy was accurately recorded by the then Foreign Secretary, Robin Cook, when in reply to a Parliamentary question in February 1998, he said:

> *"The records of the Secret Intelligence service are not released; they are retained under Section 3 (4) of the Public Records Act 1958. Having reviewed the arguments, I recognise that there is an overwhelmingly strong reason for this policy. When individuals or organisations co-operate with the service they do so because an unshakeable commitment is given never to reveal their identities. This essential trust would be undermined by a perception that undertakings of confidentially were honoured for only a limited duration. In many cases, the risk of retribution against individuals can extend beyond a single generation."* [Hansard 12 February 1998 vol.306 column 324W]

That was confirmed still to be the policy in an answer given by Mr Cook's successor as Foreign Secretary, Jack Straw, in April 2003 [Hansard 28 April 2003 vol 404 columns 132-133W]

38. Although we do not think that Mr Marriott's case is significantly strengthened by any lack of consistency between the approaches adopted by, respectively, the MPS and the security services, we should record that the policy of MI5 does not appear to include an invariable rule of perpetual anonymity, as might be suggested by those Parliamentary answers. The evidence before us included the MI5 "Centenary History – policy on disclosure", published on its website. By reference to "agents" it states:

> *"Information about the identities of agents is immensely sensitive and fiercely protected by the Service, and speculation or claims about the identities of particular agents will invariably be met with [*a neither confirm nor deny] *response. A small number of agents of major historical importance have been officially*

identified in the past in file releases to [the National Archive] – *notably the Second World War "Double Cross" agents whose wartime role has received extensively (sic) publicity. Their cases are referred to in the text* [of the MI5 history]. *In addition a very small number of agents are named here for the first time. The decision exceptionally to name these agents has been taken after the most careful consideration and on the following basis:*

(i) there is already very well-sourced information in the public domain about the work done for the Service by the individuals concerned;

(ii) the individual's role as an agent is judged to be of such historical importance that its disclosure is essential to the aims of the History; and

(iii) the information relates to the period before 1945. Regardless of the circumstances or of the historical importance of the case, no agent's identity is disclosed in the text and no information is included from which the identity of an agent may be inferred after the end of the Second World War.

39. We are unanimous in concluding that;

a. there is a risk that informant identities may be established from the publication of an unredacted version of the Ledgers and the Register and that it is not impossible that their descendants might also be traced;

b. groups or communities within which informants operate are likely to be both protective of their own security and vengeful towards those that undermine it from within. The wish for vengeance is capable of lasting for many years (as witnessed by the length of time that some witness protection schemes have been required to operate), thus justifying an informant's strong desire to protect his or her family and personal reputation well beyond his or her lifetime; and

c. no material assistance could be derived from the two authorities on which the MPS relied (*Chief Constable of the Greater Manchester Police v McNally* [2002] EWCA Civ 14 and *Frank-Steiner v the Data Controller of the Secret Intelligence Service,* IPT/06/81/CH*)* because the former arises in a different legal context and both involve the possible disclosure of information that was several decades younger than the disputed information in this case.

40. Both the majority and the minority also take note that none of the witnesses was able to:

    a. give any specific example of an informant's descendants being targeted many years after his or her death (all their evidence was of the impact on informant perception of disclosures occurring in the present or the recent past):

    b. provide us with any information about the impact on Irish police informant programmes of the public disclosure of their informant names and activities dating from the same time as the Ledgers and the Register (this notwithstanding that the period of time covered by those activities witnessed intense brutality on both sides of the conflict over Irish independence, the scars of which persist to this day); or

    c. demonstrate that informants had reacted negatively to the, admittedly limited, publicity given to the Clutterbuck and Lowdes disclosures.

41. Our unanimity evaporates, however, when we come to apply those general conclusions to the particular facts of this case. Two of us believe that they justify maintaining anonymity for at least the period of approximately 120 years since the events mentioned in the Ledgers and the Register and that the public interest in doing so

outweighs the public interest in disclosure. The other member believes that they do not.

42. The difference arises from the significance to be given to the age of the information. All agree that there must come a time when the disclosure of the identity of an informant who operated in the distant past would not have an effect on the confidence of a current day informant. Or at least one whose inherent paranoia was not so great as to make him or her totally unsuitable to perform the role in any event. To take an extreme example, if a potential informant were to be discouraged from co-operating by the fear that his or her activities would be disclosed after, say, three hundred and fifty years (the equivalent of the disclosure today of those who may have acted as spies during the English Civil War), then one might conclude that his or her paranoia was so intense and irrational that it would not be safe for the police to pursue the recruitment process. Conversely, as the MI5 policy referred to above suggests (supported by the conclusions of the Investigatory Powers Tribunal in the Frank-*Steiner* case) it would certainly be premature to disclose today information about those acting as informants or agents during the Second World War. But, as one extends further back in time than that, those seeking to retain confidentiality must shoulder a greater burden of demonstrating that the risk of real danger, or of a rational perception of danger, has not diluted to such an extent that the public interest in maintaining secrecy loses much of its weight. In that context it is not just the seniority and experience of those giving evidence that must be considered. The Tribunal must assess the reasoning of an expert witness, no matter how eminent, experienced and knowledgeable he or she may be.

43. The majority were satisfied, on the basis of what those experts said, that the importance of the informant programme to modern policing work is so great that a very cautious approach should be taken before doing anything that those most closely involved with it consider might

discourage informants or potential informants. This is not reduced by the fact that some disclosure has taken place via the Clutterbuck and Lowdes publications, or that the identity of an informant is occasionally leaked inadvertently. The deliberate disclosure of a batch of names by the MPS itself, albeit under direction from a tribunal, would have a greater impact than the occasional loss of control over a single name and would be seen as an important precedent. The majority view is that the risk of descendants being traced and targeted should not be ignored. It may be quite small, but the nature of the harm that could result (serious injury or death) is so serious that even a small percentage chance of identification should be avoided. This is so because of both the danger to those descendants and the fact that current day informers would be justified in fearing that at some time in the future their own descendants may be harmed, and their reputation within their community tarnished. The majority say that the potential value of even a single informant in preventing a terrorist outrage is so great that no step should be taken that might conceivably deter him or her from co-operating with the police.

44. On balance the majority view is that the small public interest in disclosure is not outweighed by the also fairly small, but very important, public interest in maintaining the exemption.

45. The minority view is that, despite the seniority of the witnesses and the strength of their convictions, their reasoning – that a current day informant, having sufficient emotional resilience to serve any useful purpose, would withdraw co-operation upon seeing that the freedom of information regime requires 120 year old records to be disclosed – simply fails a very basic common sense test, particularly in light of the issues mentioned in paragraph 40 above.

46. For these reasons the minority, while having great sympathy with the understandable wish of the MPS to avoid any disclosure that might in

any way increase the difficulty of retaining informant confidence, considers that extending that to a ban on the publication of the names in the Ledgers and the Register draws the line just too far back into history.

Conclusion

47. In light of the majority view we conclude that the MPS was justified in refusing access to the names redacted from the Ledgers and the Register disclosed under the direction of the Tribunal at the conclusion of the Butterworth Decision.

Signed

Christopher Ryan
Tribunal Judge

Date: 4th July 2011

Reviewed date: 31st August 2011