

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 November 2016

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the Korea Post-Armistice Military Medals Review. The Cabinet Office argued that it did not hold some of the information within the scope of his requests for the purposes of FOIA. As regards the information it did hold, it argued that this was exempt under section 35 (formulation/development of government policy) and section 37 (honours information). It upheld this at internal review.
2. The Commissioner's decision is that the Cabinet Office does not hold much of the requested information for the purposes of FOIA. Some of the information it does hold has been correctly withheld under section 37(1)(b). This is detailed in a confidential annex to this Notice.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The confidential annex to this notice sets out which information cannot be withheld under section 35(1)(a) nor under section 37(1)(b). The Cabinet Office must disclose this information.
 - Provide the complainant with the link specified in the confidential annex to this notice.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 10 January 2016, the complainant requested information of the following description:

"With regards to the KOREA POST-ARMISTICE Military Medals Review headed by Sir John Holmes, I would appreciate it if you would provide me with the following information:

1. The names of the individuals and/or veterans associations with whom the Military Medals Review Team ("Review Team") of the Committee on the Grant of Honours, Decorations and Medals Committee ("HD Committee") consulted.
 2. A list and copies of documents provided to the HD Committee and the Review Team at its meetings pertaining to the Post-Armistice Korea Medal review.
 3. Specifically, whether the HD Committee, the Review Team and Brigadier B.A.H.Parritt, CBE were provided with a copy of the Australian working party report entitled *Report of the Post-Armistice Korean Service Review*?
 4. Specifically, whether the members of the HD Committee or the Review Team and Brigadier Parritt were provided with a copy of the submission sent to Sir John Holmes entitled *KOREA POST-ARMISTICE 28 July 1953-26 July 1957*? This document was submitted to Sir John Holmes at the outset of Phase 1 of his enquiry.
 5. Copies of minutes and/or notes taken at meetings of the HD Committee and the Review Team indicating what was discussed at those meetings that led to the decision by the HD Committee that there should be no retrospective issue of a British Korea Medal or clasp for service in Korea after the ceasefire on 26 July 1953.
 6. Whether a vote was taken by committee members to determine whether or not to issue a medal/clasp? If so, what was the result of the vote FOR and AGAINST?".
6. On 29 January 2016, the Cabinet Office responded. It explained that the Cabinet Office does not have the information that the complainant is seeking with regard to the Military Medals Review Team led by Sir John Holmes. It said that the Cabinet Office does hold some of the information within the scope of the requests. It cited two exemptions as its basis for refusing to provide that information:
- Section 35(1)(a) – formulation/development of government policy

- Section 37(1)(b) – honours information.
7. The complainant requested an internal review on 5 February 2016. The Cabinet Office sent him the outcome of its internal review on 4 March 2016. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 14 March 2016 to complain about the way his request for information had been handled. Specifically, he disputed that information described in the request which related to the Military Medals Review Team was not held by the Cabinet Office as it asserted. As regards the information that was held, he argued that the public interest favoured disclosure.
9. The Commissioner has considered whether the Cabinet Office holds information described in the six requests insofar as it relates to the Military Medals Review Team. As regards the information that the Cabinet Office confirms it does hold, the Commissioner has considered whether it is entitled to withhold it based on the exemptions it has cited.

Reasons for decision

Does the Cabinet Office hold Military Medals Review Team information for the purposes of the FOIA?

10. The Military Medals Review Team was set up, according to the .gov website in the following circumstances:
- “The Prime Minister appointed Sir John Holmes in April 2012 to conduct an [independent review of the policy governing the award of military medals](#). He issued his [report](#) in July 2012, which concluded that the existing guiding principles were reasonably based but that there should be greater readiness to review past decisions. 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, ensuring that consistency and fairness were respected as far as possible, in a

context where the judgments are often difficult, but need to be clear and defensible.”¹

11. The outcome of this further review is also available via the link provided at Note 1.

Section 3(2) – information held by a public authority

12. Section 1 of FOIA states that any person making a request for information is entitled to be told whether the public authority holds the information requested and, if held, to be provided with it. Both parts of section 1 are subject to exemptions.

13. Section 3(2) sets out the criteria for establishing if information is held for the purposes of FOIA:

“For the purposes of this Act, information is held by a public authority if

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority”

14. The Commissioner’s guidance on “Information held by a public authority for the purposes of the FOIA”² states that when a public authority holds information solely on behalf of another person it is not held for the purposes of the FOIA and that each case needs to be considered according to the specific circumstances.
15. In correspondence to the Commissioner, the complainant has expressed considerable frustration at what he saw as the inconsistency in the Cabinet Office’s explanation as to whether it held or did not hold the information described in his requests.
16. In response to the Commissioner’s questions on this point, the Cabinet Office explained that the Military Medals Review Team was independent of government and therefore that Review Team’s papers were not held by the Cabinet Office for the purposes of the FOIA. The Commissioner

¹ <https://www.gov.uk/government/speeches/military-medals-review>

²

http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information_held_by_a_public_authority_for_purposes_of_foia.ashx

had noted that the Cabinet Office provided only administrative support to the Review Team.

17. In the Commissioner's view, the Cabinet Office's assertion is supported by the information available on the .gov website concerning the Review Team. While it may physically hold some information relevant to the requests relating to the Review Team, it does not hold it for the purposes of the FOIA and the information is not accessible to the public via FOIA. The Commissioner is satisfied that the Review Team is independent of government. Having considered the matter on the balance of probabilities and having reviewed both the Cabinet Office's submissions and information available online (see Note 1), the Commissioner is satisfied that the Cabinet Office does not hold for the purposes of the FOIA any information within the scope of the requests that relates to the Review Team.
18. For ease of future reference, the Commissioner will now refer to any information held by the Cabinet within the scope of the requests as the "withheld information". It is information within the scope of the requests that relates to the HD Committee. This is a permanent standing committee which provides advice to The Sovereign on policy concerning honours, decorations and medals.
19. In reaching her decision on this case, the Commissioner has reviewed the following:
 - The withheld information;
 - The arguments of both parties;
 - a recent First-tier Tribunal (Information Rights) decision³ which the complainant brought to her attention (including the minutes which were the subject of that decision); and
 - information on the subject of the request is available from the House of Lords library since 29 July 2014.
20. It is important to draw a distinction between the Tribunal's approach to the Advisory Military Sub-Committee ("AMSC")⁴ minutes referred to in

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1872/Halligan,%20Martin%20EA.2015.0291%20\(30.08.2016\).PDF](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1872/Halligan,%20Martin%20EA.2015.0291%20(30.08.2016).PDF)

⁴ The Committee on Grant and Honours Decorations and Medals Advisory Military Sub-Committee

the First-tier Tribunal decision at Note 3 and the Tribunal's comments regarding the HD Committee itself.

Section 37(1)(b) – the conferring by the Crown of any honour or dignity

21. Section 37(1)(b) of FOIA states that information is exempt if it relates to the conferring by the Crown of any honour or dignity.
22. Given that the requests specifically refer to information concerning the Committee on the Grant of Honours, Decorations and Medals (otherwise known as the HD Committee as described in the requests), the Commissioner is satisfied that the withheld information clearly falls within the scope of the exemption contained at section 37(1)(b). HM Queen would need to formally approve any decision by the HD Committee to introduce a British Korea Medal or clasp. The information is therefore exempt on the basis of section 37(1)(b).
23. However, section 37(1)(b) is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2 of the FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest arguments in favour of disclosing the withheld information

24. The Cabinet Office recognised the importance of transparency in the honours process but argued that the public interest in disclosure in this case was outweighed by the public interest in maintaining the exemption. It set out its arguments in favour of maintaining the exemption which are considered later in this notice.
25. The complainant made the following key point:

"In Sir John Holmes's July 2012 Military Medals Review, he wrote: '... 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'.

Sir John went on to say:

'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.'

In this regard, nothing has changed since Sir John wrote his report. The "black box" is still very much in evidence. Veterans, who live outside this

box have no knowledge of what is being decided in it or why; and are denied access to it on the grounds that it would not be in the public interest to release, not just some of the information it holds, but any of it. The "process" that Sir John referred continues to be largely invisible and inaccessible and veterans who hoped for so much more from their leaders are still unable to penetrate beyond bland official letters and statements that a particular decision has been made".

26. He added that without access to the withheld information it would be impossible to assess the thoroughness of the review into the matter.

"There is a strong public interest in understanding more about why the UK has an approach that differs from Commonwealth countries. Disclosure would provide information about the honours process with respect to the issuance of such a medal/clasp and lay to rest the issue of whether or not robust discussions happened in the "black box".

This important issue may be considered by some to be finely balanced. I do not believe that the public interest favours maintaining the exemption; and flies in the face of Sir John Holmes own words."

27. The complainant went on to add:

"[For] veterans who served in Korea at the height of the Cold War, it deals with the manner in which complicated and emotive issues have been disposed of. Most of these veterans are now in their late 70's and many are over 80. Time is not on their side for a satisfactory resolution. The "black box" should be opened to let a little light to shine in."

28. He also provided the Commissioner with details of the medals awarded by Commonwealth countries to Commonwealth service personnel who served in Korea after the armistice signed in July 1953. In addition he provided details of the British military units that served in Korea during this period.

29. The complainant provided a detailed rebuttal document that he and a colleague had written regarding the decision not to establish a medal for service in Korea after the July 1953 Armistice. It detailed, for example, the experiences of Australian service personnel gathered in respect of Australia's consideration of the award of a medal or clasp for service Post-Armistice in Korea. Many veterans mentioned the perceived risk of service there and the potential fragility of the Armistice. The rebuttal document also included a photograph of:

"the gravesite of Private Brian David Newton, Royal Sussex Regiment, in the United Nations Memorial Cemetery, Pusan. He was the last British post-Armistice casualty. His parents asked the War Office if his body

could be brought home for burial but were told that this would not be possible as Korea was regarded as a 'war zone' [the complainant's emphasis].

30. As noted above, the complainant also drew the Commissioner's attention to a recent decision of the First-tier Tribunal (Information Rights) (see Note 3).

Public interest arguments in favour of maintaining the exemption

31. The Cabinet Office argued the importance of confidentiality in decision making for the honours process. It also noted that the Commissioner had upheld its position on similar requests in previous cases.⁵
32. It drew the Commissioner's attention to the fact that Parliament recognised the particular sensitivity of releasing information relating to honours - even when relatively old - by expressly providing that the exemption relating to honours information does not expire after 30 years but instead remains applicable for 60 years after the date of its creation.⁶
33. Finally, it argued that the issue remained live although it did not provide any detail about this other than to assert that it remained a subject that many veterans continued to campaign about and, as such, it may be a topic that is reconsidered in the future.

Balance of the public interest arguments

34. With regard to the weight that should be attributed to maintaining the section 37(1)(b) exemption, as a general principle the Commissioner accepts the Cabinet Office's fundamental argument that for the honours system to operate efficiently and effectively there needs to be a level of confidentiality which allows those involved in the system to freely and frankly discuss the process. Furthermore, the Commissioner accepts

⁵ https://ico.org.uk/media/action-weve-taken/decision-notices/2011/581854/fs_50302265.pdf

https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1623700/fs_50588594.pdf (Currently under appeal at the First-tier Tribunal (Information Rights))

⁶ Section 63 FOIA explains that a number of exemptions cannot apply to information which is contained in a 'historical record', ie information which is more than 30 years old. However, section 63(3) has the effect of extending this 30 year period to 60 years for information which falls within the scope of section 37(1)(b).

that if views and opinions, provided in confidence, were subsequently disclosed then it is likely that those asked to make similar contributions in the future may be reluctant to do so or would make a less candid contribution. Moreover, the Commissioner also accepts that disclosure of information that would erode this confidentiality, and thus damage the effectiveness of the system, would not be in the public interest.

35. In the Commissioner's view, however, the public interest factors here are finely balanced. The Commissioner is mindful of the observations of Sir John Holmes as to the lack of transparency in decision making on this topic which the complainant drew to her attention. The Commissioner is also mindful of the age of the veterans who served in Korea after the Armistice. There is a very strong public interest in providing as much detail as possible about the decision not to award a medal or clasp to them while the cohort of veterans remains relatively numerous. Clearly the passage of time will reduce their numbers and there is a relatively small window of opportunity to provide transparent explanations to them. Where maximum transparency on this subject is provided, the veterans have as much information as possible on which to submit their counter-arguments while still in a position to do so.
36. It is not the Commissioner's role to revisit the decision itself. That is clearly a matter for the HD Committee. However, the Commissioner does accept that the complainant's arguments as to the balance of public interest are compelling. There is a strong public interest in understanding more about why the UK has an approach which differs from other Commonwealth nations. Disclosure would provide further information about the honours process with respect to the awarding of a medal or clasp for service in Korea post-Armistice.

Conclusion

37. The Commissioner has set out a more detailed analysis of her decision in a Confidential Annex to this Notice. In that Annex she makes specific reference to the detail of the withheld information. Her focus in reaching her decision has been on protecting from disclosure that information which was clearly created in a safe space and/or which requires a safe space in which to be considered as part of the honours process. In her view, that does not apply to all of the withheld information.
38. In one case, a document which the Cabinet Office asserted was exempt under both section 37 and section 35 is freely available online. This is available on the website of the UK Parliament as a deposited paper related to discussions on the very topic which is the subject of the request.

39. The Commissioner considers that this document should either have been provided to the complainant or he should have been directed to a link via which it can be accessed.
40. As far as the remainder is concerned, the Commissioner is satisfied that disclosure would not have the harmful impact on the honours process that the Cabinet Office argues. This is because, in the Commissioner's view, disclosure does not undermine the safe space that the exemption seeks to protect.
41. The Commissioner has identified in the Confidential Annex that information which is exempt under section 37(1)(b) but which, in the Commissioner's view, cannot be withheld under that exemption. This is because the Commissioner finds that the public interest does not favour maintaining that exemption in respect of that information.
42. The Commissioner accepts that some of the information is exempt and should be withheld under section 37(1)(b) because the public interest favours maintaining this exemption in respect of this information.
43. In reaching this view, the Commissioner has given weight to the importance of protecting the space in which proposals for new medals are discussed. She accepts the Cabinet Office's assertion that the decision as to whether to award a medal or clasp is not a closed matter and that it may be revisited in the future. She notes that there was an equivocal decision about the issue of a National Defence Medal which covers a similar period of time and similar issues. This is detailed in her decision notice on case reference FS50588594: https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1623700/fs_50588594.pdf.
44. In light of her decision, the Commissioner has gone on to consider Cabinet Office's reliance on the exemption at section 35(1)(a) in respect of that information which cannot be withheld under section 37(1)(b) for the reasons outlined above and in the Confidential Annex to this Notice.
45. For the avoidance of doubt, this does not include that information which she has found on the UK Parliament's website. In her view, the Cabinet Office should, strictly speaking, have argued that this information is exempt under section 21 of the FOIA (reasonably accessible by other means) and provided a link to the complainant. The fact that it was considered by the HD Committee as part of their deliberations should not, of itself, be protected from disclosure because of its publicly acknowledged relevance to the subject matter of this request. Its location on the website of the UK Parliament makes clear its relevance to that subject matter.

Section 35(1)(a) of the FOIA – formulation & development of government policy

46. Section 35(1)(a) provides that:

“Information held by a government department ... is exempt information if it relates to –

(a) the formulation or development of government policy”

47. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a minister. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

48. Section 35(1)(a) is a class based exemption which means that it is not necessary to demonstrate any prejudice arising from disclosure for the exemption to be engaged. Instead the exemption is engaged so long as the requested information falls within the class of information described in the exemption. In the case of section 35(1)(a) the Commissioner’s approach is that the exemption can be given a broad interpretation given that it only requires that information “relates to” the formulation and development of government policy.

49. In this case, the Cabinet Office argued that the information also related to the development of policy on medals which, it explained, was not a closed matter.

50. The Commissioner is satisfied, having read the information, that section 35(1)(a) can also apply to it because it clearly relates to policy discussions as referred to by the Cabinet Office.

Public interest arguments

51. The Cabinet Office set out arguments as to the balance of public interest which were the same as those made in support of its use of section 37(1). It acknowledged a public interest in transparency but argued that greater weight must be attached to the public interest in allowing ministers and officials to consider matters in a safe space.

52. As outlined above and in the confidential annex to this notice, the Commissioner is unconvinced by the strength of the Cabinet Office’s safe space arguments in respect of that information which is not exempt under section 37(1).

Conclusion

53. The Commissioner has concluded that some of the information cannot be withheld under section 35(1)(a) either. Her reasoning is set out in the confidential annex to this notice and makes specific reference to the withheld information. As such, the Commissioner does not consider it appropriate to set out that detail on the face of this notice because to do so would reveal the content of that information. However, as noted above, she is unconvinced that the Cabinet Office's arguments regarding safe space carry particular weight with respect to this information and the public interest in transparency on this subject is stronger in this case.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
56. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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