First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0147

Decided without a hearing
On 11 March 2019

Before

JUDGE BUCKLEY

MELANIE HOWARD

MARION SAUNDERS

Between

THE MINISTRY OF DEFENCE

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 FS50687095 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. The tribunal will consider whether to release a redacted version of the annex after that date.

SUBSTITUTE DECISION NOTICE

Public Authority: The Ministry of Defence

Complainant: Dr Halligan

The Substitute Decision – FS50687095

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 and the public interest in disclosure is outweighed by 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 but the public interest in disclosure outweighs the public interest in maintaining the exemption in relation to **the remainder of the withheld information**.

Action Required

1. The information which the Public Authority is entitled to withhold is set out in the closed annex. The Public Authority is required to respond to the complainant's request within 42 days of the promulgation of this judgment by supplying the remainder of the withheld information.

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 23 January 2017 asks for minutes of the inaugural meeting of the Committee on the Grant of Honours, Decorations and Medals Advisory Military Sub-Committee ('AMSC') held in December 2012.

2. This is the Ministry of Defence's appeal against the Commissioner's decision notice of FS50687095 which held that s 35(1)(a) FOIA was engaged but that the public interest favoured disclosing the information. The Ministry of Defence ('MoD') have subsequently relied on an additional exemption: 37(1)(b).

3. Four appeals arising out of a similar factual background were heard and decided by the Tribunal in decisions promulgated shortly before this appeal was decided. 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) ('Halligan 2'). Much of the factual background set out below is common to all five appeals.

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

8. Sir John Holmes published a report in July 2012 ('the Holmes Report'). 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. 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.

10. 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. The HD Committee meets typically two or three times a year.

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. The AMSC was set up in response to a recommendation in the Holmes report that 'a new sub-committee should be created to look specifically at military issues'. The report also recommended that the HD Committee, on advice from the new military sub-committee should be asked to look again rapidly at the main long-standing controversies. In relation to the AMSC and the HD Committee the Holmes report stated at p 28 para 13:

> There needs to be limits to transparency, to protect the requirement for frank discussion and the necessary discretion around the role of The Sovereign. However there should be openness about the membership of the committee and sub-committee, the fact of its having looked at particular issues, and the eventual decisions, without the details of discussions or recommendations being revealed.

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 AMSC either its first meeting on 5 December 2012 or in its meeting on 29 August 2013.

14. The claims considered at the 5 December 2012 AMSC meeting were put before the HD Committee and, according to Standard Note SN06564, [1] on 19 December 2012 the Prime Minister announced that veterans of the World War Two Arctic Convoys were to be awarded an Arctic Star Medal and that the aircrews of Bomber Command would be awarded a Bomber Command Clasp to be worn on the 1939-1945 Star. The eligibility criteria and application process for these medals were publicly announced on 26 February 2013. Much of the background information for the medal claims considered at the 5 December 2012 AMSC meeting was published on 27 July 2014.[2]

15. 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. The remaining claims, including the NDM, came before the HD Committee and 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.

17. 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.

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[1] Referred to in the Commissioner's decision at para 18 and available at http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06564

[2] https://www.parliament.uk/business/publications/business-papers/commons/deposited-papers/?max=100&fd=2014-07-29&td=2014-07-29

18. 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

19. This appeal concerns the following request made on 23 January 2017:

> I have now had time to carry out an in depth evaluation of the Partially Name Redacted Minutes of the AMSC Meeting in MoD Main Building on 29th August 2012 which were released to me as a result of my GRC First Tier Tribunal Decision.
>
> This document refers to an earlier Inaugural Meeting of AMSC which had been held sometime in December 2012. Would you please be kind enough to furnish me with a partially name redacted set of minutes for that meeting.

Reply and review

20. The MoD responded on 20 February 2017, confirming that they held information related to the request. They relied on s 35 FOIA and informed Dr Halligan that they would provide a full response after conducting the public interest test. On 7 April 2017 the MoD wrote to Dr Halligan stating that the MoD had searched for but could not find any officially agreed and finalised minutes of the first AMSC meeting held on 5 December 2012. The information in the document that had been located had not been finalised and therefore was not within the scope of the request. After an internal review the MoD wrote to Dr Halligan on 15 June 2017 stating that a draft copy of the minutes fell within the scope of the request but withholding it on the basis that under s 35 the public interest in withholding the information outweighed the public interest in disclosure, in particular because the draft minutes contain inaccuracies and comments from individual panel members. In accordance with s 16 the MoD confirmed that the draft minutes contain only one mention of the NDM, namely one sentence that makes reference to potential future work for the Committee to advise the Government on the issue of an NDM.

21. Dr Halligan referred the matter to the Commissioner on 20 June 2017.

Decision Notice

22. In a decision notice dated 13 June 2018 the Commissioner decided that s 35(1)(a) was engaged but the public interest in disclosure outweighs the public interest in maintaining the exemption. The Commissioner ordered disclosure of the requested information.

23. The Commissioner accepted that the requested information related to the formulation or development of policy in regard to the award of military medals and that the s 35(1)(a) exemption was engaged. 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 did not accept that the risk of future disclosure would deter the members of the AMSC from expressing their views.

24. The Commissioner accepted that the draft minutes could add further detail to information already in the public domain surrounding the AMSC's discussions and that the minutes contain a large amount of background information already in the public domain. Disclosure could inform the public of the rigour, or otherwise, of the AMSC discussions. She accepted the MoDs assertions that it only holds a draft copy of the minutes and that the draft minutes may be inaccurate. She did not accept that the public will be misled by disclosure of a document clearly marked draft.

25. In concluding that the public interest favoured disclosure the Commissioner was persuaded that clarification of the AMSC's considerations has been a matter of public concern for a prolonged period of time and held significant, greater weight in the balance of public interest test.

Notice of Appeal

26. The MoD appealed the Commissioner's decision notice. The grounds of appeal are:
Ground One: The Commissioner was wrong to decide that the public interest in disclosure outweighs the public interest in maintaining the exemption under s 35(1)(a).
Ground Two: In any event the minutes are exempt from disclosure under s 37(1)(b) and the public interest in maintaining that exemption outweighs the public interest in their disclosure.

Ground One

27. The Commissioner was wrong to conclude that the policy relating to the award or creation of military medals NDM was no longer 'live' at the relevant date. S 35(1)(a) encompasses reviewing and improving existing policy. The statement by Baroness Stowell on 29 July 2014 makes clear that the NDM issue might usefully be reconsidered in the future. The public interest in maintaining the s 35 exemption does not disappear once a statement in Parliament is made. Each case must be decided on its own circumstances. On the facts policy issues

relating to the awards of military medals were still live at the relevant date. The HD Committee considered the policy in relation to NDM in 2015 and in 2017. The HD Committee discussed fundamental questions about military medals policy in 2017 and 2018. The campaign by some veterans continues. The matter was live and therefore much greater weight should have been given to the need for a safe space to develop policy away from external interference, distraction or premature publicity.

28. The Commissioner failed to take into account the reasoning and conclusions of the Holmes Report, in particular para 13 on p 28 (set out above). This should have been afforded significant weight in the balancing exercise and would have resulted in the Commissioner and should result in the Tribunal giving much greater weight to the importance of the safe space and chilling effect arguments.

29. The Commissioner was wrong to treat the fact that there was already information in the public domain as supporting her conclusion on the public interest balance. This is a powerful factor that supports the maintenance of a safe space, because the public interest in the matters in issue has already been substantially addressed by the information in the public domain.

30. The Commissioner failed to afford sufficient weight to the fact that the minutes were draft minutes. As draft minutes, they are more candid about recording individual contributions which undermines the principle of collective decision making and the safe space. Secondly the public interest in disclosure is undermined because the draft minutes cannot be relied on as accurately and fairly recording the discussions.

31. In all the circumstances the Commissioner did not give sufficient weight to the importance of the AMSC being given a safe space, free to conduct candid discussions on the emotive subject of medallic recognition. Disclosure would impair the quality of advice given to the HD Committee which would be contrary to the public interest.

Ground Two

32. The exemption under s 37(1)(b) is engaged and the MoD relies on its submissions under ground one as applying a fortiori in relation to the public interest under this exemption.

The Commissioner's response

33. The ICO's response dated 28 September 2018 submits firstly that the scope of the request is limited to the minutes redacted in the same way as *Halligan 1.*

Ground One

Was the policy live?

34. The NDM policy was no longer live in any meaningful sense at the relevant date for the reasons given in *Halligan 1*. The Government's policy is that the NDM will not be revisited unless significant new evidence is produced. Any future discussion will be in a different factual context. The substantive policy question on the NDM has not been reopened since 2014. Any consideration of NDM has been of whether circumstances had changed sufficiently to warrant reviewing the policy.

35. The nature of the discussions in 2017 and 2018 is unclear, but they appear to be general discussions of medals policy and therefore of little relevance to the AMSC minutes.

36. The need for a safe space did not disappear after the announcement in July 2014 but began to diminish and was of relatively modest significance by the time the request was made.

The views in the Holmes report on transparency

37. The views of Sir John Holmes are of some relevance but the Tribunal is entitled to conclude that his views struck the wrong balance. Candour is not threatened in this case as the material was nearly five years old, the policy decision had been taken three years previously and individual contributions would not be identifiable.

Material in the public domain

38. The fact that information is in the public domain lessens the public interest in releasing it but to a greater extent weakens the public interest in maintaining a safe space. In this case releasing the information would add detail to what is already known.

Draft minutes

39. There is no evidence that the minutes are more candid in recording individual contributions than they would have been once finalised. The concern about protecting candour is met by redacting the names. There is no evidence that the minutes are substantially inaccurate or unfair. If there is uncertainty about their accuracy the MoD can say this when releasing them.

Ground two

40. It is agreed that s 37(1)(b) applies, but this does not materially alter the balance of the public interest.

Dr Halligan's response dated 7 October 2018

41. In summary Dr Halligan makes the following points:
    41.1. He agrees with the Commissioner's response.
    41.2. The Cabinet Office and the MoD have made extensive efforts to prevent disclosure of information relating to the medals review.
    41.3. The formally agreed minutes are likely to be in the possession of the Cabinet Office, because the papers of the 'Review Team' are now held by the Cabinet Office.
    41.4. It is in the wider public interest to know how the HD Committee system works and how it did or did not assess the merits of the medal submission.
    41.5. The disclosure of these minutes is needed to show what was said and decided upon as to the rules of procedure to be employed in carrying out the medals review. This is needed to support the argument that the review was unsound and should be reopened.

The MoD's reply dated 30 October 2018

Scope of the request

42. The MoD agrees that the scope of the request is limited to minutes redacted in accordance with the *Halligan 1* decision i.e. to remove identifying information of the speaker and biographical details indicating which service they came from. This does not provide sufficient protection for the safe space.

Was the policy 'live'?

43. The question is not whether the NDM policy is still 'live'. The question is whether the broader issues relating to the award of military medals, including the circumstances in which a range of medals should be awarded, as discussed in the relevant meeting are still 'live'.

44. The issue of military medal policy and the circumstances in which they should be awarded remained live: see the annex to the ministerial statement of Baroness Stowell dated 29 July 2014. In any event the issue of the NDM remained 'live' at the relevant date: see the witness statement of Helen Ewen. There is no bright line between the 'examination of the prior question of whether circumstances had changed sufficiently to warrant reviewing the policy' and the 'process of reviewing or improving existing policy'. In any event the ongoing work falls within the scope of the latter.

The role of the Holmes report

45. The Tribunal must come to its own conclusion on the issue of transparency and the public interest, but there is no good reason to reach a different view from para 13 section 4 of the Holmes Report. This para was not considered in *Halligan 1.*

Material in the public domain

46. The fact that there is material in the public domain does not mean that there is no meaningful safe space left to protect. It means that it is all the more important to protect the remaining safe space to permit and encourage the critical freedom for open, frank and candid discussion of sensitive issues.

Draft minutes

47. Helen Ewen's statement at para 36 provides evidence that the draft minutes are more candid than agreed minutes would have been. Further the draft minutes themselves are evidence to support the assertion that they do not accurately and fairly record the discussions of the AMSC and the public interest in disclosure is therefore undermined.

The exemption in s 37(1)(b)

48. The rational of s 37(1)(b) is to ensure candour and protect confidences in the entire process of considering honours, dignities and medals. The Commissioner's errors under s 35 infect its analysis under s 37.

MoD reply to Dr Halligan's response

49. There is no appeal by Dr Halligan against the Commissioner's finding that the MoD only holds draft minutes.

50. The general policy remains live not least as a result of continued campaigning.

51. The public interest justification advanced by Dr Halligan is narrowly focused on the rules of procedure to be employed in proceeding with carrying out the Medals Review. Disclosure should be limited to any information in the minutes concerning those rules.

Dr Halligan's final response dated 19 December 2018.

52. The accuracy of Helen Ewen's statement is challenged on a number of grounds. 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. 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:
    52.1. S 37 is not an absolute exemption, but subject to the public interest test.
    52.2. 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.
    52.3. It is misleading to suggest that the NDM campaign is supported by a small number of ex-servicemen and women.
    52.4. 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.

52.5. 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.

53. Dr Halligan repeats his submissions that the agreed minutes are likely to be held by the Cabinet Office (within the material belonging to the medals review team) and that the Cabinet Office and the MoD have gone to great efforts to withhold information on the Medals Review.

54. There is evidence that the twenty-one unread submissions have been unfairly dealt with, which makes the public interest in disclosure extremely wide. Evidence of unfairness is necessary to underpin calls for the medal submissions to be re-visited.

Legal framework

55. 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.

56. 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

57. 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).

58. 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.

59. 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.

60. 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.

61. 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.

62. 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).

63. 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.

64. 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).

65. 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.

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

67. 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

68. 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

69. 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, prepared on behalf of the Cabinet Office for Mr Morland's appeal (EA/2016/0078) 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.

70. 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

71. The Tribunal read and took account of the written submissions from all parties in the Notice of Appeal, Grounds of Appeal, Replies and Responses summarised above. There were no closed submissions.

Discussions and Conclusions

Was the Commissioner wrong to conclude that the MoD did not hold an agreed set of minutes?

72. For the reasons set out below, we have concluded that the Decision Notice is wrong in law because we have assessed the public interest balance differently and decided that the MoD is entitled to withhold certain information which the Commissioner decided should be disclosed. We must therefore issue a fresh Decision Notice. In making this fresh decision it is our view that we are required to look at all the issues that arise out of the request and our jurisdiction is not limited to those challenged on appeal. The MoD has not made submissions on this point, but suffers no prejudice because, as will be seen below, we decide this issue in its favour. Dr Halligan has made substantial and full submissions on this point.

73. Dr Halligan asserts that the agreed minutes are likely to be held within the Review Team papers, now held by the Cabinet Office. The Review Team papers consist of hard copy papers belonging to the Review Team led by Sir John Holmes relating to his 2012 review and his later recommendations.

74. Assuming that we accept that the agreed minutes formed part of these papers, the conclusion reached by the Information Commissioner would still be correct: that the MoD only holds draft minutes. The fact that the Cabinet Office held the finalised minutes would not affect that conclusion. Further, this would still have been the case if the Cabinet Office had not made the decision in October 2016 to incorporate the Review Team records into its own. Those Review Team records would still have been held by the Cabinet Office, in accordance with the approach taken in the FTT decision in **Davies v Information Commissioner and the Cabinet Office (**EA/2017/0006) and adopted by this Tribunal in **Cabinet Office v IC and Farrar** (EA/2016/0281). There is certainly no basis on which we could have concluded that the Review Team records were held by the MoD. Dr Halligan is wrong in his assumption that the move by the Cabinet Office to incorporate the Review Team records 'places all MoD material to do with the Review Team out of reach of FOI requests'. It does not have any effect on any 'MoD material to do with the Review Team'. It only affects hard copy material belonging to the Review Team.

75. Further we do not in any event accept that it is likely that the finalised AMSC minutes would form part of the material belonging to the Review Team. The Review Team papers are the hard copy papers belonging to the Review team led by Sir John Holmes relating to his 2012 review and his later recommendations. The AMSC is not part of the Review Team.

76. Finally we do not accept that the MoD is being untruthful when it states that extensive searches had been undertaken of all file holdings where it judged the document could have resided, and that the attendees of the meeting have been approached to see if they might have a copy. We accept that it truthfully concluded, on the balance of probabilities, that a finalised version of the minutes was either not produced or was agreed but subsequently lost.

77. For those reasons, we conclude that the MoD do not hold an agreed finalised version of the minutes.

Aggregation

78. 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

79. 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 15 June 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

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

81. 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.)

82. 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 AMSC 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.)

83. 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.

The draft nature of the document

84. The MoD submits that the draft minutes are more candid about recording individual contributions, which undermines the principle of collective decision making and the safe space. It relies on para 36 of Helen Ewen's statement as evidence that the draft minutes are more candid than agreed minutes would have been. We disagree that para 36 supports this submission. It addresses a different point: Ms Ewen states, in reference to the finalised agreed minutes requested in *Morland,* that 'I consider it unlikely that the minutes would have been drafted in the terms that they were had they been intended for disclosure to the public.' Having reviewed the draft minutes, we take the view that they do attribute individual contributions more than might be expected in final agreed minutes. We find that this can be effectively addressed by redacting the name column, and any other information that might attribute particular comments to particular individuals.

85. The MoD submits further that the public interest is undermined because the draft minutes cannot be regarded as an accurate and fair record of the discussions. We accept the MoD's submission that certain parts of the minutes themselves support the assertion that certain parts of the minutes are inaccurate and we have made certain redactions to address this point as explained further in the closed annex. Where there is no specific evidence that the minutes are inaccurate we take the view that the public interest in their disclosure is not undermined by their draft nature: they are, on the balance of probabilities, a substantially accurate record of what was said. The MoD can, on release, identify any uncertainty about their accuracy.

The relevance of material already in the public domain

86. We do not think it is necessary to decide in the abstract the issue of what effect the fact of material already being in the public domain has on the public interest balance. On the facts of this case, certain sections of the minutes largely reflect what has been made public in the Brigadier Parritt papers (recording the recommendations of the Review Team). This is usually followed, in the minutes, by a discussion of the recommendations made in those papers. The discussion is not in the public domain. Whilst the public interest in disclosing the former sections *in isolation* would be reduced because their content is largely already public, they form part of the necessary context for the rest of the minutes, including the discussion. The public interest in transparency of the process and in understanding how decisions of the AMSC were reached is best served by leaving those introductory sections in the minutes, to enable the discussions to be seen in context, rather than by removing any sections on the basis that that particular information has already been published.

87. The existence of detailed information in the public domain on these particular claims for medallic recognition has a further effect. The fact that the detailed factual background to the particular claims has voluntarily been made public tells the Tribunal that there is no reason based on protecting confidence or ensuring candour for redacting those particular sections of the minutes to remove that factual information.

Timing and the public interest

88. 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.

89. 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.

90. 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.

91. 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.

92. 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. The outcome in relation to the particular claims discussed in these minutes had been determined by the HD Committee and announced in 2013 or 2014.

93. At para 6 of the MoD's response dated 30 October 2018, Mr Scherbel-Ball submits that the issue of military medal policy and the circumstances in which they should be awarded remained live following the ministerial statement of 29 July 2014. To support this submission Mr Scherbel-Ball purports to rely on the annex to that ministerial statement. We note that his references are not in fact to the annex to the ministerial statement but to a document entitled the '*Agreed guidelines on the conditions and the criteria surrounding the award of Military Campaign Medals, and related issues*' ('the Agreed Guidelines') published in October 2014 and we assume that this was the document on which he intended to rely.

94. The Agreed Guidelines state in para 1:

> the general guidance below has been agreed by the HD Committee and endorsed by HM The Queen for the award of future medals, and consideration of potential controversies arising from such awards.

95. We do not see how general guidance on how the award of future medals and consideration of potential controversies arising from such awards demonstrates that the issue of military medal policy and the circumstances in which they should be awarded remains live, except to the extent that it shows that proposals for new campaign medals will undoubtably, in the future, be made and will be considered in accordance with that guidance.

96. The guidance does reflect, in paras 7 and 9 the government's announced approach in relation to historic medal claims summarised in our conclusions above, i.e. that absent the exceptional circumstances outlined in para 7 they will not be reopened.

97. It also shows in our view, that the government's approach to the award of future medals and to historic medal claims had been agreed, endorsed by HM The Queen and published in October 2014.

98. On the basis of Ms Ewen's statement we accept that there is, and was at the relevant time, ongoing overarching policy work, led by the MoD, into the UK's approach to medallic recognition including the basis on which UK military medals are awarded, i.e. the principle of 'risk and rigour'. We also accept that the HD Committee 'discussed fundamental questions about military medals policy in 2017, with further discussions in 2018'. We do not have any further detail on any of this policy work.

99. 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 June 2017.

100. In relation to the parts of the minutes which relate to specific medallic claims we consider that the risk to the future policy development process by their disclosure in June 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 2013 with extremely limited opportunity for re-opening the issue. We do not think there is any risk of an adverse impact of the release of these parts of the minutes on the related subordinate or overarching policy development issues i.e. the question of whether or not to re-open the issue, on how to respond to correspondence from the campaigners, or on the ongoing policy work on the basis on which medals are awarded or the broader policy issues.

101. We have considered whether or not there is any other information in the minutes which could impact on the ongoing policy work on the overarching policy development issues. The Tribunal has been given no information on the content of this policy work, save that it concerns 'fundamental questions about

military medals policy' and that there is ongoing policy work into the UK's approach to medallic recognition. The minutes confirm the public recommendations in the Holmes Report and refer to the principles which appear in the Agreed Guidelines referred to above. By the date of the request the Agreed Guidelines had already been published. We do not accept that there is a risk of any adverse impact by releasing any of the information contained in the minutes on any ongoing overarching policy work.

102. 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. There is a slim chance that the matter will be substantively re-opened. There is nothing in the small part of the requested information that relates to the NDM that could have an adverse impact on policy development if the matter were re-opened. We do not think there is any risk of an adverse impact on the related subordinate or overarching policy development issues.

Conclusions on the public interest under s 37 and s 35

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

104. 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 including a public interest in understanding how decisions of the AMSC were reached.

105. We note the MoD's reliance on para 13 of the Holmes Report. The MoD is wrong to state in paragraph 14 of its reply dated 30 October 2018 that this issue 'does not appear to have been considered by the FTT' in *Halligan 1*. It was specifically considered by the FTT in *Halligan 1* at para 34 and 35, where the tribunal stated (with a footnote reference to para 13):

> 34. We recognised that Sir John Holmes himself felt that there needed to be limits to transparency to protect the requirement for frank discussion and the necessary discretion around the role of the Sovereign. However, he argued that there should be openness about the membership of the committee and subcommittee, the fact of it having looked at particular issues and the eventual decisions (without the detail of the discussions or recommendations being revealed).

35. However in our judgment this does not go far enough to meet the public interest in transparency. Knowledge that the issue has been discussed and a recommendation made, even in the context of disclosure of the information available for the sub-committee to consider: without knowing what weight it was given and what factors were taken into consideration, just adds another layer of "*bland official statements that a particular decision has been taken*".

106. We agree with and adopt that reasoning. Further, the Holmes Report was not considering the question of whether the public interest in maintaining a specific exemption or exemptions under the FOIA outweighed the public interest in disclosing certain information. Therefore we do not agree with the MoD that the Tribunal should be slow to reach a different conclusion. We are answering a different question.

107. Secondly, we accept that there are a reasonable number of people potentially affected by the claims for medallic recognition that were considered in these meetings and there is consequently a fairly substantial public interest in understanding what discussions took place in relation to these matters in the AMSC, what recommendations were made by the AMSC and how the AMSC's recommendations were reached.

108. Overall, we find that there is a fairly significant public interest in the disclosure of these minutes.

109. 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 note that the AMSC does not make recommendations that are put before the Queen. It does however provide advice to the HD Committee which 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.

110. We take the view that the public interest in maintaining the s 37 exemption is less strong in relation to the AMSC minutes compared to the minutes of the HD Committee, because the AMSC discussions do not result directly in recommendations to the Queen. We accept, however, that full disclosure of the minutes with comments attributed to particular individuals might have an adverse impact on candour in the medals process. 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. 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.

111. With a few exceptions we consider that any chilling effect on candid discussions would be resolved by redacting the names or other identifying features in the minutes to ensure that candid comments cannot be attributed to a particular individual. There are a few sections of the minutes where we think that the chilling effect arises out of the particular content of the comments and in relation to those sections we think that there is a significant public interest in maintaining the exemptions. This is explained in more detail in the the closed annex.

112. In summary, we conclude that for certain sections of the minutes the public interest in disclosure is outweighed by a very strong public interest in maintaining the exemption. This includes:

(i) any parts of the minutes, including the name column, that attribute particular comments to particular individuals;
(ii) certain parts of the minutes where we have found that the particular content should be withheld for the reasons set out in the closed annex;
(iii) any parts of the minutes that are identified in the draft minutes as inaccurate.

113. In relation to the remainder of the minutes we find that the public interest in maintaining the exemptions is limited and that it is outweighed by the fairly significant public interest in disclosure.

114. Our decision is unanimous.

Signed Sophie Buckley

Judge of the First-tier Tribunal
Date: 27 March 2019