

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 March 2010

Public Authority: The Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Summary

The complainant asked the Cabinet Office for submissions that had been made to The Queen in respect of the recommendation of the Committee on the Grant of Honours, Decorations and Medals that British service personnel be allowed to accept, but not wear, the Pingat Jasa Malaysia medal (PJM). The Cabinet Office refused to disclose the information it held citing the exemptions provided by sections 35(1)(a) – formulation and development of government policy; 37(1)(a) – communications with the Royal Family; and 37(1)(b) – information relating to the conferring of an honour or dignity. The Commissioner has concluded that the information which falls within the scope of the request consists of a letter dating from December 2005 from the then Foreign Secretary, Jack Straw, to the then Private Secretary to The Queen, Sir Robin Janvrin and a report of the Committee on the Grant of Honours, Decorations and Medals about the PJM. The Commissioner has also concluded that both documents fall within the scope of section 37(1)(a) and furthermore that the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. Her Majesty's Government's (HMG) rules on the acceptance and wearing of foreign awards preclude the acceptance of medals for events in the distant past or more than five years previously. Furthermore, the rules do not allow for a foreign award to be accepted if a British award has already been given for the same service. All British citizens require permission from HMG to accept and wear foreign state awards.
3. In March 2005 the Malaysian Deputy Prime Minister, on behalf of the King of Malaysia and Malaysian government, made a formal request to HMG for permission to award the Pingat Jasa Malaysia medal (PJM) to British service personnel. The PJM commemorates service in the Emergency or Confrontation in Malaya between 1957 and 1966.
4. British service personnel who served in Malaysia, and who were thought to merit recognition of an award, had been previously awarded the British General Service Medal. Those personnel who had been seconded to the Malayan Armed Forces were allowed to accept and wear The Federation of Malaya Active Service Medal.
5. Therefore, acceptance of the PJM as offered by Malaysian government in 2005 would have breached both the 'five year' rule and the 'double medalling' rule.
6. The Committee on the Grant of Honours, Decorations and Medals (HD Committee) which provides the Sovereign with independent and non-political advice on the honours system, considered the request by the Malaysian government to award the PJM.
7. In December 2005 the HD Committee recommended to The Queen that veterans and others eligible should exceptionally be allowed to accept the PJM, offered by the King and Government of Malaysia, but that official permission to wear the medal should not be granted.
8. The Queen subsequently approved the HD Committee's recommendation and the government announced the decision to Parliament on 31 January 2006.
9. There followed a campaign by those dissatisfied with the decision, i.e. to allow the PJM to be accepted but not worn. Consequently, the HD Committee reviewed its decision but concluded that its original recommendation should not be changed.

10. A statement explaining the rationale behind HMG's position in respect of the PJM is available on the Foreign and Commonwealth Office (FCO) website.¹

The Request

11. On 6 May 2008 the complainant submitted a request to the Cabinet Office which sought 'copies of the notes and recommendations to Her Majesty The Queen regarding The Committee on the Grant of Honours, Decorations and Medals at their meeting on December 7th 2005 (or thereabouts) where the subject matter of The Pingat Jasa Malaysia was discussed'.
12. The Cabinet Office responded on 2 June 2008 and explained that it held a copy of the HD Committee report submitted to The Queen but it considered it to be exempt from disclosure on the basis of sections 35(1)(a), 37(1)(a) and 37(1)(b) of the Act.
13. The complainant sought an internal review of this decision on 9 June 2008.
14. The Cabinet Office conducted an internal review and informed the complainant of its outcome on 10 July 2008. The review upheld the application of all three exemptions as set out in the refusal notice.

The Investigation

Scope of the case

15. The complainant contacted the Commissioner on 14 July 2008 and asked him to consider the Cabinet Office's decision to refuse to disclose the information that he had requested.

Chronology

16. Unfortunately, due to a backlog of complaints received about the Act, the Commissioner was unable to begin his detailed investigation of this case immediately. Therefore it was not until 17 August 2009 that the Commissioner contacted the Cabinet Office in relation to the complaint. In this letter the Commissioner asked the Cabinet Office to provide him

¹ http://www.fco.gov.uk/resources/en/pdf/pdf21/fco_pingatjasamalaysiamedal

with a copy of the information requested by the complainant. The Commissioner also asked to be provided with detailed submissions to support the Cabinet Office's application of the three exemptions cited in the refusal notice.

17. The Cabinet Office provided the Commissioner with a response on 19 February 2010. In this response the Cabinet Office explained that the information falling within the scope of this request was the same as the information which fell within the scope of two cases already being considered by the Commissioner. One of these cases involved a request from a different individual to the Cabinet Office and the other case involved a request from the same complainant in this present case to the FCO. Therefore rather than providing the Commissioner with the requested information and arguments to support the application of the exemptions in this case, the Cabinet Office simply referred to the Commissioner to previous submissions he had received both from itself and the FCO on these related cases.

Findings of fact

18. On 19 December 2005 the then Foreign Secretary, Jack Straw, wrote to the then Private Secretary to The Queen, Sir Robin Janvrin, about the HD Committee's recommendation that the PJM be accepted but not worn. Enclosed with this letter was a copy of the HD Committee report of December 2005 about the wearing of the PJM.
19. The response from Sir Robin Janvrin to the Foreign Secretary is already in the public domain as it was disclosed by the Cabinet Office in March 2008.

Analysis

Substantive Procedural Matters

What information falls within the scope of the request?

20. The Commissioner has considered the wording of the complainant's request very carefully. In the Commissioner's opinion this request does not simply ask for a copy of the relevant HD Committee report as the Cabinet Office suggested in its refusal notice. Rather it asks for submissions to The Queen 'regarding' the report. Therefore in the Commissioner's opinion not only does the report itself fall within the scope of the request but so does the Foreign Secretary's letter of 19 December 2005. This is because having examined the content of the

letter the Commissioner believes that it can reasonably and objectively concluded that the letter is a submission to The Queen which relates directly to the report. It is thus a submission 'regarding' the report.

21. Therefore the Commissioner believes that both the letter and the report fall within the scope of the complainant's request.² Furthermore the Commissioner understands that the Cabinet Office holds both documents: it holds the report because the HD Committee forms part of the Honours and Appointments Secretariat (which is part of the Cabinet Office) and the Foreign Secretary's letter was copied to an individual at the Secretariat.

Exemptions

Section 37(1)(a) – communications with the Royal Family and Royal Household

22. The Commissioner has initially considered the Cabinet Office's reliance on section 37(1)(a) to withhold the information he has determined to fall within the scope of the request.
23. This section states that:
 - '37 – (1) Information is exempt information if it relates to –
 - (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household'.
24. In line with his approach to the term 'relates to' when it appears in other sections of the Act (for example section 35), the Commissioner interprets this term broadly and thus the exemption contained at section 37(1)(a) provides an exemption for information which 'relates to' communications with the Royal Family or with the Royal Household rather just simply communications with such parties.
25. Therefore, this exemption has the potential to cover draft letters, memorandums or references to the existence of meetings with the Royal Family or Royal Household.
26. However, information must still constitute, or relate to, a communication to fall within the exemption. So, for example an internal note held by a government department that simply references the Royal Family or Royal Household will not necessarily fall within this

² In previous submissions from the Cabinet Office and the FCO the Commissioner has been sent both a copy of the letter and a copy of the report and arguments to support the application of the three exemptions set out at paragraph 12 to withhold both documents.

definition. It must be evident that the information is intended for communication, or has been communicated, or that it references some other communication falling within the definition.

27. The Commissioner is satisfied that the two pieces of information withheld by the Cabinet Office clearly fall within the scope of the section 37(1)(a). The letter from the Foreign Secretary is clearly a communication with the Royal Household as it was addressed to The Queen's Private Secretary. Furthermore the Commissioner notes that having considered the content of report itself it is clear that the report was intended, in its own right, to be communicated to The Queen. It therefore falls within the scope of section 37(1)(a) even without having been enclosed with the Foreign Secretary's letter.

Public interest test

28. Section 37 is a qualified exemption and is therefore subject to the public interest test set out in section 2(2)(b) of the Act, i.e. whether in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

29. The Cabinet Office has argued that disclosure of the information would undermine the constitutional right of the Sovereign, by convention, to counsel, encourage and warn the government and thus to have opinions on government policy and to express those opinions to Her Ministers. However, whatever personal opinions the Sovereign may hold She is bound to accept and act on the advice of Her Ministers and is obliged to treat Her communications with them as absolutely confidential. Such confidentiality is necessary in order to ensure that the Sovereign's political neutrality is not compromised in case Her Majesty has to exercise Her executive powers, e.g. initiating discussions with political parties in the scenario of a hung Parliament in order to ensure that a government can be formed.
30. Consequently, disclosure of the requested information would not be in the public interest because it would undermine the confidence central to the convention, which in turn would undermine the constitutional position of The Queen.

Public interest arguments in favour of disclosing the requested information

31. There is an inherent public interest in disclosure of information to ensure that the government is accountable for, and transparent about, its decision making processes.
32. Moreover, there is a specific public interest in disclosure of information that would increase the public's understanding of how the government interacts with the Royal Family and the Royal Household, and in particular in the circumstances of this case, The Queen. This is because the Monarchy has a central role in the British constitution and the public is entitled to know how the various mechanisms of the constitution operate. This includes, in the Commissioner's opinion, how The Queen is consulted in respect of honours issues.
33. Linked to this argument, is the fact that disclosure of the withheld information could further public debate regarding the constitutional role of the Monarchy. Similarly, disclosure of the information could inform the broader debate surrounding reform of the British constitutional system.
34. In the circumstances of this case the Commissioner also recognises that there is significant interest in, and debate surrounding, the recommendation of the HD Committee, and The Queen's subsequent approval, that although the PJM could be accepted it could not be worn.

Balance of the public interest arguments

35. In the Commissioner's opinion, given the broad reading of the term 'relates to', the subject matter of information which can fall within the scope of section 37(1)(a) can be very broad because communications, and information relating to such communications, could potentially cover a variety of different issues. Therefore establishing what the inherent public interest is in maintaining the exemption provided by section 37(1)(a) is more difficult than identifying the public interest inherent in a more narrowly defined exemption, for example section 42, which clearly provides a protection for legally privileged information.
36. However, the Commissioner believes that the following two public interest factors can be said to be inherent in the maintaining the exemption and relevant in this case:
 - Protecting the ability of the Sovereign to exercise her right to consult, to encourage and to warn her government; and

- Preserving the political neutrality of the Royal Family and particularly the Sovereign, to ensure the stability of the constitutional Monarchy.
37. The Commissioner accepts that there is a significant and weighty public interest in preserving the operation of the convention identified by the Cabinet Office, i.e. it would not be in the public interest for the operation of the established convention of confidentiality to be undermined. This is particularly so given that the convention is designed to protect communications at the heart of government, i.e. between the Monarch and government Ministers.
 38. Furthermore, the Commissioner believes that significant weight should be attributed to the argument that disclosure could undermine the political neutrality of The Queen: it is clearly in the public interest that the Monarch is not perceived to be politically biased, in order to protect Her position as Sovereign in a constitutional democracy.
 39. With regard to attributing weight to the public interest arguments in favour of disclosure, the Commissioner recognises that they are ones which are regularly relied upon in support of the public interest in favour of disclosure, i.e. they focus on the need for a public authority to be accountable for, and transparent about, decisions that it has taken. However, this does not diminish the importance of such arguments as they are central to the operation of the Act and thus are likely to be deployed every time the public interest test is applied.
 40. Furthermore the Commissioner recognises the significant level of interest, and indeed dissatisfaction, some British recipients of the PJM continue to feel in respect of the decision to allow the PJM to be awarded but not worn. Whilst the Commissioner recognises that there is a significant amount of information already in the public domain about the decision regarding the PJM, there is always a public interest in disclosure of all relevant information to ensure the public have a complete and full picture.
 41. Nevertheless, in reaching a conclusion about where the balance of the public interest lies the Commissioner has to focus on the content of the information. The Commissioner does not believe that the content of the HD Committee report would add significantly to the public's understanding of the reasoning behind the decisions that were taken in respect of the PJM beyond the significant levels of information already available in the public domain, not least the document on the FCO website referred to in paragraph 10 of this notice. The Commissioner does however accept that the Foreign Secretary's letter contains reference to some issues perhaps not fully reflected in the information that is already publically available.

42. Ultimately though the Commissioner believes that the public interest in disclosing the Foreign Secretary's letter is outweighed by the public interest in maintaining the exemption because of the significant weight that should be attributed to maintaining the convention – i.e. a confidential space in which the Monarch and Ministers can communicate - and the concepts which underpin it, i.e. political neutrality and confidentiality. With regard to the HD Committee report, the Commissioner believes that the degree to which its disclosure would add to the information already in the public domain is limited. However, this does not mean that the weight that should be given to the arguments in favour of maintaining the exemption is reduced. Disclosure of the report would still, in the Commissioner's opinion, undermine the confidential nature of communications between The Queen and Her advisers, in this case the HD Committee at significant detriment to the public interest.
43. Therefore, for both the letter and the report, the Commissioner has concluded that the public interest in maintaining the exemption at section 37(1)(a) outweighs the public interest in disclosing the information.
44. In reaching this conclusion the Commissioner has considered whether the disclosure of Sir Robin Janvrin's response to the Foreign Secretary's letter affects the balance of the public interest in respect of the information that has been requested in this case. That is to say, does the disclosure of correspondence which falls within the scope of the convention discussed above undermine the weight that should be attributed to the public interest in favour of maintaining section 37(1)(a). Having considered this point carefully the Commissioner is satisfied that it does not. This is because the content of Sir Robin Janvrin's letter is very brief and simply reads:
- 'Thank you for your letter of 19th December. The Queen has approved the recommendation of the HD Committee Meeting of 7th December that the Pingat Jasa Malaysia may be accepted but not worn by those eligible to receive it.'
45. As noted above, key to any consideration of the public interest test is the content of the information. The Commissioner is satisfied that both the content of the Foreign Secretary's letter and the report are significantly different to the content of Sir Robin Janvrin's response. Therefore the Commissioner is satisfied that disclosure of the response by the Cabinet Office does not undermine the conclusion that the public interest favours maintaining the information requested by the complainant.

46. In light of his conclusion in relation to section 37(1)(a), the Commissioner has not considered the Cabinet Office's application of sections 35(1)(a) or 37(1)(b).

The Decision

47. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

48. The Commissioner requires no steps to be taken.

Right of Appeal

49. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 29th day of March 2010

Signed

**Graham Smith
Deputy Commissioner and Director of Freedom of Information**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Effect of Exemptions

Section 2(2) provides that –

"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"

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Government policy etc

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Communications with Her Majesty.

Section 37(1) provides that –

“Information is exempt information if it relates to-

- (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or
- (b) the conferring by the Crown of any honour or dignity.”