

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 November 2015

Public Authority: Ministry of Defence

Address: Main Building
Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) for a copy of the minutes of a meeting of the Advisory Military Sub Committee held in August 2013. The MOD withheld the minutes on the basis of section 35(1)(a) of FOIA. The Commissioner is satisfied that the minutes fall within the scope of the exemption and that the public interest favours withholding the information.

Background

2. In 2012 the government asked Sir John Holmes to review the rules, principles and processes for medallic recognition of military campaigns. The review was prompted by a number of long-running campaigns by veterans groups and individuals seeking redress for perceived injustices in medallic recognition. The review specifically looked at the process and rules governing the award of medals for military campaigns. Sir John published his findings in July 2012 in the 'Military Medals Review'.
3. Amongst other findings, the review recommended further examination of the main long standing controversies surrounding particular medal claims. Consequently, Sir John was commissioned by the Prime Minister to lead a second stage of work to look at such claims.
4. The government announced on 29 July 2014 that the second stage of Sir John's medal review was complete. The decisions taken by the review

and background documents were placed in House of Commons Library.¹ Of relevance to this complaint, the review concluded that in relation to the case for a National Defence Medal it was felt that a 'strong enough case could not be made at this time, but that... this issue might be usefully reconsidered in the future'. The review also concluded that no other historic claims for medallic recognition will now be reviewed, unless 'significant new evidence is produced that suggests an injustice has been done'.

Request and response

5. The complainant submitted the following request to the MOD on 27 August 2014:

'Thank you for your response to my FOI request F012014/04477, under the heading below,

"Was there a meeting of the Advisory Military Sub Committee of the Committee on the Grant of Honours, Decorations and Medals, held in MOD Main Building on 29 August 2013."

Now that you have confirmed that this meeting 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 responded on 3 September 2014 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of section 35(1)(a) of FOIA.
7. The complainant contacted the MOD on 30 April 2015 in order to ask for an internal review of this decision.
8. The MOD informed him of the outcome of the review on 27 May 2015. The review explained that the detailed version of the minutes of the meeting in question was exempt from disclosure on the basis of section 35(1)(a) and that the public interest favoured maintaining the exemption. The review noted that during the MOD's attempts at informal resolution the complainant had been provided with the appendix to the minutes which listed the medal proposals that were discussed and

¹ <http://www.parliament.uk/business/publications/business-papers/commons/deposited-papers/?fd=2014-07-28&td=2014-07-29#toggle-1168> See deposit references DEP2014-1168 and DEP2014-1269.

provided a summary of the outcome of the decisions taken on these cases by the Advisory Military Sub Committee (AMSC). The review confirmed that this appendix was also in the public domain and thus was technically exempt on the basis of section 21 of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 3 June 2015 in order to complain about the MOD's refusal to provide him with a copy of the meeting minutes he had requested. He argued that the public interest favoured disclosure of the complete minutes. At the very least, he argued that a partially redacted version of the minutes should be disclosed which removed the names of 'who said what'. In his view, the key issue was the nature of the matters discussed at the meeting rather than 'who said what'.

Reasons for decision

Section 35(1)(a) – formulation and development of government policy

10. Section 35(1)(a) of FOIA states that:

'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

(a) the formulation or development of government policy'

11. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
12. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
13. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by

case basis, focussing on the precise context and timing of the information in question.

14. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant minister;
 - the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
15. The MOD explained that the AMSC considers all arrangements relating to military medals within the Armed Forces and provides advice to the Committee on the Grant of Honours and Decorations and Medals (the HD Committee). It explained that the HD Committee was the only channel through which proposals for additions to, or changes in, the honours system, including proposals affecting specifically Armed Forces awards, may be submitted to the Sovereign. The MOD therefore argued that section 35(1)(a) was engaged because it related to formulation of government policy in relation to military medals.
16. On the basis of this explanation, the Commissioner is satisfied that the withheld information falls within the scope of section 35(1)(a) of FOIA.

Public interest test

17. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

18. The MOD argued that the AMSC panel must have the space to discuss freely and frankly military operations and the emotive aspects of the validity of claims to ensure that arguments for each case are properly considered and any recommendation to the HD committee is merited. The MOD argued that disclosure of detailed minutes of such meetings – such as those withheld in this case - could lead to public scrutiny, comment and criticism of the AMSC's activities. However unwarranted this attention may be, the MOD argued that this would undermine the committee's effectiveness.
19. Furthermore, the MOD argued that disclosure of minutes would also restrict the panel's space to fully consider and candidly record all the

relevant issues of any given claim, both for and against. This is because the release of medal policy deliberations would be likely to damage the confidence of AMSC members and would potentially result in a reluctance to provide open and honest views. Whilst the composition of the panel is in the public domain, comments attributed to individual panel members are not and the panel should be free to express their thoughts without the fear of these views being exposed to the Armed Services community and the wider public.

20. The Commissioner specifically asked the MOD to confirm whether the policy making process in question remained live and ongoing at the time of the complainant's request. It explained that decisions taken on the medal claims considered at the AMSC meeting in question were announced on 29 July 2014 with copies of much of the background material for each medal claim being published on 27 July 2014.²
21. However, the MOD explained that in many instances, including the National Defence Medal (NDM), campaigners will continue to revisit these claims and will continue to lobby for the award of a medal. In particular the MOD noted that the written announcement in the House of Lords stated in respect of the NDM that 'The Committee on the Grant of Honours Decorations and Medals 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'. Furthermore, the MOD noted that for a number medal claims the claim is for an extension to the qualifying period and therefore the risk and rigour surrounding the event/campaign discussed at the AMSC will be revisited again should further claims be made. Consequently the MOD argued that whilst the medal claims considered by the AMSC in question had already been announced by the time this request was submitted, the policy issues around these medals could be considered to be live.
22. Finally, with regard to the complainant's suggestion of disclosing an anonymised version of the minutes, the MOD explained that the composition of the AMSC is the public domain and membership of it is very small and includes three retired military officers who represent each of the three services respectively. The MOD argued that the detail in a number of the comments and observations in the minutes would identify the contributor's service and in such instances any redaction would have to go beyond removing a contributor's name in order to ensure anonymity. The MOD also explained that the approach of

² [See](#) the link to the documents provided at footnote 1.

withholding even an anonymised version of the minutes was consistent with the Cabinet Office policy in respect of the disclosure of HD Committee minutes.

Public interest arguments in favour of disclosure

23. The complainant emphasised that when the Prime Minister announced the Medals Review he explained that it would be open and transparent. The complainant argued that the public interest would therefore be best served by providing full access to a copy of the minutes of the AMSC meeting in question at which the medal claims were discussed.
24. More specifically, the complainant explained that via a separate information request he had submitted to the MOD he had established that the meeting in question lasted two hours. He calculated that taking into account the useful formalities of any such meeting (introduction, break etc) that would have left on average just over six minutes to discuss each of the 21 medal cases. The complainant suggested that this implies that the meeting was a rather rushed one. He explained that he had submitted two of the cases for submission and he argued that such time was in no way sufficient to lightly skim the submissions he had made. Furthermore, the complainant argued that the appendix of the meeting that was disclosed confirmed, in his view, that the submissions he had made were not properly considered.

Balance of the public interest arguments

25. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments made in a key Information Tribunal decision involving the application of the section 35(1)(a). In that case the Tribunal confirmed that there were two key principles that had to be taken into account when considering the balance of the public interest test: firstly the timing of the request and secondly the content of the requested information itself.³
26. The Commissioner has initially considered the weight that should be attributed to the public interest arguments in favour of maintaining the exemption. The Commissioner considers that the MOD's line of argument appears to encompass two concepts, firstly that of safe space and secondly that a chilling effect.

³ *DFES v Information Commissioner and Evening Standard* (EA/2006/0006)

27. With regard to 'safe space', the Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This will carry significant weight in some cases. The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight. Nevertheless, the Commissioner does accept that the government may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However, this safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision. The timing of the request will therefore be an important factor in determining the weight that should be given to safe space arguments.
28. The Commissioner notes that in the MOD's view the policy making process remained ongoing at the time of the request. The Commissioner is somewhat reluctant to accept this argument; as the review concluded in July 2014, no other medal claims would be looked at again unless significant new evidence was provided. In the Commissioner's view the fact that further medal claims *may* be considered in the future should sufficient evidence be put forward, does not mean that the policy making is actively ongoing. Nevertheless, the Commissioner accepts that the review did leave the option of re-examining the option for a NDM in the future. Moreover he accepts that disclosure of the withheld minutes may well lead to public scrutiny, comment and criticism of the AMSC's activities and thus impact and detract from its ability to discuss the claim for a NDM (and potentially other claims in the future). The Commissioner is therefore prepared to attribute some weight to the safe space arguments.
29. With regard to attributing weight to the chilling effect arguments, the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.

30. As discussed above the Commissioner has some reluctance in accepting that the policy making in question was actively ongoing at the time of the request; rather some aspects of it, primarily a discussion around the NDM, may be re-visited in the future. Nevertheless, 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 in which they discuss any other medal claims that may be brought. The Commissioner therefore attributes some notable weight to the chilling effect arguments.
31. With regard to the public interest in disclosure, the Commissioner accepts that disclosing of the minutes could certainly add further detail to the information that is already in the public domain surrounding the AMSC's discussions of the various medal claims. Disclosure could also reassure the public of the rigour of the AMSC's discussions; or conversely, may confirm to the public – as the complainant suspects – that there was a lack of rigorous consideration. The public interest in disclosing the minutes cannot therefore be ignored. However, the Commissioner considers that it is important to re-call the amount of information already in the public domain about the various medal claims, including the annex to the meeting in question which summarised the AMSC's findings in relation to each claim. Furthermore, whilst the Commissioner takes the complainant's point that a significant number of claims were considered at the two hour meeting this does not necessarily mean that the submissions for each were not given careful consideration by the attendees prior to the meeting.
32. In conclusion, the Commissioner has decided that the public interest favours maintaining the exemption. He has reached this decision because although the policy making in relation to the particular medal claims discussed in the minutes is not actively ongoing, there is a likelihood in relation to the NDM at least that it may well be in the future. Given the content of the information, detailed as it is, in the Commissioner's opinion there is a risk of a chilling effect on future AMSC's discussions if the minutes were disclosed. Similarly, he also considers that disclosure of the minutes could impact on the safe space the ASMC needs in order to have effective discussions on such issues. In reaching this conclusion the Commissioner is not dismissing the public interest in disclosing the information, but at the point of the request the Commissioner finds the public interest in maintaining the exemption is more compelling, especially taking into account the information regarding these decisions that has already been made public.

Right of appeal

33. 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

34. 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.
35. 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

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF