



IN THE FIRST-TIER TRIBUNAL

Case No. Appeal No. EA/2015/0291

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice FS50584583

Dated 19th November 2015

BETWEEN

Dr Martin Halligan

Appellant

And

The Information Commissioner

1st Respondent

And

Ministry of Defence

2nd Respondent

Determined on the papers on 9th June and 5th August 2016

Date of Decision 30th August 2016

BEFORE

Ms Fiona Henderson (Judge)

Ms Melanie Howard

And

Ms Rosalind Tatam

Subject: s35(1)(a) FOIA – formulation or development of government policy

Decision: The Appeal is allowed in part

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision Notice FS50584583 Dated 19th November 2015 which held that the MOD correctly applied s35(1)(a) FOIA¹ in withholding the disputed information.

Background

2. The Committee on the Grant of Honours Decorations and Medals (HD Committee) is the only channel by which proposed changes in medal policy may be submitted to the Sovereign. Following a number of long-running campaigns by veterans' groups and individuals for historic medallic recognition by the introduction of new medals and seeking to change the criteria for others, Sir John Holmes conducted a review of the rules, principles and processes for medallic recognition. In July 2012 the outcome was published as the "Military Medals Review".
3. Sir John Holmes recommended that the membership of the HD Committee should be broadened and a new sub committee created specifically to look at military issues and a second stage review further examine the main long standing controversies to "*try to draw a line under them*". The Committee on the Grant of Honours, Decorations and Medals Advisory Military Sub-Committee (AMSC) was set up to provide advice on medallic recognition and policy to the HD Committee.
4. The government announced on 29 July 2014 that the second stage of Sir John Holme's review was complete and the decisions taken by the review and background documents were made public. The Government said that no other historic claims for medallic recognition would now be reviewed unless "*significant new evidence is produced that suggests an injustice has been done*"

Information Request

5. Dr Halligan is a longstanding campaigner on behalf of a National Defence Medal, the Accumulated Campaign Service Medal and an Award for Service personnel Injured in the Service of their Country and made 2 submissions to the AMSC prior to their meeting on 29th August 2013. On 27th August 2014 he wrote to the MOD asking:

¹ formulation or development of government policy

“Now that you have confirmed that [the meeting of the AMSC held in MOD Main Building on 29 August 2013²] did in fact take place would you please be so kind as to furnish me with a complete set of minutes taken at that meeting”.

6. The MOD refused the request on 3rd September 2014 confirming that it held the information but relying upon s35(1)(a) FOIA. This decision was upheld upon internal review on 27th May 2015 although the MOD did clarify that a copy of the Appendix to the minutes³ which listed which medal proposals were discussed and provided a summary of the outcome of the decisions taken by the AMSC was already in the public domain and that this should have been drawn to Dr Halligan’s attention as s21 FOIA⁴ therefore applied.

Complaint to the Commissioner

7. The Appellant complained to the Commissioner on 3rd June 2015 arguing that the public interest favoured disclosure and that as a minimum, a partially redacted version should be published on the basis that redacting the attribution of specific comments, as what was said was more important than who said it. Following an investigation in which the Commissioner was provided with a copy of the disputed information and the MOD made further submissions he upheld the MOD’s refusal.

Appeal

8. On 14th December 2015, the Appellant appealed on the grounds that the balance of public interest had been incorrectly weighed. In particular:
 - i. There is a high degree of public interest in light of the large numbers of potential recipients⁵ for e.g. the National Defence Medal.
 - ii. The Prime Minister promised that costs would not be an issue; disclosure would provide reassurance to know the extent the cost was or was not a factor. In particular as the Appellant had concerns that the financial information relied upon by AMSC may have been flawed (based on estimates for medals that were approved).
 - iii. The minutes of this meeting would not include current operations. The criteria for campaign medals was generally “risk and rigour” and “time in

² In response to an earlier FOI request FOI2014/04477

³ P153-9 OB

⁴ Information accessible to applicant by other means

⁵ Possibly up to 7 million serving and ex serving personnel would qualify p27 OB

theatre”; this was a more generalist proposition than individual awards for honours and bravery. Following approval the criteria are placed in public domain – disclosure was necessary to provide transparency of how those guidelines are arrived at.

9. The Commissioner opposed the Appeal and relied upon the reasoning in his Decision Notice. The MOD were made a party to the appeal by the Registrar on 12th February 2016. They relied upon part of the information being already in the public domain, the emotive nature of medal awards (in the need for a safe space for debate) and the role of the AMSC in advising the HD Committee, in opposing the Appeal. Additionally the MOD adopted the Commissioner’s submissions.
10. All parties have consented to the case being determined upon the papers and the Tribunal is satisfied that it can properly determine the issues without a hearing pursuant to rule 32(1) GRC Rules. In concluding that it was in the interests of justice to proceed on the papers, the Tribunal has had regard to the overriding objective as set out in Rule 2 GRC rules and is satisfied that it has sufficient information before it (taking into consideration the opportunity to seek further information by way of written directions). The Tribunal is in receipt of an open bundle of some 180 pages plus an additional open bundle including further submissions from the Appellant and further submissions from the MOD pursuant to adjournment directions. The Commissioner and Appellant were given the opportunity to comment on the adjournment material but did not. The Tribunal has also had regard to the background documents which were before the AMSC⁶. The Tribunal has also seen the disputed information in a closed bundle and provides specific reasoning relating to the content of the disputed information in a closed annex.

Issues arising from the Adjournment Evidence

11. This case was considered at a paper hearing on 9th June 2016 when the case was adjourned for the MOD to provide further information relating to matters arising out of the closed bundle. The MOD had no objection to the closed directions being provided to the Appellant, the Tribunal has made some redactions to the open version so as not to fetter its ability to disclose a redacted version of the disputed information pursuant to the determination of this appeal. The MOD’s response was open and served on all parties.

⁶ <http://www.parliament.uk/business/publications/business-papers/commons/deposited-papers/?fd=2014-07-28&td=2014-07-29#toggle-1168>

12. Pursuant to the Adjournment directions, the MOD has confirmed that contrary to the heading of the publicly available Annex to the Minutes⁷, Rear Admiral Williams (Defence Services Secretary) was present and participated in the meeting. The Tribunal accepts the MOD's explanation that his name was omitted in error and in light of its presence in the body of the disputed information accepts that he was present and participated in the meeting. Since this has now been disclosed to the Appellant, there is no issue for the Tribunal to determine on this point.
13. The Tribunal had asked for further information from the MOD relating to what information was in the public domain relating to meetings of the AMSC and HD Committee from around the relevant time (including its recommendations to the HD committee) and had asked to be provided with a copy of this. The evidence which we accept is that this information is not in the public domain, we are satisfied therefore that any reference to the HD Committee ought to be redacted from disclosure of the minutes as it would reflect upon the deliberations of the HD Committee and thus impact upon their safe space to deliberate. We are satisfied however, that the conclusions of the HD Committee are publicly available and have not therefore redacted reference to these.
14. Paragraph 20 (page 3 of the closed bundle) refers to a paper by Cabinet Office officials relating to the policy on acceptance of foreign awards. The MOD response provided a link to a document⁸ entitled *Agreed guidelines on the conditions and the criteria surrounding the award of Military Campaign Medals, and related issues*. This document was published on 27th October 2014 and sets out the agreed guidelines agreed by the HD Committee and endorsed by Her Majesty The Queen. Both its date and its status indicate that this was not the background document referred to by the AMSC at paragraph 20 as it is the document that concluded the process. The Tribunal considered adjourning again in order to obtain the document relied upon but was satisfied that due to the proximity of the publication of the Agreed Guidelines to the original refusal and issue prior to the consideration of the internal review there was no sensitivity attached to the debate of this issue as reflected in the minutes and a further adjournment would not be proportionate or in the interests of justice⁹, and

⁷ P153-9 OB

⁸ <https://www.gov.uk/government/publications/awarding-military-campaign-medals-guidance>.

⁹ Pursuant to the overriding objective as set out in rule 2 GRC Rules.

consequently the public interest did not support redaction of the relevant part of the Minutes which the Tribunal has ordered should be disclosed.

The formulation or development of government policy,

15. Section 35 provides that:

(1) Information held by a government department ... is exempt information if it relates to—

(a) the formulation or development of government policy...

It is a class based exemption as the exemption is engaged if the information falls within that category and there is no need to show prejudice to the purpose. It is however qualified subject to the s2(2)(b) FOIA public interest test, namely that:

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

16. There is no dispute that the exemption was engaged. We agree and adopt the Commissioner's reasoning at paragraphs 12-15 of the Decision Notice. The issue between the parties is where the balance of public interest lies and whether a full or redacted version of the minutes could be disclosed.

Public interest.

17. The Appellant made submissions contending that there was a misunderstanding of the status of the review by those in Government, including the status of the sub committee and its impact upon the government. We are satisfied that disclosure of the minutes would not (greatly) inform that debate as it relates to the constitution of the committee rather than the content of the meeting concerned. We do not therefore take these arguments into consideration in our assessment of the balance of public interest.

18. We accept that there is a high degree of public interest in light of the large numbers of potential recipients, and their families, and the public's wish that public service be recognised.

Against disclosure

19. Safe Space: The MOD argued that:

- i) the British approach to the award of military campaign medals has long been that they should be awarded sparingly and on the basis of “risk and rigour”. The motivational value of medals means that medallic recognition is a particularly emotive subject amongst those in the services and veterans.
 - ii) Space is needed to discuss the issue freely and frankly and may include comparison of the particular “risk and rigour” of various campaigns.
 - iii) Public comment and criticism of the AMSC’s activities however unwarranted would undermine the committee’s effectiveness. It would restrict the panel’s ability to evaluate fairly the specifics of each case including frank and candid discussions of the relevant issues of any given claim both for and against including the level of risk and rigour involved.
 - iv) Disclosure in this case would be likely to undermine the frankness and impair the quality of advice given to HD committee in future.
 - v) The HD Committee’s own deliberations on these medal claims would have referred to the discussions and deliberations of the AMSC, disclosure would enable informed speculation about the content of the discussions of the HD Committee and impair ability to protect information about the proceedings of the HD Committee which is responsible for formulating the actual policy.
20. The Tribunal agrees with the Commissioner that whilst in principle the Government needs a safe space to develop policy and debate live issues away from external interference and distraction, the policy had been announced by the date of the information request.
21. The MOD argue that the matter is still “live” because in the announcement in the House of Lords the government left open the possibility of reconsideration in relation to the National Defence Medal (NDM).
22. “[The HD Committee] is not persuaded that a strong enough case can be made at this time, but has advised that ... this issue might be usefully reconsidered in the future”¹⁰. Thus for the NDM lobbying is likely to continue and the policy is not yet necessarily finally determined. Additionally a number of medal claims were for the

¹⁰ HL Deb 29 July 2014, c147-8WS

extension of the qualifying period and therefore the “risk and rigour” of a campaign would be revisited should further claims be made.

23. In his Decision Notice the Commissioner was reluctant to accept that the issue was actively ongoing but attributed some weight to the safe space argument as it was likely that the NDM would be debated again and disclosure of this information might impact and detract from the AMSC’s ability to discuss that (and other) claims in the future. We accept that the NDM and possibly other qualifying period claims are likely to arise again, however, that does not in our judgment mean that they are necessarily “live” as a decision has been made and announced for now and any future discussion will be in a different factual context due to the passage of time. Nevertheless, such weight attributable to the future “safe space” in our judgment is outweighed by the public interest in transparency in this case and s35 (4) FOIA which specifies:

“In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking”.

24. We note that a number of the background papers are in the public domain; however, it is material which elements of the information therein are considered to carry the most weight in order to inform the public as to the basis upon which the recommendations have been made. The recommendations made to the HD Committee from the latter part of this meeting are all in the public domain (as per the Appendix) which sheds some light on the contents of the HD Committee’s deliberations. It is not apparent to the Tribunal whether the Minutes themselves would form part of the deliberations, but whether they do or not, the Minutes are material as to the quality of the advice that the HD Committee is receiving and whether or not it was arrived at following a robust and factually accurate consideration of the evidence before it. In light of some of the recommendations and background documents being in the public domain and since disclosure in this case would not itself indicate the views and elements taken into consideration by the HD Committee, the Tribunal is not satisfied that disclosure of these minutes would impact upon the ability to protect information about the proceedings of the HD Committee.

25. Chilling Effect: The MOD argued that disclosure would restrict the panel's space to consider and candidly record all the relevant issues as disclosure would be likely to damage confidence of AMSC members. Although the membership of the AMSC is public, individual comments are not and members should be free to operate without fear of being personally targeted. The Commissioner stated that "given the detailed and frank nature of the minutes the Commissioner is prepared to accept that their disclosure could inhibit the candour of the AMSC's future discussions about the NDM and also potentially the manner which they discuss any other medal claims that may be brought¹¹." He therefore attributed some notable weight to the chilling effect arguments.
26. In assessing the weight to be given to the "chilling effect", the Tribunal takes into consideration that civil servants are expected to be impartial and robust when giving advice and not easily deterred from expressing their views. We have also had regard to the ability to redact the document so as to remove the attribution of the comments.
27. In their internal review the MOD argued that "*it is the level of detail of debate in the minutes including comments attributed to the individual committee members which if exposed that would have an adverse impact on the policy process which changes the weight of the public interest balance to withholding this information¹² about the committee's deliberations*".
28. The MOD argued in their representations to the Commissioner that they consulted with the Cabinet Office who "*strongly advised, due to the AMSC's advisory role to the HD Committee that the AMSC Minutes should be withheld in full. This is consistent with the cabinet office policy in respect of the disclosure of HD Committee Minutes*"¹³. However, the Tribunal reminds itself that it should have regard to the balance of public interest in the individual case rather than a blanket policy applicable in every case, we also concur with the points made above with regards to the likely impact of disclosure upon the deliberations of the HD Committee.
29. We agree that it would be against the expectation of the individuals on the committee that their candid comments would be disclosed and attributed to them. Where they are in an advisory role (e.g. Sir John Holmes) and where their views are already

¹¹ DN para 30 p8 OB

¹² P152 OB

¹³ P177 OB

known and in the public domain, we are satisfied that there is no need for redaction. However, where the views are candid and not previously attributed to an individual publicly, we are satisfied that this would be likely to inhibit candour and frankness in future debate and that this would not be in the public interest.

30. The Commissioner appears to have accepted the MOD's arguments (which he repeated in his decision notice¹⁴ but did not provide his own analysis) about why redaction (including biographical detail to avoid direct attribution) would not meet the concerns about the chilling effect on future debate. We have had regard to the closed material and are satisfied that concerns of a future "chilling effect" can be resolved by redacting the identity of the speaker and any biographical detail of the speaker to indicate which service they came from. Although each comment could therefore be reduced to a small pool of those present, redaction will ensure that comment and scrutiny remains at a committee level which the Tribunal is satisfied would be within the expectation of the membership; this is in keeping with the level of disclosure already made in the Appendix which is at a collective level. Where content has been redacted (rather than identity or biographical detail), the Tribunal has had regard to the small membership of the committee and the need for frankness and candour within such a small pool of individuals and has had regard to content and hence the degree of candour expressed in making these redactions. We are satisfied that it would not be in the public interest if the committee members felt inhibited in participating but we are satisfied that redaction at this level provides the appropriate safeguard against the future chilling effect.

In favour of disclosure

31. The Prime Minister announced that the Medals Review would be open and transparent. We are satisfied that consideration by the AMSC is part of that transparency.
32. In our judgment the public interest in transparency is substantial in this case. Sir John Holmes Review stated that¹⁵ *"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."*

¹⁴ Para 22 DN p5 OB

¹⁵ Section 4 para 6 p89 OB

33. The AMSC was set up in part to remedy the perceived disadvantages of the HD Committee which “rarely meets in practice..., and conducts its business largely by correspondence/email ,,,, which increases the risk that recommendations to it about military medals issues from the MOD or FCO via the Secretariat, go through without substantial discussion or airing of other views”¹⁶
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).¹⁷
35. However, in our judgment this does not go far enough to meet the public interest in transparency. Knowledge that an issue has been discussed and a recommendation made, even in the context of disclosure of the information available for the subcommittee 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”. We take into consideration that whilst the AMSC recommendations are not binding on the HD Committee; they are a factor that is intended to carry weight in their considerations. Once the policy has been made it is intended that this should be the end to the matter.
36. Following Sir John Holmes’ report it was envisaged that there would be no reconsideration of historic medal claims unless significant new evidence is produced that suggests an injustice has been done. In his report Sir John Holmes ¹⁸ suggests that examples of new evidence would include:
- “a) evidence that the issue was never properly considered at the time;*
 - b) significant new information becoming available that had not been considered previously;*
 - c) facts relied upon during the original decision-making process being shown to be unsound;*

¹⁶ Section 4 para 5 Sir John Holmes Report p 88-9 OB

¹⁷ (section 4 paragraph 13 p 90 OB)

¹⁸ Section 3 para 30 p 83 OB

d) the original decision appearing to be manifestly inconsistent with those for other similar campaigns;

e) the decision appearing to have been taken for reasons which have nothing to do with risk or rigour”.

37. Although this was stated in the context of criteria that the AMSC and HD committee should use to reopen claims, the Tribunal agrees with the Appellant that these criteria would be equally applicable to the AMSC's reasoning and decision making in assessing whether the review process was itself sound or flawed. We accept the Appellant's argument that there is no outside scrutiny or checks and balances on the AMSC which reports directly to the HD Committee and note the limited make up of the committee (in particular as the civilian historian was not present) in adding weight to the public interest in transparency. We agree that the clearest evidence to evaluate this will come from the minutes of the AMSC meeting.

38. The Appellant raises specific concerns which he argues demonstrates the need for transparency, particularly as the meeting was 2 hours long and 21 medal cases were considered during that time, he questions the rigour with which these cases were considered especially in light of the amount of background submissions that were made. This is in the context that the AMSC was specifically set up to ensure that decisions did not “*go through without substantial discussion or airing of other views*”¹⁹

39. Sir John's recommendations were disagreed with in 7 out of the 21 cases as recorded in the Appendix. Sir John had found some merit but the AMSC disagreed, the reasoning for this is not clear - often being summarised as “*the sub-committee were not convinced of the need to revisit this issue*”²⁰.

40. Cost was said by the Prime Minister not to be a determining factor in the consideration of these medal claims. The Appellant questions how the AMSC addressed or did not address particular factors including costs and whether fair and accurate cost projections were taken into consideration. He argues that this is material to whether criteria a, c and e of Sir John Holme's definition of new evidence is applicable to any of these cases.

¹⁹ Section 4 para 5 Sir John Holmes Report p 88-9 OB

²⁰ E.g. paragraphs 17-20 p157-8 OB

41. It is not for the Tribunal to judge the rigour with which these cases were debated at the AMSC meeting and we note that by way of simple calculation Dr Halligan is already able to raise concerns he may have about the depth of consideration and time spent on each issue. We accept that disclosure of the minutes could either reassure the public of the rigour of the AMSC's discussions or confirm the complainant's fears that there was a lack of rigorous considerations. Additionally we note that the background material considered by the Committee has been (largely) placed in the public domain and this can be expected to be considered in advance by way of pre-reading. Whilst the degree of pre-consideration will not be apparent from the minutes, we do consider it to be in the public interest for the degree of scrutiny and rigour with which these matters were considered, which parts of the background evidence were relied upon and the specific considerations taken into account in debate to be in the public domain in light of the Prime Minister's promise of openness and transparency.

Conclusion

42. As set out above, we are satisfied that some redactions are required on the grounds of attributability and candour in order to counter the "chilling effect" of full disclosure, as detailed in the closed annex; however, for the rest of the material we are satisfied that even with these limited redactions the public will be better informed by disclosure of the remainder of the minutes which is in the public interest in light of the aims and purposes of the AMSC.
43. This decision is unanimous
44. The MOD are to provide a redacted copy of the Minutes (in accordance with the closed schedule) within 35 days of the date of this decision. Following disclosure a redacted version of the closed Annex shall be promulgated.

Dated this 30th day of August 2016

Fiona Henderson

Tribunal Judge