First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA.2017.0006

Decided without an oral hearing
On 2 February 2018

Before

JUDGE CLAIRE TAYLOR
SUZANNE COSGRAVE
ROSALIND TATAM

Between

ANDREW DAVIES

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

THE CABINET OFFICE

Second Respondent

DECISION

We allow the appeal for the reasons set out below.

SUBSTITUTED DECISION NOTICE

STEPS TO BE TAKEN

1. Within 21 days, the Cabinet Office are to issue a section 17 response in relation to both requests, having performed a thorough search, and taken into account all points made in this decision, including para.51 and the Appendix, para.6.
2. The Cabinet Office is to disclose to the Appellant the confidential annex to the Decision Notice and full letter of 27 April 2016 from the Cabinet Office to Commissioner (excluding names and contact details that constitute personal data).
3. The closed version of this decision, is to be published as an open decision after 29 days from the date of promulgation.

REASONS

Background

1. The various papers before us suggest the following background:

    a. The Committee on the Grant of Honours Decorations and Medals (HDC) is a permanent standing committee that advises the Sovereign on the grant of individual honours and matters of honours policy such as proposed changes in medal policy.

    b. In April 2012, Prime Minister David Cameron MP set up the Military Medals Review Team ('Review Team'), appointing Sir John Holmes to conduct an independent review of the rules, principles and processes governing the award of military campaign medals. This followed a number of long-running campaigns for historic medallic recognition to introduce new medals and change criteria for others. Sir John Holmes conducted a two-stage review.[1]

    c. The outcome of the first stage was published as the "Military Medals Review" in July 2012. Sir John Holmes recommended the HD Committee membership be broadened and a new sub-committee created. The Advisory Military Sub-Committee (AMSC) was set up to provide advice on medallic recognition and policy to the HDC.

    d. A second-stage review then examined the main longstanding controversies to "try to draw a line under them". On 29 July 2014, the Government announced that the second stage of Sir John Holmes' 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".

    e. On 13 June 2012, the Appellant met with Sir John Holmes to persuade him of the case for medallic recognition for British Cold War Veterans (BCWV).

The Requests

2. On 8 July 2015, the Appellant requested from the Cabinet Office ('CO') as a 'public authority' for the purposes of the Freedom of Information Act 2000 ('FOIA' or the 'Act'):

> "Having provided a full and comprehensive submission on behalf of the 'British Cold War Veterans' to the recent Government Medal Review and met with Sir John Holmes, we are disappointed that the decision was made not to fully and comprehensively review our submission.
>
> We have asked Sir John why such a decision was made, the reasons and who was responsible for making that decision but he has declined to provide answers to our questions.
>
> Therefore, on behalf of the 'British Cold War Veterans' I submit this official request under the Freedom of Information Act:

[1] Those conducting Military Medals Review are referred to below as the Review Team.

1. Why wasn't the British Cold War Veterans Submission reviewed fully and comprehensively as promised?

2. Who was responsible for the decision not to review the BCWV submission fully and comprehensively?

3. What were the processes and justification for not reviewing the BCWV submission fully and comprehensively?" *(Emphasis added).*

3. On 22 July 2015, the CO replied. It stated that having searched paper and electronic records, it held a paper published on 29 July 2014 as part of the written ministerial statement made by the leader of the House of Lords. It explained that on 29 August 2013, the paper had been presented by the Review Team to the AMSC. The authority provided the requester with a link, stating that it was available online and noted the application of s.21 FOIA *(information accessible by other means)*. It stated that no other information was held.

4. On the same day, the Appellant responded with another request, stating:

"In light of the statement made by the Military Medal Review Team to the Advisory Military Sub-Committee on 29 August 2013 about Claims for Medallic Recognition. **Can you please supply; documentary notes, written evidence, minutes of meetings and any other statements, which led to the decision for the Military Medal Review Team to reach other conclusions that the claim for a 'Cold War Medal' was not suitable for a detailed review**.

This decision was an insult to generations of service personnel who protected the nation from a potential WW3 in the face of the massive and overwhelming forces of the Soviet empire"

(Emphasis added.)

5. On 29 July 2015, the CO refused the second request citing s.21 FOIA and repeating wording used in its letter of 22 July 2015. On the same day, the Appellant requested an internal review, stating:

"I refer to FOI request No FOI321437 which we find totally unacceptable as it has failed to provide the detailed information requested and does not offer answers to the questions that we have asked. Please therefore will you conduct an internal review as a matter of urgency."

6. The CO's internal review of 7 September focused only on the request of 29 July. It confirmed that further checks had been undertaken and no information was held. It also stated: "Throughout this entire review, Sir John Holmes and his team acted independently of the Cabinet Office. This department provided him only with administrative support. We therefore do not have access to the Review Team's papers."

7. On 24 September 2015, the Appellant contacted the Information Commissioner stating:

"We wish to submit this application for you to investigate the matter of our Freedom of Information **requests** to the Cabinet Office for documents and minutes relating to the recent government medal review and a decision not to review the British Cold War Veterans submission.

... As an official government review which was provided with resources through the Cabinet Office, we find it difficult to imagine that very little in the way of records or minutes were kept, beyond that which has been disclosed to us.

> We seek to discover the rationale and those responsible for the decision-making process and upon what basis the decision not to review our submission was reached and therefore submitted FOI requests to obtain such information. The information provided to date, which the Cabinet Office suggest is all that is available, is insufficient and we are of the opinion that more detailed documentation would have been kept and we request that it is made available to us as per our requests.
>
> We are shocked that having been promised an open and transparent review by the Prime Minister it has been anything but, and in our case it was a review that wasn't a review. This is an absolutely appalling way to treat this country's veterans who were ready to protect this country with their lives in defence of freedom and democracy… " *(Emphasis added.)*

8. On 3 October 2016, a case officer for the Commissioner wrote to the Appellant indicating a change in position by the CO. He explained that the CO had stated that the Review Team's records were now being incorporated into its own, and it would then decide whether the information could be disclosed. No further background was given such that it was unclear what had changed to make the CO now consider the records to be 'incorporated' into their own and when any particular event had happened and why. The case officer explained: "In the Commissioner's view, this would be a satisfactory outcome for your appeal. The basis of the Commissioner's investigation was to determine whether the information was held, and the Cabinet Office is now confirming that it is. The Commissioner acknowledges that the Cabinet Office maintains at the time of your request the information was not held."

9. The Commissioner's Decision Notice[2] was published on 21 December 2016. Of note:

   a. It was limited to the request of 22 July 2015.

   b. It decided that no further information was held, finding that the Review Team was independent of the CO such that the team's material stored at the department was held on the Review Team's behalf and not its own.

   c. A significant part of the reasoning was contained in a confidential annex, withheld from the Appellant.

10. The Appellant appealed the matter seeking a response to both requests, effectively disputing that further material was not held.

The Task of the Tribunal

11. The task of this Tribunal is to consider whether the decision made by the Commissioner is in accordance with the law, or, where the decision involved exercising discretion, whether it should have been exercised differently. This is the extent of the Tribunal's remit as set out in s.58 FOIA. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint. The Tribunal may receive evidence that was not before her and make different findings of fact.

12. We have received documents and submissions, including a "closed" bundle. We have carefully considered these even if not specifically referred to below. The Appellant in

[2] *Ref. FS50598690*

particular raises various arguments that we do not consider assist him in addressing the precise issues before us, and to that extent we do not address them below.[3]

13. The parties elected or consented for the matter to be heard without an oral hearing. The panel convened and adjourned the hearing to issue further directions.[4]

The Law

14. A person making a request of a public authority for information is generally entitled to be informed in writing whether it holds the information, and if so, the public authority is generally required to disclose it. *(See S.1(1)(a) and (b)FOIA).* There are exceptions to these duties as provided by the Act.

15. Under section 3 FOIA:

> *"… (2) 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."*

16. Section 16 provides:

> *'(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.*
>
> *(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 ['the Code'] is to be taken to comply with the duty imposed by subsection (1) in relation to that case.'*

Developments During this Appeal

17. The appeal has taken an unusual path, and we have many submissions before us. We set this out below in some detail, to help clarify the issues. This is because we have found the Respondents' representation of the issues before us to be unduly limited.

18. The Appellant's Notice of Appeal of 11 January 2017 and his response of 14 February 2017 raised points that included:

    a. He considered that the BCWV claim had been unfairly dealt with and required the information to properly investigate this. He had first unsuccessfully sought clarification from Sir John Holmes as to decisions concerning BCWV.

    b. This first request had been wide-ranging. The Decision Notice addressed material of the Review Team, but neither requests had been so limited. They would include material held by the CO in its own right - on for instance AMSC

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[3] We have not found it relevant to address other points made by the Appellant. For instance, the Appellant focused much of his arguments on the AMSC not being independent and administrative support provided to bodies other than the Review Team. This is not of strong relevance to the appeal because the Decision Notice focused on the independence of the Review Team, and not the AMSC, and the question of administrative support only related to whether that implied an independent relationship between the Review Team and CO.

[4] We have directed for the confidential annex of the Decision Notice and another part of the Closed Bundle to be disclosed.

and HDC deliberations, which he envisaged would be held by the CO because the AMSC and HDC membership included senior officials.

c. He explained that minutes of the AMSC meeting of 29th August 2013 showed that the AMSC had recommended not to review the claim for Cold War Veterans. However, he had discovered that on 24 March 2014, an in-depth review of the Berlin Airlift by Brigadier Parritt CBE had been published. This favoured medallic recognition of those serving during the Berlin Airlift. He surmised that this meant that HDC had decided in any event for there to be a review of at least a part of the BCWV claim. Given that HDC would therefore have made decisions pertaining to the BCWV, he assumed that minutes related to this must be held by CO.

d. He gave further arguments as to why the CO itself would have information. For instance, in relation to the Berlin Airlift medals, he stated:

> *"The next that we hear of this particular matter is an announcement from the MoD that Her Majesty the Queen had been graciously pleased to confirm the Award of The General Service Medal 1918-62 with […] "Berlin Airlift", for operations in that zone between 25 June 1948 and 6 October 1949. The medals to be available for issue from 1 March 2015. Now the Berlin Airlift is seen by most historians as The First Battle of The Cold War so there is no doubt that all medal campaigners would be delighted to see this award. The promulgation of this award however proves that the Cabinet Office must hold papers in respect of deliberations to do with the BCWV submission. For a medal to be promulgated by Her Majesty the Queen, it must first be recommended to be instituted by the Honours and Decorations Committee and this department comes directly within the remit of the Cabinet Office. The minutes of those meetings are held by the Cabinet Office."*

e. He questioned the independence of the Review Team, where he explained in detail how decisions were instead made by the AMSC.

19. In the documents before us, neither the CO nor the Commissioner seem to have addressed the points made by the Appellant in para. 18 above. Instead, the CO's response of 28 April 2017 includes:

a. A claim that the appeal had become 'entirely academic' as the CO now held some documents 'within the scope of the request' produced by the Review Team. (It is noted that the CO referred to "request" in the singular and did not identify which one of the two requests it was responding to.) These comprised:

i. Three letters from the Appellant to Lieutenant Colonel Woyka and a response to those letters. A submission from the British Cold War Veterans about a Cold War Medal. The CO disclosed these.

ii. A set of handwritten notes by an unnamed member of the Review which appear to have been intended to prepare for a meeting to discuss a Cold War Medal. This was withheld under s.36(2)(c) FOIA.

iii. Correspondence from members of the public in support of a Cold War Medal. This was withheld under s.40 of the Act.

b. If the Appellant was unsatisfied, he should 'apply' to the Commissioner for an investigation. That it would be "contrary to the overriding objective for the Tribunal to consider this appeal" and it was outside the Tribunal's jurisdiction to consider the CO's withholding of the material.

20. The CO's response of 28 April did not explain in any way why it had changed its position. It referenced a letter of 2 March 2017 which simply stated it had located information it held. We would expect that the CO's approach risked being perceived as somewhat intimidating to an Appellant not legally represented. He had been given little information and it was suggested that nearly two years after the requests his appeal was 'wholly academic', and that he should sign a consent order to withdraw it and effectively start a new one,

21. The Appellant gave a lengthy reply on 1 May 2017. He rejected the argument that the appeal was now effectively defunct. He further claimed that the CO held more material within the scope of the requests than had more recently been identified. He thought the Commissioner's reference to a move to "incorporate" the Review Team's records into the CO's own suggested that it would now hold substantially more material than had been released. His points do not seem to have been addressed.

22. On 2 May 2017, the Tribunal's Registrar issued directions seeking to know whether the appeal could now be ended on terms of consent. (She also questioned why the CO thought the appeal should be dismissed. As the CO now accepted that it held information, she questioned whether the appeal would more properly be allowed rather than dismissed.)

23. On 16 May 2017, the CO responded explaining:

a. That it had come to the conclusion that the information was not held on behalf of the Review Team as a result of further inquiries as to the status of the review and details received in the course of the separate appeal of *Halligan*[5]. (It did not explain the relevance.). It had decided to bring it within its holdings as soon as possible. It had communicated this conclusion three times to the Commissioner on 30 September, 8 November and 14 December 2016. The Decision Notice had reached a different conclusion[6].

b. It had identified information in scope of the initial request such that the appeal had been overtaken by events.

c. It therefore considered that if disputing the exemptions, the Appellant should make a fresh complaint to the Commissioner and until that time the Tribunal could not be properly seized of the dispute. It proposed that the appeal be dismissed, but would accept it being allowed, on the basis of terms of a draft consent order it provided.

24. Of note, the CO's response of 16 May did not address the second FOI request. At the time of the hearing, it was not been explained to us why the full documents of 30

[5] See *Dr Martin Halligan v Information Commissioner and Ministry of Defence (Ref. EA/2015/0291) (Halligan.).*
[6] This does not accord with the Commissioner's communication at para.8 above, of its understanding of what CO had said as to whether the information was held at the time.

September, 8 November and 14 December 2016 have not been provided to us. What we do have does not seem to support the CO's contentions; or explain its precise position as to (a) why information was now considered held; (b) whether it considered that it was held as at the date of the request; and (c) why/how it had altered its stance. It was also still not clear why the CO sought to argue that the matter was outside the Tribunal's jurisdiction or 'wholly academic', such that the Appellant should have withdrawn the request and made a fresh complaint.

25. On 19 May 2017, the Appellant provided a lengthy reply. He considered that the CO was attempting to derail his appeal and claimed the CO had disclosed a selection of documents knowing them to be of limited value, where more evidence within scope was held. (*See for instance page 89 of the Bundle that referred to the General Service Medal related to the Berlin Airlift.).* On 19 June 2017, the CO responded that it did not interpret the request to include "the General Service Medal 1918-62 with Berlin Airlift clasp" which was information relating to the separate decision), and that it considered this was a matter would need to be fully investigated by the Commissioner.

26. On 21 June 2017, the Tribunal's Registrar issued directions requiring final submissions to address what they maintained the Tribunal should conclude about what further information was held, and what it should do if concluding the CO held more information within the scope of the request. *(See para.5 on page 101 of the Bundle for the full direction.)*

27. In response, the CO's further submissions of 5 September included:

    a. As to whether any further information was held within the scope of the request, it stated that it had conducted a thorough search of the material previously held by the Review Team and the information set out in the letter of 2 March 2017 was that held by the CO. It considered that no further information was held – making reference to the second request, (but not the first); and claiming the Berlin Airlift clasp was a different subject matter which the Appellant had not requested information on before 19 May.

    b. As regards whether the CO held information at the time of the CO's initial response of 29 July 2015, it stated that its position had been set out in its response of 28 April and letter of 16 May 2017.

    c. The CO repeated that the appeal was now academic so should either be disposed of or allowed on the terms of the draft consent order provided by the CO[7]. However, it stated that if the Tribunal considered that the CO may hold additional information to that identified in the 2 March 2017 letter:

        > "the procedurally proper route is to remit the matter back to the Cabinet Office for fresh consideration and, if appropriate, a fresh section 17 refusal letter. This is because of the unusual circumstances of this case, where the underlying Decision Notice of the ICO is now entirely academic (for reasons explained in the Cabinet Office submissions dated 28 April 2017 and its letter of 16 May 2017) and Mr Davies is now effectively seeking to challenge the Cabinet Office's section 17 letter of 2 March 2017. The statutory scheme requires any such challenge to be made first by way of an application to the

[7] It was noted that the draft substitute Decision Notice it had proposed had wrongly referred to the first request instead of the second.

ICO under section 50 of the Act and does not give the Tribunal jurisdiction to consider the matter before that process has been followed.

Moreover, there are good reasons for this which are particularly applicable on the facts of this case. If there is simply a dispute or misunderstanding about the scope of Mr Davies' request that will likely be most effectively resolved through further correspondence between him and the Cabinet Office, or subsequently the ICO. The Tribunal process is not a proportionate means of addressing any such problem. If Mr Davies object to any exemptions claimed by the Cabinet Office over information it holds, the Cabinet Office should have the opportunity to explain those exemptions to the ICO first."

28. We have already noted the lack of reasoning provided by the CO. Despite para.27(b) above, we could not find a rationale for the CO's changed position in the documents of 28 April and letter of 16 May 2017, or clarity of whether the documents were held by it at the time of the request or afterwards and why. However, the proposed consent order used optional wording that the CO had failed to deal with the request in accordance with the FOIA because it did have "control or access to the relevant information", consisting of in particular "certain material previously held by the Military Medal Review Team." It seems reasonable to conclude that the CO was accepting that the information was held at the time of the request. (It is not proportionate within the meaning of rule 2 of *The Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 S.I. 2009 No. 1976 (L. 20)* ('Rules') to require the CO to clarify its position where it has had the opportunity and chosen not to.)

29. The Commissioner gave responses on 19 June and 21 September 2017. Her points included:

    a. She regarded the only issue within the Tribunal's jurisdiction to be to address whether information was 'held' under FOIA at the time of the request. She still maintained it was not.

    b. If the Tribunal found that more information was held, it ought to require the CO to issue a fresh response to the Appellant. Since the CO had already sent such a response on 2 March 2017, the appeal was academic and that the Appellant would need to pursue the internal review if remaining unsatisfied. If finding that more information was held, the Tribunal should seek further submissions and then having considered those either seek further responses or make a decision, deciding what steps (if any) were appropriate. She regarded it as outside the Tribunal's jurisdiction to consider the application of exemptions where the Commissioner had not issued a decision notice on these.

30. The Appellant's further submissions dated September 2017 did not fully address the Registrar's direction.[8] His submissions included:

    a. As regards whether the scope of the requests included the Berlin Airlift, he stated that the AMSC minutes of 29 August 2013 stated: ''This claim is for those who served during the period of the Cold War with special reference to those who served in submarines and those in the Berlin Airlift''. He explained that most eminent historians agree that the first Battle of the Cold War was the Berlin Airlift. He was interested to understand why a separation

[8] See in particular, direction 5(b) on page 101.

had been made and why one particular part of their claim was agreed and yet the other denied.

b. Regarding information being held by the CO, he referred to Dr Halligan's attempt to obtain information concerning the Review Team. It was not strictly clear what he meant or why it helped his case. Dr Halligan's request was to a different department. We do not think it provides compelling evidence to assist the Appellant in the facts of this case.

c. The Appellant argued that the MOD or CO could and had sought to place information out of the reach of FOIA by holding each other's information on behalf of the other. This misunderstands section 3(2)(b) FOIA[9] which makes clear it cannot be circumvented in this way.

Issues in Appeal

31. The Issues before us concern:

A. **Scope of Requests**

1. The Appellant made two requests, the Commissioner only addressed the second request**.**

2. What is the Scope of the requests? Is the Appellant's request limited to material created by or that was originally located with the Review Team? Are matters relating to the Berlin Airlift outside the scope of the Appellant's request?

B. **Held**

1. Did the Commissioner err in finding that no further material was held by the CO at the time of the request?

2. If so, has the CO's more recent disclosures and response addressed the Appellant's requests?

Findings

A. Scope of Appeal

Two Requests

32. As regards the scope of the appeal, the Appellant considers it concerns both requests and that he was seeking a response to both. *(See his Notice of Appeal and Response)*. Neither Respondents addressed the issue and accordingly do not seem to have contested this. However, the matter was further confused by the CO's responses sometimes referring to the first request and sometimes the second when stating what information it now considered held.

[9] Which the Commissioner set out at para.10 of her Decision Notice.

33. Based on the papers before us, in our view, the Commissioner should not have considered the second request alone in her Decision Notice. The Appellant's email of 24 September had requested an investigation of the "requests" in the plural. Further, they were also clearly related in time and content. The second request flowed from the first - the Appellant was seeking to probe further after the CO's initial response had only yielded one document. Disregarding the first request or treating it as entirely separate seems somewhat artificial and has lengthened the process.

34. The CO's internal review also should have covered both requests. (This not happening need not have limited the remit of the Commissioner. There is no obligation to have an internal review.) The Appellant's request for an internal review on 29 July, stated that he found [the response to] his "FOI request No FOI321437"[10] completely unacceptable as it did not answer the questions asked. He had not requested an internal review limited to the second request and given that only the first and not second request posed questions, he seemed to be requesting a review covering both. At the very least, the CO should have clarified the matter with him.

Scope of Requests

35. It is important to be clear about the scope of the requests, to ensure a proper search and consideration of what is held. We accept the requests were wide-ranging and the Appellant's arguments set out in para. 18(b) above, as compelling.

36. We accept that information on the issuance of the General Service Medal for Berlin Airlift service was within the scope and should not have been discounted. Our reasons include:

    a. The Appellant's second request asked for information that led to the conclusion reached by the Review Team that the Cold War Medal was not suited for detailed review. This read on its own, does not seem to include the decision regarding the Berlin Airlift.

    b. However, that request was drafted in response to having received the extract of Minutes of 29 August 2013 that had shown the recommendation not to review the claim of cold war veterans. This was the sole document provided in response to his first request on why the BCWV submission was not fully reviewed.

    c. When looking at the questions in the first request, and the two requests combined, the requester was asking for information that would illuminate the decisions and decision-making process concerning cold war veterans' claim. The Berlin Airlift was clearly a part of this topic.[11]

    d. He asks why the BCWV submission was not reviewed fully. He asks who was responsible for decisions made in relation to it and information showing the processes and justifications. Further, it is most plausible that material held about the Berlin Airlift decision process might shed light on the extent to which the submission had been comprehensively reviewed and the decision process, and why the other parts of the claim were not successful.

[10] I.e. the Reference given on the CO's reply of 29 July.
[11] See point 7 at page 49 OB.

37. It seems to us somewhat artificial to have separated the Berlin Airlift matter from the rest of the BCWV claim when interpreting the requests. At the very least, the CO should have sought clarification from the Appellant under the section 16 duty to advise and assist him at the time of the request. Making the suggestion to restart a new process for the Berlin Airlift seems somewhat unfair in this case.

B. Held

38. The Decision Notice determined that the CO did not hold the Review Team's records even though the material was located there. The Commissioner cited its own guidance on section3(2)(a) as:

    a. the authority has no access to, use for, or interest in the information;

    b. access to the information is controlled by the other person;

    c. the authority does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information;

    d. the authority is merely providing storage facilities, whether physical or electronic.

39. She noted that the review was established and funded by government and CO provided the administrative support. However, the CO could not amend the information held by the Review Team. Any support offered had been to assist the review in reaching its findings, but there was nothing to suggest that there was a degree of collaboration that would afford the CO control over the requested information.

40. She acknowledged that by the time of the request, the review had long since completed its primary task, and the reason for its independence was "potentially no longer relevant". She considered that the information would "at some point" be held by the government for its own purposes within the meaning of FOIA. Further reasons set out in a confidential annex included:

    a. Whilst the review published its findings a couple of years ago, the CO did not have agreement from the chairman of the review to bring its records into those of CO. The report for the medal review was issued on 12 July 2012, however Baroness Stowell's written statement to Parliament was on 29 July 2014 which indicates there was still work done in the intervening period. It was not historic enough to the point where the chairman's view was unreasonable.

    b. The chairman's response demonstrated that whilst the CO physically held the records, it did not have access to them.

    c. The Commissioner respected the CO's wishes. To disregard the chairman would be to undermine the independent nature of the review.

    d. The CO did have an interest in the information, as it had informed the Commissioner that the records would soon be brought into its holdings. However, it did not control the records at the time of the request.

41. As stated above, it seems that the CO concedes that information was held and the Commissioner erred in reaching otherwise. To the extent that this is not the case, the CO has not advanced a clear position to the contrary. The Appellant's case in essence seems to be that the Review Team was not independent of the CO and in any event more information is held by the CO even disregarding the Review Team's papers.

42. We find that on balance material was held at the time of the request beyond that already disclosed by the public authority. This includes the Review Team's records, and those that had been held by the CO in its own right.

43. As regards the Review Team's record, our reasons include, in the absence of compelling evidence to the contrary:

    a. The material was held at the CO. We find it highly unlikely that CO had no right to access it or control over it. We have not seen sufficient compelling arguments to the contrary.

    b. At the time of the requests, the Review Team's work had completed at least approximately a year earlier. Whilst the Review Team may have been independent of Government, (on which we make no finding), it is fair to assume it no longer existed at the time of the request and was no longer being paid. Accordingly, the team's material is likely to have transferred to the CO at the time its work ended. This is also supported by the facts that (a) the papers had been kept after the review disbanded, whilst the Review Team may have decided which papers should be handed over, the CO had effectively decided to keep them and has stated an interest in them; and (b) as the CO (or Government) had paid for the review and the material was still located there, the material belonged to it.

    c. The Decision Notice states that to disregard Sir Holmes' wishes would undermine the independence of the review. However, it is unclear how independence could be undermined retrospectively, for instance by the CO accessing documents. It would seem that the purpose of independence would have been to enable the team's view to be formed independently whilst carrying out its work. The Commissioner even stated that the reason for independence was no longer relevant.

    d. The Decision Notice seems to acknowledge that the chairman's response reflects his 'wishes' – it does not state they were requirements. We have seen nothing to suggest that Sir John Holmes had authority to determine whether the records could be integrated into the CO's records; or why his response (and its reasonableness) would be determinative of whether the information was 'held' by the CO.

    e. The Commissioner maintained that the transfer of records had not occurred at the time of the second request even though the review had "long since completed" and the reason for independence was no longer relevant. Yet she accepted that "at some point" the material would be held by Government. The CO intended to and subsequently integrated the material into its own records. Thus, a transfer was considered inevitable but the reasoning related to the timing seems to be somewhat unclear and arbitrary. Further, applying section 3(2), the material must have been held by CO unless it was held by

another. That other was argued to be the Review Team. It is not clear to us how material could be held by a body that no longer exists.

f. Based on these conclusions and following the logic of the Commissioner's own guidance in para.38 above, the material from the Review Team was held by CO at the time of the requests.

44. The CO maintains that the matter is academic because it had now considered the Review Team's records and provided a new response making disclosures and relying on exemptions set out in the Act.

45. The Commissioner helpfully referred to *Bromley v. The Information Commissioner and the Environment Agency EA2006/0072,* which is persuasive in setting out factors to take into account on this topic:

> *"… There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued …* ***the test to be applied was not certainty, but the balance of probability.*** *This … clearly applies to appeals before this Tribunal ...* ***We think that its application requires us to consider a number of factors, including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted.*** *Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere, whose existence of content point to the existence of further information within the public authority, which had not been brought to light. Our task is to decide, on the basis of our review of all these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed…" (Emphasis Added).*

46. We find it more likely than not that more information is held beyond that so far identified. Our reasons include:

a. The CO has not considered both requests, and given a broader lack of clarity in submissions, it is not fully clear which request it did consider in the new response.

b. The Decision Notice focused on material held by the Review Team. We accept the Appellant's arguments in relation to material held by CO in its own right. These are set out in para.s.18(b) to (d) and are compelling for reasons given above.

c. The Appellant stated that he would expect the Review Team's records to show substantially more than the documents the CO had shown. We find his arguments in para. 21 above compelling.

d. In the CO's original response and review, little information was given about the search undertaken to ascertain what information was held. During the

Commissioner's investigation, the CO[12] does not seem to have provided specific search terms and their reply was partially kept from the Appellant for reasons that are not clear. In relation to the new response, we have insufficient information as to how the CO searched the Review Team's records after integrating them, and what search terms were used, such that we cannot conclude that the search was adequate. The CO simply asserts that a thorough search was made. Given the broader approach to the case including not addressing both requests, in our view, such vagueness would not have provided confidence to the Appellant that the CO had fully understood what he had been seeking and that this had been searched for.

47. In conclusion, we find that the Commissioner erred in finding that no further information was held. We also consider that both requests should have been addressed, and that on balance more information is held than that set out in the CO's response issued after integrating and considering the Review Team's records.

Further Steps

48. We were provided with submissions by the Respondents as to what the Tribunal should do if reaching such a conclusion.

49. The Commissioner suggested seeking submissions and then (on the basis of what we have seen, inevitably seek further submissions) in relation to the question of what further documents were held. However, it would subsequently need to revert the matter back to the Commissioner to consider application of exemptions. This approach seems unduly protracted and highly unlikely to efficiently or effectively resolve the matter fully.

50. The CO considered that the matter ought be reverted back to it to issue a fresh response to address matters such as the scope of the request where the Tribunal was not a proportionate means of addressing any such problem. The Appellant simply requests for the information to be disclosed. This can only be done in compliance with the Act, and the matter before us has been insufficiently developed for it to reach that stage.

51. We consider we have taken the matter as far as we can and a new section 17 response and potential investigation is now required as a more suitable means to address the remaining issues. There has been a failure to consider both requests, and it is more likely than not that more information is held. We would anticipate that a section 17 response should demonstrate (a) the CO's full understanding of the requests, (if necessary, having first engaged with the Appellant under section 16); (b) a thorough search; and (c) precisely what is held and the CO's position on whether the requester has a right to that information under FOIA, setting out its full arguments on any exemptions it considered necessary to apply.

52. If unsatisfied with the CO's response, the Appellant might note the Tribunal's understanding that an internal review by the public authority is not a necessary precursor to the Commissioner's investigation. It is hoped that both Respondents will be able to deal with any matters arising from this case as swiftly as possible. If it results

[12] The reply of 27 April 2018 is at pages 140-142 OB. We have directed for the redactions, contained in the Closed Bundle to be disclosed.

in another appeal to this Tribunal, the parties should consider electing for an oral hearing at an early stage, due to the complexity so far revealed.

53. As regards points made by the parties, we have seen nothing that explains in any detail why considerations of scope or exemptions are beyond our remit. However, based on the material before us, it would not be effective or a proportionate use of the Tribunal's or other parties' time to consider seeking further submissions on exemptions prior to the CO first taking the steps set out in para. 51 above. The broader issues would benefit from fuller scrutiny starting with the section 17 response because they are insufficiently developed before us for anything further to be a proportionate within the meaning of rule 2 of the Rules.

Other

54. We have set out above some concerns in the handling of this case, from our perspective. It is hoped this will be useful in ensuring the matter can now be dispensed with fairly and efficiently.

55. A ruling relating to material that was placed in the Closed Bundle is set out in the Appendix to this decision.

Claire Taylor
Judge of the First-tier Tribunal

Date of Decision: 9 July 2018
Promulgated Date: 20 July 2018

APPENDIX

Ruling on Rule 14 Application

1. Our Directions to the Respondents of 28 May 2018 stated that in the absence of any submissions on the point, it was not clear why the 'confidential annex' to the Decision Notice and letter of 27 April 2016 had been withheld from the Appellant. *(See footnotes 4 and 13).* Both were key documents in this appeal. Time extensions were requested and granted to respond to these directions.

2. The Commissioner's response was provided on a closed basis without a rule 14 application.[13] This stated that she had respected the CO's wishes to keep certain information confidential and it now looked to the CO for its response. In our view, the Commissioner in issuing its Decision Notice must jealously guard its independence. Basic principles of open justice and fairness underline the importance of an appellant knowing the reasons for the decision. This is particularly so when it that finds against him, as this aids his ability to understand and be able to decide whether and how to advance an informed focused appeal. Accordingly, redactions from a Decision Notice are never to be made lightly. They must have a clear quality of confidentiality, such as either disclosing details of the requested information or being likely to be exempt if requested under FOIA. Accepting to keep matters confidential purely to respect a party's wishes, without further rigour and scrutiny seems to fall short of what is fair to the Appellant and does not suffice as an acceptable reason for redaction.

3. The CO's response was also provided on a closed basis without a rule 14 application. It accepted redactions (concerning the location of the requested information and the CO's past relationship to information held by the Review Team) were unnecessary. It sought to retain other redactions.

Letter of 27 April 2016

4. The first redaction in the letter of 27 April 2016, was in response to the Commissioner's question during its investigation "*6) If searches included electronic data, which search terms were used?*". It reads:

   > *"The team searched the Meridio records for Medals Policy and; HD Committee. This covered the folders on the Military Medals Review, HD papers and Military Sub Committee papers."* .

5. The CO argued that the names of file titles ought to be withheld under s.36 *(Prejudice to effective conduct of public affairs.)* It stated that if these names were released routinely, officials might be deterred from creating frank and detailed file titles which reveal the contents of those files.

6. We rule that this text ought to be disclosed. We find it highly unlikely that this decision will deter officials from choosing how to name their files. In any event, the issue of disclosure would depend on the circumstances of the case. In this case, we cannot see why the terms are sensitive. We have received no arguments explaining this or why disclosing the terms would prejudice the effective conduct of public affairs. Further, there are important public interests in disclosure. The issue in this appeal has concerned whether information is held. Public authorities routinely specify their search terms so as to be able to demonstrate whether their search was satisfactory.

[13] I have addressed this by including the substance of both Respondents' responses in this Appendix, to prevent delay.

Appellants may then put forward arguments as to the adequacy of terms and whether other terms may be reveal the information sought. (They might have more expertise about the subject of his request than others including the panel.) This process may ideally happen at an early stage (for instance within the duty of s.16 (*to advise and assist)*, so as to reach a satisfactory speedy outcome. Not disclosing this information stunts this process. Further, it hinders transparency. In this case, the text shows that the CO failed to provide search terms, and the Appellant would then know the level of probing that has occurred. The matter is not academic. First, we have ordered that the CO conducts a new search and would hope they do so in a way that takes into account best practise and previous decisions of this Tribunal on the matter. Second, the CO asked the Appellant to withdraw his appeal such that it would not have reached this Tribunal. This was on the basis that the information had been to some extent provided. Without knowing the adequacy of the search, he could not have made an informed decision, such that it would have been better to have provided this information at an earlier stage.

7. The second redaction reads:

> "The Cabinet Office Records and Archives Team has been made aware of the existence of the stored records and will be in touch with the former Chairman of the Review to seek his agreement to bring those records within the remit of the Cabinet *Office* holdings. Assuming the Chairman believes this to be the appropriate way in which to deal with these records, they will be reviewed and catalogued. None of these records are over twenty years old, and so it is unlikely that they will be considered for release."

8. The CO's reasons for withholding this and the confidential annex are:
   (i) These concern the CO's consultation with the chairman of the review. They relied on s.35 *(formulation of government policy, etc.)* and s.41 *(information provided in confidence)*, claiming that the documents develop the CO's policy and outcome of discussions with a senior public official appointed to conduct an independent review.
   (ii) There is no obligation to provide the Appellant with a commentary of the change in the CO's position in what has now become contested proceedings. Disclosing the information may prevent officials routinely providing the Commissioner with an open view of its position during an investigation.
   (iii) As the CO has conceded it now holds the information, their disclosure would serve little purpose.

9. We rule that the material should be disclosed.

10. We have been given no analysis to support the applications of the exemptions. Based on our understanding of s.41, it is difficult to see how disclosing either the wording in para.7 above or the confidential annex would create an 'actionable breach of confidence'.

11. Presumably, the only potential confider would be the chairman. However, the reasoning in the confidential annex is not limited to what the chairman had stated, so it is difficult to see how the s.41 (or 35) could apply to all of it. In the absence of further analysis, it seems somewhat unlikely that his conveyed wishes could be said to have

been imparted conferring an obligation of confidentiality. It is difficult to see how the disclosure would cause him detriment, where his communications were presumably in the performance of (or related to) a role he undertook in an official capacity. In any event, the CO has not demonstrated why the information has the necessary quality of confidentiality, and we cannot see anything sensitive. The approach seems overly secretive. Further, there would be a strong, we think overwhelming public interest defence to any action for breach of confidence that the chairman may bring. There are the basic principles of open justice and fairness outlined in para. 2 of this Appendix, as well as the need for transparency in understanding why and how the CO has conducted its case, in circumstances where it has taken a somewhat unusual path. (*See para.17 of the Decision.)*

12. Regarding s.35, we see nothing beyond mere assertion to explain how the material (on for instance reaching agreement on bringing the records into those of the Cabinet Office and the independence of the review) relates to the development of government strategy. In any event, since the decisions (presumably on archiving records) have now been taken, any sensitivity to disclosure is neither apparent or persuasively explained. Even if we were to accept that the material engages s.35, the exemption is subject to consideration of, we would find the public interest considerably outweighs any interest in withholding it.

13. The CO argued that disclosure (that includes key parts of a Decision Notice) may prevent officials routinely providing the Commissioner with an open view of its position during an investigation. In view of the civil service code which reflects values of integrity, objectivity and impartiality, and the public authority's role to cooperate with the Commissioner and the Court, we find this most unlikely. If seeking to successfully apply the FOIA, it needs to advance a well-reasoned case.

14. In view of having allowed this appeal, it was not necessary or proportionate to seek submissions from the Appellant on the material now being disclosed.