

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 April 2018

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

Decision (including any steps ordered)

1. The complainant has requested the minutes of the Honours and Decorations Committee concerning discussions and decisions regarding the 'Medals Review'.
2. The Commissioner's decision is that the Cabinet Office has correctly engaged the exemptions at sections 35(1)(a) and 37(1)(b) but she considers that the public interest in disclosure outweighs the public interest in maintaining the exemptions.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information with limited redaction in accordance with paragraph 39 of this notice.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

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5. The Committee on the Grant of Honours Decorations and Medals ('HDC') is the channel by which proposed changes in medal policy may be submitted to Her Majesty The Queen. A number of veterans groups and individuals have been lobbying the Ministry of Defence and the Government about perceived injustices in medallic recognition, in some cases for many years. Some are in relation to specific actions or campaigns that have not been recognised. Other groups feel unfairly excluded by qualifying criteria for campaigns that were recognised. There are also campaigns to recognise military service more generally, notably for a National Defence Medal (NDM). Sir John Holmes conducted a review of the rules, principles and processes for medallic recognition. The Review was conducted between 1 May and 29 June 2012. The team took a wide range of evidence from individuals and campaign groups with the outcome published in July 2012 as the "Military Medals Review". The Review recommended the establishment of a standing sub-committee charged with looking more deeply at the military issues and making recommendations to the full committee. The Committee on the Grant of Honours, Decorations and Medals Advisory Military Sub-Committee ('AMSC') was set up to provide advice on medallic recognition and policy to the HDC.
 6. The complainant previously requested information from the Ministry of Defence ('MoD') comprising the minutes of a meeting of the AMSC on 29 August 2013. The request was refused and following his complaint to the Commissioner, who did not uphold his complaint, he appealed to the First-Tier Information Tribunal. On 30 August 2016 the Tribunal [EA/2015/0291] ordered disclosure of a redacted copy of the requested Minutes which it considered to be in the public interest "in light of the aims and purposes of the AMSC."
 7. Following this disclosure the complainant explained to the Commissioner that he has concerns regarding the AMSC deliberations and how this could have affected the decision making process of the HDC.

Request and response

8. On 18 January 2017 the complainant wrote to the Cabinet Office and requested information in the following terms:

"Subsequent to the meeting of the AMSC carried out in MoD Main Building on 29th August 2013 and prior to the release of the Medals Review, Ministerial Statement by Baroness Stowell in the House of Lords on 29th July 2014 the decisions made by AMSC must have been discussed and final decisions with respect to the AMSC meeting must have been made by The Honours and Decorations Committee. I wish to

request a full set of the minutes of that (those) meeting(s) of the Honours and Decorations Committee.”

9. The Cabinet Office responded on 15 February 2017. It stated that the information was withheld in reliance of sections 35(1)(a) and 37(1)(b).
10. Following an internal review the Cabinet Office wrote to the complainant on 6 April 2017 upholding its initial response.

Scope of the case

11. The complainant contacted the Commissioner on 11 April 2017 to complain about the way his request for information had been handled. He explained:

“We have indeed found evidence of unfairness in the way in which the AMSC conducted its deliberations, and we say that this would have affected the decision making process as this material reached the HDC.

We now know that the recommendations passed to HDC for their final deliberation were indeed based upon flawed and incorrect evidence, but what we cannot know is how much weight was placed upon these documents as HDC went on to make their final decision prior to their final recommendations being moved up the reporting chain. Since we seek remedy through having the Medals Review re-opened we argue that the only way in which that evidence can be reached and assessed for unfairness, is through sight of those HDC minutes.”

12. The Commissioner considers the scope of her investigation to be the application of the exemptions found at sections 35(1)(a) and 37(1)(b) FOIA to refuse to provide the requested information.

Reasons for decision

Section 35

13. Section 35(1)(a) of FOIA states:

“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.”

14. The Cabinet Office explained to the Commissioner that the withheld information comprises a full record of two specific meetings of the HDC, on 29 January 2014 and 9 June 2014, at which the independent review

of military medals was discussed. It went on to explain that the policy in relation to the Military Medals Review was, at the time of the request, a live issue. It was announced in July 2014 that although in relation to the NDM the HDC was not persuaded that a sufficiently strong case could be made at that time the "issue might usefully be reconsidered in the future." The Cabinet Office stated that this policy "still stands" such that the NDM was discussed earlier this year.

15. The Cabinet Office went on to explain that ministers may request a review of the policy and the decision not to introduce the NDM at any time. It relies on this premise to argue that the policy formulation with regard to the Military Medals review is more complex than:

"...simply deciding that information relating to the policy formulation stage has ended and implementation begun."

16. The Commissioner considers that the purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well considered or effective policies. In particular, it ensures a safe space to consider policy options in private. However, she notes her guidance advises that a public announcement of the decision is likely to mark the end of the policy formulation process.
17. In this case the Cabinet Office acknowledges that there was a public announcement of the decision in July 2014. Notwithstanding this, the Cabinet Office seeks to maintain that because the matter has been reviewed by the HDC in February 2015 and discussed in February 2017, the matter remains at the stage of policy formulation, although no change in the decision has resulted. The Cabinet Office went on to explain that although ministers decided not to introduce a NDM, the fundamental questions underlying how military medals are awarded continues to be a current policy issue which the HDC considered in July 2017 and is expected to revisit "over the next year at least".
18. To be exempt from disclosure in reliance of this exemption, the information must relate to the formulation or development of government policy. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy. She accepts that the requested information comprises information relating to the formulation or development of policy in regard to the award of military medals. She is therefore satisfied that the exemption is engaged. Section 35 is subject to the public interest and the Commissioner will now proceed to consider this.

The public interest

19. The complainant considers that there is a substantial public interest in the NDM. In particular due to the large number of potential recipients,

as highlighted in the complainant's grounds for appeal referenced in paragraph 6 above. His arguments in support of disclosure in this case follow a similar reasoning as those set out in the grounds for appeal¹. In addition the complainant explained:

"We have already seen that in her Decision Notice on 30 August 2016, Judge Henderson found a high level of Public Interest. We would argue that since that date, the Public Interest factor has in fact increased substantially, as we now know that we have indeed found unfairness present in the AMSC minutes and these minutes were then passed to HDC as the main source of evidence as they made their final decisions."

20. The Commissioner notes that the Cabinet Office has used very similar arguments in its consideration of the public interest as those advanced by the MoD during the Appeal referenced above.
21. The Cabinet Office recognises the general public interest in openness in government to enable the understanding of the way in which decisions are reached, to improve government accountability and to encourage informed and constructive public engagement with important topics such as honours and medals whilst increasing public confidence and trust.
22. However, the Cabinet Office considers that these points are outweighed by the public interest in maintaining the exemption in order to preserve the 'safe space' required by those involved in policy formulation and development in this area. The Cabinet Office argues that:

"It is in the public interest that such policy discussions are kept confidential for this live period in order that ministers and senior officials may conduct a full and frank discussions [sic] of the issues at hand, in the knowledge that their discussions will remain confidential during that period and will not be subject to premature disclosure."

23. The Commissioner agrees that there is a need for a safe space to develop policy and debate live issues away from external interference and distraction. The need for such a safe space will be strongest when the issue is still live. Once a decision has been made a safe space for deliberation will no longer be required and this argument will carry little weight. The timing of the request is therefore an important factor. This was confirmed by the Information Tribunal in *DBERR v Information Commissioner and Friends of the Earth* (EA/2007/0072, 29 April 2008):

¹ EA/2015/0291

"This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public."

24. In this case the Commissioner is not convinced that the matter is still 'live'. The announcement in July 2014 provided the decision and therefore although the Cabinet Office has demonstrated that the NDM has been subsequently discussed and may be raised again this does not mean that the matter is 'live' in respect of the safe space arguments provided. She does not consider disclosure in this case could be premature.
25. The Commissioner accepts that the requested minutes will provide insight into the decision making process of the HDC. She cannot determine whether such insight is sufficient for the purposes set out by the complainant.
26. The complainant has advised the Commissioner that he accepts that members of the meeting(s) should; "have room to make candid comments." The complainant also explained his understanding that there is a likelihood that items concerning individual honours or decorations may be covered in the requested minutes. He advised:

"We have no wish to ask for the material where this was the case. We do see the need for confidentiality with respect to these individuals whose names are being processed with a view to an Honour or Dignity."
27. The Commissioner notes that the complainant therefore expects appropriate redactions to the requested information with respect to personal information.
28. On balance the Commissioner has determined that the public interest favours disclosure and is satisfied that appropriate redaction will provide a safeguard against any future chilling effect on discussions.

Section 37

29. Section 37(1)(b) of FOIA states:

"Information is exempt information if it relates to-

(b) The conferring by the Crown of any honour or dignity."

30. The Cabinet Office explained its consideration that the requested information falls within the scope of this exemption given that it is on the subject of the introduction of potentially several new medals to be conferred by HM The Queen. It also considers that the exemption encompasses not only decisions on individuals' eligibility for honours or

medals but also the formulation of policy in relation to honours and medals.

31. The Commissioner is aware of her guidance which advises that 'relates to' should be interpreted broadly and accepts that the exemption encompasses the policies and procedures that underpin the honours process. She therefore is satisfied that the exemption is engaged.

The public interest

32. Section 37(1)(b) is a qualified exemption and therefore subject to the public interest test. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
33. The Cabinet Office acknowledges the need for transparency and openness but nevertheless considers that;

"...the need to respect and protect confidences and discretion within the honours policy making process weighs the heavier. The Queen, as the fount of honour in the United Kingdom, should be able to expect the maintenance of the confidentiality of communications with public authorities in the matter of honours."

34. The Cabinet Office asserts that the content of the process needs to remain confidential in order to maintain the integrity of the honours system and to ensure that decisions continue to be taken on the basis of full and honest information. This includes providing an understanding to those who offer opinions that their confidence will be honoured.
35. The Commissioner accepts that for the honours system to operate efficiently and effectively there needs to be confidentiality to allow those involved to hold free and frank discussions. However, in the particular circumstances of this case she considers that the redaction of any specific names with comments attributed serves to sufficiently protect confidentiality without inhibiting any future frank discussions.
36. The Cabinet Office also explained its consideration that there is a public interest inherent in this exemption which is the "protection and preservation of the integrity and robustness of the honours system". It concluded that the public interest favours withholding the information and the confidentiality of the information is on-going.
37. The Commissioner has considered the withheld information and notes that there is no content concerning individuals' specific eligibility for honours, the discussion taking place is generic. She also notes that the information relates to meetings during 2014, the broad content of which is reflected in documentation already in the public domain including

Baroness Stowell's Statement, House of Commons Library briefings on line and disclosures ordered by the Tribunal referenced above in paragraph 6.

38. The Commissioner also notes the motivation expressed by the complainant in paragraph 11 and the significant degree of public interest in the fair and appropriate award of medals involving a high number of potential recipients. She considers that disclosure would demonstrate an openness in what may be viewed as a relatively opaque process. Taking into account all of the above the Commissioner's decision is that the balance of the public interest in the specific circumstances of this case weighs in favour of disclosure.
39. In ordering disclosure the Commissioner accepts that the Cabinet Office may make limited redactions to protect the safe space for those named individuals in the minutes of 9 June 2014 at "Falkland Islanders" section paragraph 2 lines 5 and 6 and "Military Medals Review" section at paragraph 5 line 7 and paragraph 6 lines 7 and 8.

Right of appeal

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

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

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. 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.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

**Gerrard Tracey
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