First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0098

Decided without a hearing
On 19 November 2018

Before

JUDGE BUCKLEY

MELANIE HOWARD

MARION SAUNDERS

Between

THE CABINET OFFICE

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

DR MARTIN HALLIGAN

Second Respondent

OPEN DECISION

1. For the reasons set out below the Tribunal allows the appeal against Decision Notice FS50676797 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. There is also a closed annex in order not to undermine the Tribunal's decision on what information should be disclosed in accordance with rule 14. The annex will remain closed until after the latest date for applying for permission to appeal or until the conclusion of any appeal. A redacted version of the annex will be released after that date.

SUBSTITUTE DECISION NOTICE

Public Authority: The Cabinet Office

Complainant: Dr Halligan

The Substitute Decision – FS50676797

1. For the reasons set out below s 35(1)(a) and s 37(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 exemption in relation to the parts of the withheld information identified in the closed annex.

2. For the reasons set out below s 35(1)(a) and s 37(1)(b) of the Freedom of Information Act 2000 (FOIA) are engaged and the public interest in disclosure is outweighed by the public interest in maintaining the exemption in relation to the remainder of the withheld information identified in the closed annex.

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 identified in the closed annex.

REASONS

Introduction and procedural background

1. Dr Halligan is a campaigner for the introduction of a National Defence Medal ('NDM') to recognise the service of Armed Forces members who did not serve in specific conflicts. He is also a campaigner for changes to the Accumulated Campaign Service Medal and for an Award for Service Personnel injured in the Service of their Country. The request dated 18 January 2018 asks, in summary, for minutes of relevant meetings of the Honours and Decorations Committee ('HD Committee') held between 29 August 2013 and 29 July 2014.

2. This is the Cabinet Office's appeal against the Commissioner's decision notice of 10 April 2018 FS50676797 which held that s 35(1)(a) and s 37(1)(b) were engaged but that the public interest favoured disclosing the information.

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. As well as campaigning for the NDM, Dr Halligan campaigns for changes to the Accumulated Campaign Service Medal ('ACS Medal') and an Award for Service Personnel injured in the Service of their Country. The ACS Medal is currently subject to the condition that the recipient must still be serving on or after 1 January 2008.

6. 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.

7. 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.

8. Mr Halligan was the author of two medal review submissions.

9. 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)

10. 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.

11. 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.

12. 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.

13. The HD Committee directly advises The Queen on policy relating to the granting 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.

14. 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.

15. 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.

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

17. 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 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 had in some case 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…

18. 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.

19. 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.

20. 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.

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

22. 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.

23. 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 Stevens 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.'

24. Colonel Scriven wrote again to Sir Jonathan Stevens 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.

25. Dr Halligan also considers that the investigation and its conclusions was flawed.

26. Dr Halligan previously requested minutes of the AMSC meeting on 29 August 2013. His appeal to the First Tier Tribunal was successful (EA/2015/0291) and the tribunal ordered disclosure of a redacted copy of the minutes. The EA/2015/0291 tribunal decision is referred to in this decision as '*Halligan 1'*.

Request, Decision Notice and appeal

Request

27. This appeal concerns the following request made on 18 January 2017:

> Subsequent to the meeting of the AMSC carried out in the 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.

28. Two sets of HD Committee minutes, held on 29 January 2014 and 9 June 2014, fall within the scope of the request.

Reply and review

29. The Cabinet Office responded on 15 February 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 6 April 2017. Dr Halligan referred the matter to the Information Commissioner on 11 April 2017.

Decision Notice

30. In a decision notice dated 10 April 2018 the Commissioner decided that s 35(1)(a) and s 37(1)(b) were engaged but the public interest in disclosure outweighs the public interest in maintaining the exemption. The Commissioner ordered disclosure of a redacted version of the minutes.

31. In balancing the public interest under s 35, the Commissioner recognised 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 a safe space is strongest when the issue is still live. It will carry little weight once a decision has been made. The Commissioner was not convinced that the matter was still live, and she did not consider disclosure in this case could be premature. The Commissioner accepted that the minutes will provide insight into the decision-

making process. She concluded that appropriate redaction would safeguard against any future chilling effect.

32. Under s 37 the Commissioner accepted that for the honours system to operate effectively and efficiently there needs to be confidentiality to allow those involved to hold free and frank discussions. She considered that the redaction of any specific names with comments attributed would sufficiently protect confidentiality without inhibiting any future frank discussions. The withheld information does not concern an individual's specific eligibility for honour. The information relates to meetings during 2014, the broad content of which is reflected in documentation already in the public domain. There is a significant degree of public interest in the fair and appropriate award of medals involving a high number of recipients. Disclosure would demonstrate openness in what may be viewed as a relatively opaque process. She concluded that the Cabinet Office could make limited redactions to protect the safe space as set out in paragraph 39 of the Decision Notice.

Notice of Appeal

33. The Cabinet Office appealed the Commissioner's decision notice. The grounds of appeal are that the Commissioner's exercise of discretion under s 35(1)(a) and s 37(1)(b) was wrong.

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

    34.1. The Commissioner was wrong to conclude that the NDM was not a 'live' issue at the relevant date.
    34.2. The public interest in maintaining a safe space does not disappear once a statement in Parliament or similar is made. Close attention must be made to the specific circumstances.
    34.3. On the facts the matter was clearly left open and the Commissioner gave no reasoning for concluding that the matter was not live.
    34.4. The matter was live and therefore much greater weight should have been given to the need for a safe space.

35. In relation to s 37(1)(b) the Cabinet Office states:
    35.1. The Commissioner did not recognise any difference between the AMSC and the HD Committee.
    35.2. There is a heightened public interest in ensuring the HD Committee's deliberations are full, frank and confidential compared to the AMSC because the HD Committee's decision is the final decision on issues of honours and medals.
    35.3. The Commissioner has not recognised the foundational constitutional nature of the principle that communications between ministers and Her Majesty the Queen should be confidential.

35.4. Greater weight should be given to the need for a safe space for confidential discussion in the HD Committee for both of these reasons.

The Commissioner's response

36. The ICO's response dated 15 June 2018 submits that there is a significant public interest in greater transparency around the process by which new honours are created and the discussion process can be protected, so far as is necessary given the passage of time, through limited redaction. In relation to the specific issues raised in the Notice of Appeal:
    36.1. The Tribunal in *Halligan 1* found that the NDM process was not 'live' in August 2014. Any future discussion will be in a different factual context because the government's policy is that the matter will only be reopened if the factual context changes.
    36.2. The discussion in February 2017 is assumed to be a review of whether or not circumstances had changed sufficiently to warrant revisiting the issue.
    36.3. The Government's position remains that there is no current intention to review the NDM decision. There is currently no political will to carry out further proactive work on the NDM.
    36.4. The nature of discussions in July 2017 and 2018 is unclear, but they appear to be general discussions of medals policy and their relevance to the sensitivity of discussions about the specific question of NDM in 2014 appears to be low.
    36.5. The need for a 'safe space' did not disappear once the policy decision was announced in July 2014, but it began to diminish. By the time of the request it had dwindled to a factor of relatively modest significance.
    36.6. To the extent that there is a greater need to afford a safe space to HD Committee discussions there is a countervailing increase in the public interest in disclosure of its decisions.
    36.7. The HD Committee minutes have no special status.
    36.8. Redaction would be enough to address concerns about any 'chilling effect'.
    36.9. The public interest that s 37(1)(b) protects is that there should be candour in discussions and confidences should be protected in the particular context of the honours process, because that process is ultimately one of advising the Sovereign.

Dr Halligan's response dated 5 July 2018

37. Dr Halligan makes the following points:
    37.1. As well as the NDM he is directly involved in two other submissions and indirectly involved in all 21 submissions which the AMSC considered. Consideration of those other medals is not 'live'.
    37.2. Over 100,000 people in the UK have a personal interest in the 'Award for those Injured during their Service'.

37.3. A large number of people are excluded by the current restrictions on the ACS Medal.

37.4. The 21 individual submissions listed in the AMSC minutes were not looked at by the independent review team. There is evidence that AMSC decisions on NDM were based on flawed evidence. The minutes are needed to show whether the HD Committee acted purely on the basis of AMSC recommendations.

37.5. The HD Committee minutes are needed as evidence to support the case for reconsidering historic medal claims in accordance with the criteria set out by Sir John Holmes.

37.6. Dr Halligan accepts that the minutes can be redacted so that they do not show 'who said what', but it is in the interests of public confidence in the workings of the HD Committee to know who attended the meetings.

The Cabinet Office's response dated 12 July 2018

38. The Cabinet Office makes the following points:

38.1. The issue of NDM is still the subject of campaigning and lobbying.

38.2. Discussion of further arguments in favour of NDM by the HD Committee took place in 2017.

38.3. The more senior, final and sensitive the policy decision-making process, the more the need for a safe space generally and the greater the public interest there needs to be in disclosure of the particular information sought.

38.4. The outcome of the Decision Notice may have been different if the Commissioner had taken the constitutional principle into account.

Legal framework

39. 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.

40. 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

41. 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).

42. 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.

43. 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.

44. 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.

45. 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.

46. 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).

47. 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.

48. 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).

49. 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.

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

51. 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

52. 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

53. The Tribunal read and took account of a closed and an open witness statement dated 11 May 2018 of Helen Ewen, Head of the Honours Secretariat, on behalf of the Cabinet Office and its attached documents. The contents of this statement and those documents will not be summarised here, but it has been taken into account, where relevant, in making findings on the factual background and in our conclusions below.

54. This statement was prepared for the purposes of Mr Morland's appeal (EA/2016/0078). The Tribunal notes that the Cabinet Office has accepted in the Morland appeal that there was an error in paragraph 12 which states 'The conclusions of Sir John Holmes report (HE10/1-70) (to which I refer below) were put before The Sovereign for approval'. This should refer to the NDM Options Paper exhibited at HE10/77-88, published in July 2014, which was put before the Sovereign for approval.

Submissions

55. The Tribunal read and took account of additional written submissions from Dr Halligan.

Submissions from Dr Halligan dated 6 September 2018

56. Ms Ewen has an extremely wide knowledge base with respect to the Military Medals Review throughout its complete progress and it is therefore surprising that the statement includes mistakes.

57. Dr Halligan makes a number of points about the statement of Ms Ewen. In relation to paragraph 12 this has been corrected by the Cabinet Office. His additional points are:

    57.1. S 37 is not an absolute exemption, but subject to the public interest test.

57.2. The request for information does not simply concern the NDM. It relates to all those who submitted cases in respect of outstanding claims for Military Medals: twenty-one individual campaign groups.
57.3. It is misleading to suggest that the NDM campaign is supported by a small number of ex-servicemen and women.
57.4. Sir John Holmes was tasked to carry out a review of all the medal submissions, not 'some specific medal claims' as set out in para 16 of Ms Ewen's statement.
57.5. There is evidence that the 21 submissions have been unfairly dealt with by the AMSC. It is in the public interest to know how they were dealt with by the HD Committee.
57.6. The First-tier Tribunal's decision in **Davies** (EA/2017/0006) shows that the Cabinet Office is determined to prevent information about the medals review and HD Committee decisions from being disclosed.

Discussions and Conclusions

Aggregation

58. 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

59. 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 6 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

60. In our view it is not appropriate to assess the public interest in relation to a particular category of document (here, '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.

61. 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.)

62. 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.**

63. Further, we note that some of the information contained in the minutes relates to different matters which were at different stages of 'liveness' at the date of

the request. This makes it difficult to assess the public interest in disclosing or not disclosing the document as a whole.

Timing and the public interest

64. The question of the timing of the request is important because of the risks of the adverse effects of premature publicity on the particular interest which s 35 is intended to protect: the efficient, effective and high-quality formulation and development of government policy.

65. 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.

66. 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. 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.

67. 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.

68. 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.

69. 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. In relation to the minutes which relate to other medallic claims we consider that the risk to the future policy development process by their disclosure in April 2017 rather than at a later date is extremely small, and we conclude that this adds little weight to the public interest in maintaining the exemption. These matters had been concluded in July 2014 with extremely limited opportunity for re-opening the issue. We do not think there is any risk of an adverse impact on the related subordinate policy development issues i.e. the question of whether or not to re-open the issue, or on how to respond to correspondence from the campaigners.

70. In relation to the NDM, the government had left the door open in July 2014, but only by a crack. Any consideration which had taken place between 2015 and 2017 had not been a substantive reconsideration of the matters discussed at the meetings on 29 January 2014 and 9 June 2014. There is a slim chance that the matter will be substantively re-opened, and if so, a slim chance that the issue would remain so similar that revealing certain aspects of the discussions in 2014 would have an adverse impact on policy development. We find that this adds some, but limited, additional weight to the public interest balance in relation to the sections which we have decided should be redacted. In relation to the matters which we have decided should be disclosed, we do not think that there is more than a negligible risk that disclosure of this particular information would have such an adverse impact. We do not think there is any risk of an adverse impact on the related subordinate policy development issues i.e. the question of whether or not to re-open the issue, or on how to respond to correspondence from the campaigners.

The public interest under s 37 and s 35

71. 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.

72. We do not accept that this means that minutes of the HD Committee should never be disclosed. 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.

73. We accept in relation to some of the requested information that it consists of confidential information or candid discussions. Some of it, in relation to specific claims for medallic recognition, results in recommendations that are put before The Queen. We accept that revealing that information might compromise the candour of future discussions. We find that this carries significant weight in the public interest balance.

74. We accept that this effect on the candour of future discussions might also have an adverse effect on future policy formulation under s 35 in this area, in terms of a more general chilling effect. There is a greater expectation of confidentiality in this sphere compared with other areas of policy development because of the role of The Sovereign and the underlying constitutional principle. We are therefore prepared to accept the risk of a chilling effect, even taking account of the robustness expected of civil servants. We find that the s 35 'chilling effect' mainly overlaps with the matters set out above and therefore only adds limited additional weight. It does however add some weight: it is policy that is being discussed rather than a one-off decision on whether to award an individual a medal, and that has been statutorily recognised as a particular interest which is worthy of specific protection under s 35.

75. In relation to the rest of the information, we do not accept that revealing the information could compromise the candour of future discussions. It is either a fairly anodyne description of the issues and an outline of the action that would be taken, or it is information that is already in the public domain. We conclude that the public interest in maintaining the exemptions, taken together, in relation to this part of the information is very limited.

76. 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.

77. We find that the following matters add weight to the public interest in disclosure.

78. Firstly, 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.

79. Secondly, we accept that there are a large number of people affected by the claims for medallic recognition that were considered in these meetings and there is consequently a substantial public interest in knowing how those matters were finally concluded. This has a greater weight in relation to a full set of unredacted minutes, and we find that this interest will be only be served to a fairly limited extent by the disclosure of the remaining information.

80. Thirdly, we accept that there is a legitimate interest in those people affected by the 21 claims that the AMSC agreed did not need to be subject to detailed review by the independent review team in knowing what discussions took place in relation to their claims when they came before the HD Committee. Again, whilst this has fairly significant weight in relation to the full minutes, it will only be served to a more limited extent by the sections we intend to order should be disclosed.

81. Overall, we find that there is a fairly significant public interest in the disclosure of the full minutes and a much more limited public interest in disclosure of the remaining information.

82. Despite the significant public interest in disclosure of the full set of minutes set out above, we conclude that for certain sections of the minutes this is outweighed by a very strong public interest in maintaining the exemption. We have set out in summary our reasons for concluding that there is a very strong interest above.

83. There are some sections of the minutes which do not relate to matters arising out of the military medal review. In relation to those sections we have concluded that the public interest arguments in favour of disclosure set out above do not apply. On the other hand, some of the arguments in favour of maintaining the exemptions are of more general application. In relation to these sections of the minutes we have concluded that the public interest favours maintaining the exemptions.

84. In relation to the rest of the information we have concluded that the public interest in maintaining the exemptions is very limited. For the reasons set out above we have concluded that there is some public interest in disclosure of this information and in our view, it outweighs the very limited public interest in maintaining the exemption.

85. Our decision is unanimous.

Signed Sophie Buckley

Judge of the First-tier Tribunal
Date: 20 February 2019
Promulgation date: 05 March 2019