First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/0295

Decided without a hearing
On 19 November 2018
Promulgation date 27th February 2019

Before

JUDGE BUCKLEY

MELANIE HOWARD

MARION SAUNDERS

Between

THE CABINET OFFICE

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

COLONEL TERENCE SCRIVEN

Second Respondent

DECISION

1. For the reasons set out below the Tribunal allows the appeal against Decision Notice FS50677400 and issues the following substitute decision notice.

2. All parties consented to the matter being determined on the papers and the Tribunal considered that it was appropriate to determine the appeal without an oral hearing.

3. Although we considered a closed bundle, we have not found it necessary to produce a closed decision or annex.

SUBSTITUTE DECISION NOTICE

Public Authority: The Cabinet Office

Complainant: Colonel Scriven

The Substitute Decision – FS50677400

1. For the reasons set out below s35(1)(a) and s37(1)(b) of the Freedom of Information Act 2000 (FOIA) are engaged but the public interest in disclosure outweighs the public interest in maintaining the exemptions.

Action Required

1. The Public Authority is required to respond to the complainant's request within 42 days of the promulgation of this judgment by supplying the information.

REASONS

Introduction and procedural background

1. Colonel Scriven is the co-chair of a campaign for the introduction of a National Defence Medal ('NDM') to recognise the service of Armed Forces members who did not serve in specific conflicts. The request dated 16 February 2017 asks for details of the members of the HD Committee who did not attend meetings which dealt with the military medals review in January 2014, July 2014 and February 2015.

2. This is the Cabinet Office's appeal against the Commissioner's decision notice of 7 December 2017 FS50677400 which held that s 35(1)(a) and s 37(1)(b) were not engaged.

3. Four appeals arising out of a similar factual background have been heard by the Tribunal on the same day. They are: EA/2016/0078 (Morland v IC and Cabinet Office); EA/2017/0295 (Cabinet Office v IC and Scriven); EA/2016/0281 (Cabinet Office v IC and Farrar); and EA/2018/0098 (Cabinet Office v IC and Halligan). Much of the factual background appears in each decision.

Factual background

4. The National Defence Medal ('NDM') proposed by campaigners is a medal in recognition of service which, subject to certain criteria, would be awarded to all Regular and Reserve servicemen and women who have served in the Armed Forces since the end of the Second World War. It is intended to honour veterans who did not participate in a specific conflict, but who stood ready to do so as members of the Armed Forces.

5. A medal review was carried out by the Ministry of Defence in 2011. This review is described as 'flawed and discredited' by the UK NDM campaign for the reasons set out at pp5-8 of their NDM submission dated 3 May 2012. On 30 April 2012 the Prime Minister announced a further independent review.

6. In May and June 2012 Sir John Holmes conducted an independent review of the policy concerning military medals including the case for a National Defence Medal. The review team received over 200 submissions and spoke to more than 50 individuals including representatives from veteran groups.

7. Sir John Holmes published a report in July 2012 ('the Holmes Report'). In relation to NDM Sir John Holmes recommended that it was 'worthy of consideration' and that:

> Its merits, and examples from other countries, should be looked at by a Cabinet Office-led working group in the first place, before consideration by the reconstituted HD Committee and its sub-committee. Any recommendations should be made initially to the government, rather than The Queen, and would then need to be the subject of wider political and other consultation, since this is a decision of broad national significance which would require a broad political and public consensus. (P123 of the Holmes Report)

8. Paragraph 17, p 10 of the Holmes Report reads as follows:

> … the current system of decision-making is vulnerable to the charge of being a "black box" operation, where those outside have no knowledge of what is being decided or why and have no access to it; and where the rules and principles underlying the decisions, while frequently referred to, have never been properly codified or promulgated.

9. With specific reference to the HD Committee, the Holmes Report stated, on p27:

> The process is also largely invisible and inaccessible to those outside the system, which has substantially added to the frustration of veterans and other campaigners, unable to penetrate beyond bland official statements that a particular decision has been taken.

10. Under the United Kingdom Constitution, honours and decorations are created and conferred by Her Majesty the Queen in her personal capacity as Monarch rather than on behalf of the Government. The 'HD Committee' (the Committee on the Grant of Honours, Decorations and Medals) is a sub-committee of the Cabinet. It is a permanent standing committee established in 1939 at the request of George VI to provide advice to The Sovereign on policy concerning honours, decorations and medals. It operates under the direction of the Head of the Civil Service, who nominally chairs the Committee, and its current terms of reference are:

> To consider general questions relative to the Grant of Honours, Decorations and Medals; to review the scales of award, both civil and military, from time to time, to consider questions of new awards, and changes in the conditions governing existing awards.

11. The HD Committee directly advises The Queen on policy relating to the grant of individual honours, decorations and medals. It also considers general questions relating to this topic, including the introduction of new awards. The Committee's more general recommendations are also put forward for The Sovereign's formal approval.

12. The HD Committee meets typically two or three times a year. The role of chair of the HD Committee is currently formally delegated to Sir Jonathan Stephens, Permanent Secretary to the Northern Ireland Office. The members of the HD Committee are:
Private Secretary to HM The Queen
Principal Private Secretary to the PM
Permanent Secretary, FCO
Permanent Secretary, Home Office
Permanent Secretary, Ministry of Defence
Defence Services Secretary
Secretary, Central Chancery of the Orders of the Knighthood.

13. Following the Holmes report, the Prime Minister asked Sir John Holmes to lead a second stage of work to make further recommendations using the principles he had proposed to implement his findings. Reviews of certain claims for medallic recognition were undertaken by an independent review team, and Sir John Holmes's recommendations in relation to these were put before the Advisory Military Sub-Committee (the 'AMSC' – a sub-committee of the HD Committee set up in response to the Holmes report) at the first meeting of the AMSC, on 12 December 2012 and 29 August 2013. An NDM paper, prepared by Cabinet Office officials was put before the AMSC on 29 August 2013. At that meeting on 29 August Sir John Holmes outlined 21 further claims for medallic recognition which had not yet been looked at by the independent review team, and gave recommendations as to the way forward, i.e. whether or not these should be reviewed.

14. All these claims, including the NDM, came before the HD Committee on 29 January 2014 and/or on 9 June 2014.

15. On 29 July 2014 a written ministerial statement from Baroness Stowell informed the House of Lords that the review was complete, stating that:

> Sir John was therefore commissioned to review independently a number of cases which had been brought to his attention as possible candidates for changed medallic recognition. The aim was to draw a definitive line under issues which in some cases had been controversial for many years… Each of the reviews has been subject to detailed discussion by the Committee on the Grant of Honours, Decorations and Medals and its conclusions submitted for Royal Approval….The outcomes where detailed reviews were carried out are listed in the Annexe to this statement.

16. In relation to the NDM Baroness Stowell stated that the HD Committee was 'not persuaded that a strong enough case can be made at this time but has advised that this issue might usefully be considered in the future'. This was in contrast to other historic claims for medallic recognition where it was stated that there would be no possibility of reconsideration in the absence of significant new evidence of injustice.

17. The NDM options paper that was considered by the HD Committee at the point that it made its recommendations was placed in the Library of the Lords. We accept the Cabinet Office's assertion that although it is dated after the HD Committee meeting, that is merely the date of publication and that it is the same options paper that was before the Committee.

18. Correspondence subsequently took place between the Cabinet Office and the NDM campaign and the HD Committee considered that correspondence at a meeting on 23 February 2015, concluding that the time was not right for a review. In an email to Mr Morland dated 8 April 2015, Gary Rogers of the Cabinet Office stated, in relation to the meeting of 23 February 2015:

> HD Committee had before it recent correspondence from Colonel Scriven, Co-Chairman of the UK National Defence Medal Campaign, but whilst the Committee noted the points made by Colonel Scriven, members remained unpersuaded of the case for an NDM at this time. In light of this, there are no plans for further work on this issue… You will be aware that Stephen Gilbert's Private Member's Bill on the National Defence Medal which was due to have a second reading on 27 February, were not reached.

19. There was a House of Commons Debate on NDM on 12 April 2016. The HD Committee considered reopening the NDM issue again on 1 February 2017 but remained unconvinced.

20. By letter dated 14 February 2017 Colonel Scriven made an official complaint under the Cabinet Office complaints procedure to the minister for the Cabinet Office, Ben Gummer MP. The complaint alleged failures by the head of the

Honours and Appointments Secretariat to appropriately oversee the Cabinet Office responsibilities of the Holmes review and the alleged provision of misinformation about the veracity of the medal review process. Mr Gummer tasked Sir Jonathan Stephens, the chair of the HD Committee, with carrying out an investigation into the complaint.

21. Sir Jonathan Stephens asked a retired former senior civil servant to consider the complaint. His conclusions were that the review was handled entirely properly, but that the figure used in the Westminster debate on 12 April 2016 for the cost of introducing NDM (£475m) was wrongly attributed to the Holmes review, whereas it was an MOD estimate. The error was repeated in a Written Parliamentary Answer on 25 April 2016. Colonel Scriven was informed of the outcome and sent a copy of the report by letter dated 28 July 2017. In that letter Sir Jonathan Stephens apologised for the error of attribution and indicated that the parliamentary record would be set straight. He concluded 'I am afraid I will not be able to correspond further with you on this issue. As you know, the Minister decided in July 2014 not to introduce a National Defence Medal. That remains the position and unless, or until, there is change of policy there will be nothing more to add.'

22. Colonel Scriven wrote again to Sir Jonathan Stephens on 15 January 2018. He asserted that the investigation and its conclusions were flawed. His letter requests either that the military medal review is reopened or that the matter is referred to the parliamentary ombudsman for an in-depth evaluation of the whole process, with a view to reopening the review.

Request, Decision Notice and appeal

Request

23. This appeal concerns the following request made on 16 February 2017:

> Please forward to me details of which of the eight members (includes the Chairman) of the Honours, Decorations and Medals Committee DID NOT attend the HD Committee meetings which dealt with the military medals review in January 2014; July 2014; and February 2015.

24. Three redacted sets of HD Committee minutes, held on 29 January 2014, 9 June 2014, and 23 February 2015 fall within the scope of the request. No HD Committee meeting dealing with the military medals review took place in July 2014 and it is assumed that the request refers to the meeting in June 2014.

Reply and review

25. The Cabinet Office responded on 17 March 2017, refusing the request on the basis of s 35(1)(a) and s 37(1)(b). It upheld its decision on internal review on 13

April 2017. Colonel Scriven referred the matter to the Information Commissioner on 13 April 2017.

Decision Notice

26. In a decision notice dated 7 December 2017 the Commissioner decided that s35(1)(a) and s37(1)(b) were not engaged. The Commissioner ordered disclosure of the information.

27. In relation to s 35(1)(a) the Commissioner concluded, in summary, that the request was not concerned with government policy and therefore s 35(1)(a) was not engaged. In relation to s 37(1)(b) the Commissioner concluded, in summary, that a list of those members not attending the meeting does not relate to the conferring of an honour or dignity and therefore s 37(1)(b) was not engaged.

Notice of Appeal

28. The Cabinet Office appealed the Commissioner's decision notice. The grounds of appeal are that the Commissioner erred in law in deciding that the information failed to engage the exemptions in s 35(1)(a) and s 37(1)(b).

29. In relation to s 35(1)(a) the Cabinet Office states:

    29.1. 'Relates to' has a broad interpretation.
    29.2. Discussions of the HD Committee about the military medals review related to the formulation and development of government policy. Information about attendees and non-attendees must also relate to that formulation and development.
    29.3. The Tribunal has to consider not just the precise content of information but also what kind of information it is, including careful attention to the context.
    29.4. The question of prejudice to the convention of collective responsibility goes to the public interest balance not to the question of whether or not s 35(1)(a) is engaged.

30. In relation to s 37(1)(b) the Cabinet Office states:
    30.1. 'Relates to' has a broad interpretation.
    30.2. Information about which members of the HD Committee were at meetings which discussed the military medal review does relate to the conferring of an honour or dignity.

The Commissioner's response dated 26 February 2018

Section 35(1)(a)

31. The Commissioner accepts that the term 'relates to' is to be construed widely. Mere context cannot bring information within scope. The question must be whether or not the issue is sufficiently closely connected to the policy formulation context. It is helpful to ask whether the information has any bearing on the content of the policy or explains something about the process that was followed in formulating that policy. This information does not, in particular because the absence of a member does not affect the collective decision making.

32. The Commissioner accepts that prejudice to the convention of collective responsibility is irrelevant to whether or not the exemption is engaged.

Section 37(1)(b)

33. 'Relates to' is to be construed widely. The question is whether or not there is a sufficiently close connection between the information requested and the conferring of any honour, so that the former can be said to 'relate to' the latter. There is an insufficiently close connection in this case for the reasons set out above and because there is an additional degree of remoteness compared to s 35: the discussions in the HD Committee only relate to the conferring of honours, they are not the conferring of honours.

Colonel Scriven's response dated 5 July 2018

34. Colonel Scriven has produced a wide-ranging and detailed response which the Tribunal has read and taken account of where relevant. The Tribunal notes in particular the following points:
    34.1. The request is not about the formulation or development of government policy.
    34.2. The Holmes report at p26, para 5, states of the HD Committee:
    …the review also found a degree of dissatisfaction with its operation. This is partly about process. The Committee rarely meets in practice…and conducts its business largely by correspondence/email. Since most of its members are extremely busy people with many other issues on their plate, this increases the risk that recommendations to it about military medals issues from the MOD or FCO, via the Secretariat, go through without a substantial discussion or the airing of other view.
    34.3. It is not unreasonable to have expected the Chair and members of the HD Committee to have attended in person.
    34.4. It is in the public interest to know which of the HD Committee members attended, particularly if only those from the MoD attended.
    34.5. Colonel Scriven considers the investigation report attached to the Notice of Appeal to be inadequate and the report derisory.
    34.6. The Tribunal is asked to consider directing that the right to claim a 'safe space' is invalidated where it can be shown that unsound decisions have been reached based on inaccurate advice.

The Cabinet Office's reply dated 11 April 2018

'relates to'

35. Any connection, however remote, is sufficient to engage the exemption. Connection is different to context. It requires some direct link or contact. A list of attendees clearly does have a connection as it is the attendees who contribute to the policy discussion. The closeness of the connection is a matter to be weighed in the public interest balance. A 'sufficiently close connection' test is more complex and impermissibly narrows the scope of the wording in the statute. If the correct test is applied, there is clearly a connection between the conferring of honours and information about which members attended a particular meeting, given that the discussion of honours and honours policy is the purpose of the HD Committee. Colonel Scriven's submissions illustrate this clear connection.

Public interest balance

36. The Cabinet Office recognises the general public interest in openness in government to enable the public to understand the way in which decisions are reached and the considerable public interest in the decisions surrounding the NDM and the military medals review, so transparency about the reasons for those decision is important.

37. There is an important public interest in preserving a safe space for those involved to formulate and develop policy in this area, so that ministers and senior officials feel able to conduct full and frank discussions in the knowledge that their contributions will remain confidential. This is particularly true where there are strong opinions and emotions involved. There is in addition a need for collective responsibility so no individual can be singled out for criticism or pressure.

38. The Tribunal must consider if the disclosure of this information will materially advance the public debate about the outcome of the review or similar issues. The Cabinet Office submits that it would not do so. The overall conclusions of the HD Committee, the Holmes Review, the views of the AMSC and the vast majority of underlying evidence and submissions considered by the HD Committee have been made public. Identifying non-attendees would not indicate how engaged they were, because members can take part in discussions by correspondence. The utility of the information to the public interest in openness and transparency is very limited indeed.

39. Harm might be caused to the safe space because there is a possibility of particular officials being criticised for their non-attendance. The collective responsibility of the Committee would be undermined because it would lead to speculation about whether a member really played an active part of

contributed their views fully, even though, as a matter of fact, members of the HD Committee express their views in writing or through another representative if they cannot attend. This might have a chilling effect on the willingness of the Committee to consider radical ideas or reach unpopular conclusions. The Committee as whole may be more worried about taking a particular course because each member individually may be attacked for it, and each member may be less willing to voice radical ideas in case this leads to an unpopular decision. Senior civil servants would be encouraged to attend meetings simply to be seen to be there which could be to the detriment of them focussing on carrying out their duties.

40. The unwarranted and speculative criticism is illustrated by criticism made by Colonel Scriven in his submission. This would be damaging in its own right. In addition, if officials were at risk of being subject to such an attack in a named or personal capacity it would cause even the most robust to think twice about voicing unpopular opinions or advice in the context of sensitive policy discussions and/or when considering honours or dignities.

Legal framework

41. The relevant parts of s 1 and 2 of the FOIA provide:

> General right of access to information held by public authorities.
> 1(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.
>
> Effect of the exemptions in Part II.
> .....
> 2(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.

42. Section 35(1)(a) of FOIA provides as follows:

> 35 Formulation of government policy, etc.
> (1) Information held by a government department or by the Welsh Assembly government is exempt information if it relates to—
> (a) the formulation or development of government policy

43. The question of whether the policy-making process is still 'live' is an issue that goes to the assessment of the public interest balancing test (**Morland v Cabinet Office** [2018] UKUT 67 (AAC).

44. The inter-section between the timing of the FOIA request and its relevance to the public interest balancing test is helpfully analysed by the First-tier Tribunal in **Department for Education and Skills v Information Commissioner and the Evening Standard** (EA/2006/0006) ("**DFES**") at paragraph 75(iv)-(v) (a decision approved in **Office of Government Commerce v Information Commissioner** [2008] EWHC 774 (Admin); [2010] QB 98 ("**OGC**") at paragraphs 79 and 100-101):

> (iv) The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy. We note that many of the most emphatic pronouncements on the need for confidentiality to which we were referred, are predicated on the risk of premature publicity. In this case it was a highly relevant factor in June 2003 but of little, if any, weight in January 2005.
>
> (v) When the formulation or development of a particular policy is complete for the purposes of (iv) is a question of fact. However, s. 35(2) and to a lesser extent 35(4), clearly assume that a policy is formulated, announced and, in many cases, superseded in due course. We think that a parliamentary statement announcing the policy, of which there are examples in this case, will normally mark the end of the process of formulation. There may be some interval before development. We do not imply by that that any public interest in maintaining the exemption disappears the moment that a minister rises to his or her feet in the House. We repeat – each case must be decided in the light of all the circumstances. As is plain however, we do not regard a "seamless web" approach to policy as a helpful guide to the question whether discussions on formulation are over.

45. The public interest can wax and wane and the need for a safe space changes over time in relation to development of policy. If disclosure is likely to intrude upon the safe space then there will, in general terms, be significant public interest in maintaining the exemption, but this has to be assessed on a case by case basis.

46. Further helpful guidance is provided in para. 75 of **DFES:**

> (vii) In judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants… These are highly educated and sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions…'

47. S 37 FOIA provides where relevant as follows:

> **37 Communications with Her Majesty, etc. and honours.**

(1) Information is exempt information if it relates to –
…
(b) the conferring by the Crown of any honour or dignity.

48. The Upper Tribunal in **Morland v Cabinet Office** [2018] UKUT 67 (AAC) said at para. 18:

> Case law has established in the FOIA context that "relates to" carries a broad meaning (see *APPGER v Information Commissioner and Foreign and Commonwealth Office* [2016] AACR 5 at paragraphs 13-25). In *UCAS v Information Commissioner and Lord Lucas* [2015] AACR 25 at paragraph 46 the Upper Tribunal approved the approach of the FTT in the APPGER case where it said that "relates to" means that there must be "some connection" with the information or that the information "touches or stands in relation to" the object of the statutory provision.

49. Sections 35 and 37 are not absolute exemptions. The Tribunal must consider if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

50. In considering the factors that militate against disclosure the primary focus should be on the particular interest which the exemption is designed to protect, in the case of s 35 this is the efficient, effective and high-quality formulation and development of government policy (see e.g. para 57 in the FTT decision in **HM Treasury v ICO** EA/2007/0001).

51. The Upper Tribunal in **Morland v Cabinet Office** [2018] UKUT 67 (AAC) held that:

> …the purpose of section 37 itself is to protect the fundamental constitutional principle that communications between the Queen and her ministers are essentially confidential. Section 37(1)(a)-(ad)…specifically protects the actual communications with the Sovereign and certain other members of the Royal Family and the Royal Household. Section 37(1)(b) must be concerned with activities other than communications with the Sovereign. The logical purpose of section 37(1)(b) is to ensure candour and protect confidences in the entire process of considering honours, dignities and medals.

52. The balance of public interest should be assessed as it stood at the time of the outcome of the internal review (**Savic v ICO AGO and CO** [2016] UKUT 0534 (AAC) at para 10).

53. The **APPGER** case gives guidance on how the balancing exercise required by section 2(2)(b) of FOIA should be carried out:

> … when assessing competing public interests under FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This … requires an appropriately detailed identification of, proof, explanation and examination of both (a) the harm or prejudice,

and (b) benefits that the proposed disclosure of the relevant material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote.

54. The public interest is not the same as being of interest to the public.

55. When a qualified exemption is engaged, there is no presumption in favour of disclosure. The proper analysis is that, if, after assessing the competing public interests for and against disclosure having regard to the content of the specific information in issue, the Tribunal concludes that the competing interests are evenly balanced, we will not have concluded that the public interest in maintaining the exemption (against disclosure) outweighs the public interest in disclosing the information (as section 2(2)(b) requires) (**Department of Health v Information Commission and another** [2017] EWCA Civ 374 .

The role of the Tribunal

56. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Evidence

57. The Tribunal read and took account of, where relevant, a large number of documents.

Submissions

Submissions from Colonel Scriven dated 24 June 2018

58. Colonel Scriven's submissions were wide-ranging and set out a full and detailed background to the appeal. The Tribunal has read and taken account of them where relevant. Some of the points have already been outlined above, and not all the additional points are repeated here.

59. Colonel Scriven hopes that in determining the non-attendance of the HD Committee members, it will contribute to establishing their lack of individual participation and collective responsibility in the medal review process.

60. When considering the public interest balance the Tribunal is asked to take account of:

60.1. The medal review was established to address the inconsistency and injustice of medallic recognition so a 'line in the sand' could be drawn once and for all;
60.2. The review should be open and transparent;
60.3. The Government designated the Cabinet Office medal review 'The most far ranging independent review of military medals for a generation'.
60.4. The deficiency of public confidence in three main pillars of the medal review: assiduousness of the process; veracity of advice presented to the HD Committee; and soundness of the decisions/recommendations made by the HD Committee.

61. Colonel Scriven accepts that there is a connection between the non-attendees and the formulation of policy or conferring of honours but does not accept that it is a sufficiently close connection.

62. The protection of a safe space is not relevant as no information about discussion is being sought.

63. The request is not about advancing the debate on the outcome of the medal review or the NDM. It is about contributing to the research and understanding that supports allegations that the medal review process was flawed and should be reopened. If most of the HD Committee members did not attend the relevant meetings, this raises questions as to the soundness of the HD Committee's decision-making process, which is of public interest and a key factor in the reopening of the medal review.

64. Many documents and much information have not been released to the public. A lack of openness and transparency has prevailed throughout the process.

65. The claim that non-attendees contributed to discussions by correspondence has not been corroborated.

66. The HD Committee members comprise some of the top civil servants in the land. They are well versed in making difficult and unpopular decisions. Disclosure of what they might say in a meeting is unlikely to deter them from expressing their views in the future. The decisions made by the Committee should have been able to be substantiated to the public. Criticism for non-attendance is always a possibility if there are no good reasons for absence.

67. There will rightly be occasions where individual members might not have been able to attend a meeting, but it is difficult to understand why the senior civil servants who were members of the HD Committee would only consider attending such meetings if they thought the public might be aware of their non-attendance.

68. The Cabinet Office misrepresents the issues raised by Colonel Scriven and subjects him to unfair criticism in an attempt to weigh the public interest in their favour (as detailed in Colonel Scriven's submissions in paragraph 58 and 59).

69. In the alternative the Tribunal could direct the release of the number of members who did not attend the meetings, rather than the names.

Submissions from the Commissioner dated 6 July 2018

'*Relates to*'

70. It is agreed that the term 'relates to' should be construed broadly and that there are limits to its breadth. The Commissioner submits that the most obvious way to identify the limit is to ask whether the information has some bearing on the subject matter of the exemption.

71. In **Lewis** the Court of Appeal at para 13 cited with apparent approval from the FTT's judgment:

> In relation to the exemption in section 35 of FOIA, the FTT held (at para. [28]) that the phrase 'relates to' in section 35(1) 'should not be read with uncritical liberalism as extending to the furthest stretch of its indeterminacy, but instead must be read in a more limited sense so as to provide an intelligible boundary, suitable to the statutory context'; and '[a] mere incidental connection between the information and a matter specified in a sub-paragraph of s 35(1) would not bring the exemption into play; it is the content of the information that must relate to the matter specified in the subparagraph'.

72. This shows that focussing on a 'sufficient connection' is a permissible approach. The Court endorses the focus on the whether the content of the information relates to the content of the exemption. Here it does not.

Public interest balance

73. If either exemption is engaged, it is only just engaged. It is engaged in a way that means that the interests which the exemptions exist to protect would not be prejudiced by disclosure. Those interests under s 35(1)(a) are that officials should be afforded a safe space for policy discussions, and that there should be no chilling effect on such discussions in future. Under s 37(1)(b) the purpose is to ensure candour and protect confidences in the entire process of considering honours, dignities and medals.

74. Disclosure of the attendees will not prejudice these interests. It does not reveal any content and therefore it cannot be said that participants would be less candid in future. It is hard to see how it has any bearing on a 'safe space'. The fact that officials may be criticised for non-attendance is irrelevant to their

willingness to consider radical ideas or reach unpopular conclusions. The criticism would be levelled at their non-attendance not their ideas. Because non-attendees can and do contribute to meetings, exposing their non-attendance does not diminish the concept of collective responsibility. The decisions are the collective decisions of those present and those who were absent. The Commissioner does not understand how attendees could reasonably have regarded their non-attendance as confidential. It is unlikely that senior civil servants will attend meetings simply so their name will appear in minutes and they will be immune from criticism (see the Tribunal's comments in **DfES** at para 75(iv)). The Commissioner submits that there is no public interest in maintaining either exemption.

75. The Commissioner agrees with the Cabinet Office that Colonel Scriven has greatly over-stated the importance of the public interest in knowing who did and did not attend in person. The public interest in disclosure is very modest, but there is some public interest in knowing who attended the meeting because it contributes something to the transparency of the medals process which the government has accepted should be more open. In any event, as there is no public interest in withholding the information, even if there is no public interest in disclosure the outcome of the balancing exercise will be disclosure.

Discussions and Conclusions

Does the information 'relate to' etc?

76. This has been interpreted broadly. We must decide if there is 'some connection' with the information, or that it 'touches or stands in relation to' the object of the statutory provision. We take the view that there is some connection between the identity of the decision makers and the decisions that are taken, and that the identity of those decision makers stands in relation to the making of those decisions. On that basis we find that the requested information relates to the formulation and development of policy and to the conferral of honours and dignities. We accept that there must be limits to the interpretation of the phrase, but we think that these are adequately captured in that case law as summarised in para. 18 of **Morland** and we find that this information falls within those limits.

Aggregation

77. We have looked at the aggregate effect of the s 35 and s 37 exemptions in an impressionistic rather than a mathematical way, considering where the different exemptions add weight and, conversely, where they overlap. While carrying out this exercise we have kept in mind the different interests protected by the different exemptions.

The relevant date at which to assess the public interest

78. The public interest balance has to be assessed at the time of the request or at the latest at the date of the outcome of the internal review which took place in this case on 13 April 2017. The Tribunal cannot take account of matters that have happened since then, save where they shed light on the position at the relevant date.

A contents-based approach

79. In our view it is not appropriate to assess the public interest in relation to a particular category of document (for example 'minutes of the HD Committee'), irrespective of content. We find the following paragraphs in the Upper Tribunal's judgment in **Department of Health v Information Commissioner** [2015] UKUT 159 to be of assistance in relation to a contents-based approach to public interest:

> 30. So a contents based assertion of the public interest against disclosure has to show that the actual information is an example of the type of information within the class description of an exemption (e.g. formulation of policy or Ministerial communications or the operation of a Ministerial private office), and why the manner in which disclosure of its contents will cause or give rise to a risk of actual harm to the public interest. It is by this route that:
>
> i) the public interest points relating to the class descriptions of the qualified exemptions, and so in maintaining the exemptions, are engaged (e.g. conventions relating to collective responsibility and Law Officers' advice) and applied to the contents of the information covered by the exemption, and
> ii) the wide descriptions of (and so the wide reach of) some of the qualified exemptions do not result in information within that description or class that does not in fact engage the reasoning on why disclosure would cause or give rise to risk of actual harm (e.g. anodyne discussion) being treated in the same way as information that does engage that reasoning because of its content (e.g. examples of full and frank exchanges).
>
> 31. That contents approach will also highlight the timing issues that relate to the safe space argument. The timing issues are different to the candour or chilling effect arguments in that significant aspects of them relate to the likelihood of harm from distracting and counterproductive discussion based on disclosure before a decision is made.
>
> 32. Finally, I record that I agree that a contents approach does not mean that the information is not considered as a package (see Foreign and Commonwealth Office v Information Commissioner and Plowden [2013] UKUT 275 (AAC) at [16]). Indeed, such a consideration accords with the nature of a contents-based assessment because it reflects the meaning and effect of the content of the relevant information.

80. These parts of the judgment remain binding on us. Further the Court of Appeal [2017] EWCA Civ 374 approved a contents-based approach at para 46 (my emphasis):

I agree with Charles J that, when a qualified exemption is engaged, there is no presumption in favour of disclosure; and that the proper analysis is that, if, after assessing the competing public interests for and against disclosure **having regards to the content of the specific information in issue**, the decision-maker concludes that the competing interests are evenly balanced, he or she will not have concluded that the public interest in maintaining the exemption (against disclosure) outweighs the public interest in disclosing the information (as section 2(2)(b) requires.)

81. We note the decision in **Plowden** referred to by the Upper Tribunal above, and we look at the information in context, i.e. on the basis that it appears in the minutes of discussions of the HD Committee. However, this does not mean that we must treat the document as a whole without regard to its contents. The FOIA regime is concerned with information not documents. When considering the public interest, we must look at the particular information contained in the document (see e.g. paras 33-36, **DBERR v Information Commissioner and Friends of the Earth EA/2007/0072).**

Timing and the public interest

82. The question of the timing of the request is, in general, important because of the risks of the adverse effects of premature publicity on the particular interest which s35 is intended to protect: the efficient, effective and high-quality formulation and development of government policy.

83. We do not consider that the question of the 'liveness' of a policy nor the question of the effect on the public interest should be seen as binary. Looking firstly at the effect on the public interest, it is clear that the public interest waxes and wanes with the circumstances: it is not a question of any public interest in maintaining a safe space disappearing the moment a policy is announced. The corollary of this, in our view, is that a policy's liveness can also wax and wane. We do not accept that the policy development process should be seen a seamless web, because this suggests that the policy development process is always live. Nor do we accept that a policy development process is necessarily 'dead' the moment a policy is announced publicly.

84. All the circumstances must be taken into account in order to assess, at the relevant point in time, whereabouts on the spectrum the facts fall: a policy in the very early stages of development or at a critical point in its development process would fall near the live end of the spectrum and consequently the weight of the public interest in maintaining the exemption would be much greater. A policy which is announced with no intention of further work would fall near the other end of the spectrum. Somewhere in between lie policies which have been 'placed on the backburner', or that are due to be reviewed after a certain period of time. The policy development process does not move smoothly from one end of the spectrum to the other – as stated above, its 'liveness' waxes and wanes.

85. The task for the Tribunal is to consider, taking into account the facts before it on the state of policy development at the relevant date, what impact the disclosure of this particular information at the relevant time might have on the particular interest of protecting the efficient, effective and high-quality formulation of government policy.

86. On the facts we find that, at the relevant time, there was no ongoing process of substantive policy formulation and development on whether or not to introduce the NDM. The question of whether, at some point, that process would be rekindled was explicitly left open. On occasion, the decision on whether or not to re-open that substantive process was considered and taken. For example, the question of whether or not to re-open the process was considered and taken at the meeting of the HD Committee on 23 February 2015. We also accept that it was likely that the question of whether or not to re-open the substantive discussion on NDM would have to be considered again in the future. Further there were related discussions and decisions as to how to respond to correspondence on the issue from the campaign.

87. In relation to the other claims for medallic recognition the government had made clear that, absent significant new evidence of injustice, there would be no reconsideration of the claims.

88. Leaving aside the broader chilling effect arguments, which we consider below, we have asked ourselves whether, in the light of all the circumstances, the efficient, effective and high-quality formulation and development of government policy would be harmed or prejudiced by disclosure of this information in April 2017. We find that in relation to this particular information there would have been no such risk even if the policy was live. In the light of of our findings above on the state of liveness of the policies, there is, a fortiori, no risk of any adverse effect by releasing the names of those who were not present at the meeting.

The public interest under s 37 and s 35

89. The purpose of s 37(1)(b) is to ensure candour and protect confidences in the entire process of considering honours, dignities and medals. We accept that the HD Committee is a Committee that makes recommendations that are put before The Queen. We accept that underlying s 37 as a whole is the fundamental constitutional principle that communications with The Queen are confidential.

90. In our view, the content and context of the information will affect the public interest balance. Where the information contains or reveals confidential information or candid discussions, the public interest in maintaining the exemption will be stronger. Where that confidential information or those

candid discussions result directly in recommendations to The Queen, the public interest in maintaining the exemption will be stronger.

91. It has not been argued that the attendees had any reasonable expectation of confidentiality in relation to their attendance and we would not, in any event, have accepted that civil servants at this level had any reasonable expectation of confidentiality in relation to their attendance at HD Committee meetings.

92. We accept that disclosure of the attendees might lead to particular officials being criticised for their non-attendance and that there might be unfounded speculation about whether a member really played an active part or contributed their views fully. We do not believe that either criticism for non-attendance or unfounded speculation about contribution would have any chilling effect on the willingness of the members of the HD Committee to consider radical ideas or reach unpopular conclusions. The members of the HD Committee can be expected to be robust, and we cannot see how disclosure of their attendance or non-attendance would affect their willingness to consider radical ideas or reach unpopular conclusions.

93. We cannot see how exposure to unwarranted and speculative criticism of the nature set out in paragraphs 24-25 of Colonel Scriven's submissions even in a named or personal capacity *as a result of not attending these particular meetings* would have any effect on the voicing of unpopular opinions or advice. There is no suggestion, as a result of this decision, that any such opinions or advice would be disclosed.

94. The Cabinet Office also asserts that the unwarranted and speculative criticism is damaging 'in its own right'. Without any indication of how this impacts on the interests which the exemptions are intended to protect, it is difficult for the Tribunal to evaluate. The Cabinet Office has a simple, clear and short explanation that it can give as to the involvement of absent members to rebut such criticism.

95. Given the level of robustness that can be expected from senior individuals at this level, we would be astonished if the Committee's substantive decisions would be influenced by the knowledge that an individual member might be subject to unfounded criticism for attendance or non-attendance, particularly as the concept of collective responsibility can be quickly and easily explained. Nor, for the same reason, do we accept that 'each member may be less willing to voice radical ideas in case this leads to an unpopular decision'.

96. Finally, we simply do not accept that civil servants would attend meetings 'simply to be seen to be there' even if they have already provided their views, rather than choosing to explain to critics, as the Cabinet Office have done in this appeal, why they have nonetheless been able to participate fully. We cannot see how such an approach is consistent with the proper performance of

civil servants' duties, and we do not accept that harm caused by a civil servant deliberately choosing to waste his or her time for the sake of appearances is something we can properly take into account.

97. In our view, for the reasons set out above the possibility of unfounded criticism for non-attendance holds no risk of adversely affecting the policy development process or of having any 'chilling effect'. Further, for the reasons set out above, we find that the possibility of criticism holds no risk of affecting the candour or confidences in the medal's process. We conclude that there is no public interest in maintaining the exemptions, taken together, in relation to this particular information.

98. In terms of the public interest in disclosure there are many matters raised in this case, and the other cases we heard at the same time, that we do not think weigh in the balance, because they are not interests that would in fact be served by the disclosure of the particular information.

99. We do not accept that the information would serve the purpose of showing whether the issues had been properly considered. We accept the Cabinet Office's assertion that absentee members can and do contribute in other ways.

100. We find that the following matter alone adds some weight to the public interest in disclosure. Whilst we accept that much other information relating to the medals process has now been put in the public domain, we find that the general public interest in transparency in decision making in the medals process is heightened because the process was said, in the Holmes Report, to be 'vulnerable to the charge of being a "black box" operation, where those outside have no knowledge of what is being decided or why'. It is clear that matters have moved on since the Holmes Report to some extent, but we find that there remains an enhanced general public interest in transparency in relation to the operation of the entire process. This general but very modest public interest in a transparent process would be served by disclosure of all the details surrounding a meeting including the attendees and non-attendees.

101. For those reasons, we find that the very modest public interest in the disclosure of the information outweighs the public interest in maintaining the exemptions.

102. Our decision is unanimous.

Signed Sophie Buckley

Judge of the First-tier Tribunal
Date: 20 February 2019