First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2016/0281

Decided without a hearing
On 19 November 2018
Promulgation Date 28th February 2019

Before

JUDGE BUCKLEY

MELANIE HOWARD

MARION SAUNDERS

Between

THE CABINET OFFICE

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

RICHARD FARRAR

Second Respondent

OPEN DECISION

1. For the reasons set out below the Tribunal allows the appeal against Decision Notice FS50620631 and issues the following substitute decision notice.

2. All parties consented to the matter being determined on the papers and the Tribunal considered that it was appropriate to determine the appeal without an oral hearing.

3. There is also a closed annex in order not to undermine the Tribunal's decision on what information should be disclosed in accordance with rule 14. The annex will remain closed until after the latest date for applying for permission to appeal or until the conclusion of any appeal. A redacted version of the annex will be released after that date.

SUBSTITUTE DECISION NOTICE

Public Authority: The Cabinet Office

Complainant: Mr Richard Farrar

The Substitute Decision – FS50620631

1. The scope of the request is set out in the reasons below.

2. The Cabinet Office does, on the balance of probabilities, hold military medals review team information. The Tribunal has ordered the Cabinet Office to provide this information or serve a notice under s 17 of the Freedom of Information Act 2000 (FOIA).

3. In relation to information not falling within para 2 above, for the reasons set out below and in the closed annex, s 35(1)(a) and s 37(1)(b) of FOIA are engaged and:

    a. the public interest in disclosure outweighs the public interest in maintaining the exemption in relation to the parts of the withheld information identified in the closed annex;
    b. the public interest in disclosure is outweighed by the public interest in maintaining the exemption in relation to the remainder of the withheld information identified in the closed annex.

Action Required

1. The Public Authority is required to respond to the complainant's request for information relating to the military medals review team either by providing the requested information or by serving a notice under s 17 FOIA indicating what exemptions it relies on within 42 days of the promulgation of this judgment.

2. The Public Authority is required to supply the information identified in the closed annex within 42 days of the promulgation of this judgment.

REASONS

Introduction and procedural background

1. Mr Farrar is involved in a campaign for retrospective medallic recognition for those who served in Korea post-Armistice, between 28 July 1953 and 26 July 1957. The request, dated 10 January 2016, asks for information relating to the decision not to award a Korea post-Armistice medal.

2. This is the Cabinet Office's appeal against the Commissioner's decision notice of 1 November 2016 FS50620631 which held that s 35(1)(a) and s 37(1)(b) were engaged but that the public interest favoured disclosing some of the requested information.

3. Four appeals arising out of a similar factual background have been heard by the Tribunal on the same day. They are: EA/2016/0078 (Morland v IC and Cabinet Office); EA/2017/0295 (Cabinet Office v IC and Scriven); EA/2016/0281 (Cabinet Office v IC and Farrar); and EA/2018/0098 (Cabinet Office v IC and Halligan). Much of the factual background appears in each decision.

Factual background

4. The Korean Armistice Agreement was signed in July 1953, but British Troops remained in the Korean peninsula until July 1957. There is a long running campaign amongst veterans for a medal to recognise post-Armistice service in Korea. Post-Armistice medals have been issued by the governments of Australia, Canada and New Zealand. Mr Farrar is active in that campaign.

5. A medal review was carried out by the Ministry of Defence in 2011. This review was described as 'flawed and discredited' by the UK NDM ('National Defence Medal') campaign. On 30 April 2012 the Prime Minister announced a further independent review.

6. In May and June 2012 Sir John Holmes conducted an independent review of the policy concerning military medals. The review team received over 200 submissions, including a submission on the retrospective issue of a British Korea medal or clasp for service after the ceasefire on 27 July 1953. The review team also spoke to more than 50 individuals including representatives from veteran groups.

7. Sir John Holmes published a report in July 2012 ('the Holmes Report'). It recommended that:

> The reconstituted HD Committee, on advice from the new military sub-committee, should be asked to look again rapidly at the main long-standing controversies to try to draw a line under them, on the basis of the criteria set out in paragraphs 30-33 of Section 3. It should start with the longest-standing issues, notably that surrounding the Arctic Convoys from the Second World War. An independent expert should be commissioned on a temporary basis to advise the sub-committee on these controversies rapidly but fully, starting from the material provided to the Review.

8. Paragraph 17, p 10 of the Holmes Report reads as follows:

> … the current system of decision-making is vulnerable to the charge of being a "black box" operation, where those outside have no knowledge of what is being decided or why and have no access to it; and where the rules and principles underlying the decisions, while frequently referred to, have never been properly codified or promulgated.

9. With specific reference to the HD Committee, the Holmes Report stated, on p27:

> The process is also largely invisible and inaccessible to those outside the system, which has substantially added to the frustration of veterans and other campaigners, unable to penetrate beyond bland official statements that a particular decision has been taken.

10. With reference to the Korea post-armistice issue, the report stated as follows:

> Korea Post Armistice
> 26.The Review has received a detailed submission from the Korea Post Armistice Medal Campaign which seeks medallic recognition for the thousands of British troops who served in Korea following the July 1953 Armistice until the final British withdrawal in July 1957. The Campaign argues that the arduous climate and physical conditions, and the continuing real risk of a sudden resumption of hostilities, represented service that was significantly more difficult and dangerous than could usually be expected. They illustrate with a range of examples continuing tensions in the demilitarized zone and emphasise the political instability. They note that other Commonwealth countries and the US have all established medallic recognition for personnel who served in Korea after the war.
>
> 27.In particular they point to the findings of a 2005 Australian working party established to review the level of recognition after the Armistice, and query why the UK has not adopted a similar approach for British service personnel.
>
> 28.MoD has not evaluated the potential coverage or estimated the potential cost of such an award.

11. Under the United Kingdom Constitution, honours and decorations are created and conferred by Her Majesty the Queen in her personal capacity as Monarch rather than on behalf of the Government. The 'HD Committee' (the Committee on the Grant of Honours, Decorations and Medals) is a sub-committee of the Cabinet. It is a permanent standing committee established in 1939 at the request of George VI to provide advice to The Sovereign on policy concerning honours, decorations and medals. It operates under the direction of the Head of the Civil Service, who nominally chairs the Committee, and its current terms of reference are:

> To consider general questions relative to the Grant of Honours, Decorations and Medals; to review the scales of award, both civil and military, from time to time, to consider questions of new awards, and changes in the conditions governing existing awards.

12. The HD Committee directly advises The Queen on policy relating to the grant of individual honours, decorations and medals. It also considers general questions relating to this topic, including the introduction of new awards. The Committee's more general recommendations are also put forward for The Sovereign's formal approval.

13. The HD Committee meets typically two or three times a year. The role of chair of the HD Committee is currently formally delegated to Sir Jonathan Stephens, Permanent Secretary to the Northern Ireland Office. The members of the HD Committee are:
Private Secretary to HM The Queen
Principal Private Secretary to the PM
Permanent Secretary, FCO
Permanent Secretary, Home Office
Permanent Secretary, Ministry of Defence
Defence Services Secretary
Secretary, Central Chancery of the Orders of the Knighthood.

14. Following the Holmes report, the Prime Minister asked Sir John Holmes to lead a second stage of work to make further recommendations using the principles he had proposed to implement his findings. Reviews of certain claims for medallic recognition were undertaken by an independent review team, and Sir John Holmes's recommendations in relation to these were put before the Advisory Military Sub-Committee (the 'AMSC' – a sub-committee of the HD Committee set up in response to the Holmes report) at the first meeting of the AMSC, on 12 December 2012 and 29 August 2013. At that meeting on 29 August Sir John Holmes outlined 21 further claims for medallic recognition which had not yet been looked at by the independent review team, and gave recommendations as to the way forward, i.e. whether or not these should be reviewed.

15. All these claims came before the HD Committee on 29 January 2014 and/or on 9 June 2014.

16. On 29 July 2014 a written ministerial statement from Baroness Stowell informed the House of Lords that the review was complete, stating that:

> Sir John was therefore commissioned to review independently a number of cases which had been brought to his attention as possible candidates for changed medallic recognition. The aim was to draw a definitive line under issues which in some cases had been controversial for many years… Each of the reviews has been subject to detailed discussion by the Committee on the Grant of Honours, Decorations and Medals and its conclusions submitted for Royal Approval….The outcomes where detailed reviews were carried out are listed in the Annexe to this statement.

17. The conclusion in relation to the Korea post-armistice medal set out in the Annexe was:

> There will be no retrospective issue of a British Korea Medal or clasp for service after the ceasefire on 27 July 1953. There was a certain amount of rigour endured at the time, but insufficient risk to warrant the award of a medal.

18. In relation to the NDM Baroness Stowell stated that the HD Committee was 'not persuaded that a strong enough case can be made at this time but has advised that this issue might usefully be considered in the future'. This was in contrast to other historic claims for medallic recognition where it was stated in the Annexe that no other historic claims will now be reviewed, unless significant new evidence were produced that an injustice has been done.

19. The NDM options paper that was considered by the HD Committee at the point that it made its recommendations was placed in the Library of the Lords. We accept the Cabinet Office's assertion that although it is dated after the HD Committee meeting, that is merely the date of publication and that it is the same options paper that was before the Committee.

20. Correspondence subsequently took place between the Cabinet Office and the NDM campaign and the HD Committee considered that correspondence at a meeting on 23 February 2015, concluding that the time was not right for a review. In an email to Mr Morland dated 8 April 2015, Gary Rogers of the Cabinet Office stated, in relation to the meeting of 23 February 2015:

> HD Committee had before it recent correspondence from Colonel Scriven, Co-Chairman of the UK National Defence Medal Campaign, but whilst the Committee noted the points made by Colonel Scriven, members remained unpersuaded of the case for an NDM at this time. In light of this, there are no plans for further work on this issue… You will be aware that Stephen Gilbert's Private Member's Bill on the National Defence Medal which was due to have a second reading on 27 February, were not reached.

21. There was a House of Commons Debate on NDM on 12 April 2016. The HD Committee considered reopening the NDM issue again on 1 February 2017 but remained unconvinced.

22. By letter dated 14 February 2017 Colonel Scriven made an official complaint under the Cabinet Office complaints procedure to the minister for the Cabinet Office, Ben Gummer MP. The complaint alleged failures by the head of the Honours and Appointments Secretariat to appropriately oversee the Cabinet Office responsibilities of the Holmes review and the alleged provision of misinformation about the veracity of the medal review process. Mr Gummer tasked Sir Jonathan Stephens, the chair of the HD Committee, with carrying out an investigation into the complaint.

23. Sir Jonathan Stephens asked a retired former senior civil servant to consider the complaint. His conclusions were that the review was handled entirely properly, but that the figure used in the Westminster debate on 12 April 2016 for the cost of introducing NDM (£475m) was wrongly attributed to the Holmes review, whereas it was an MOD estimate. The error was repeated in a Written Parliamentary Answer on 25 April 2016. Colonel Scriven was informed of the outcome and sent a copy of the report by letter dated 28 July 2017. In that letter Sir Jonathan Stephens apologised for the error of attribution and indicated that the parliamentary record would be set straight. He concluded 'I am afraid I will not be able to correspond further with you on this issue. As you know, the Minister decided in July 2014 not to introduce a National Defence Medal. That remains the position and unless, or until, there is change of policy there will be nothing more to add.'

24. Colonel Scriven wrote again to Sir Jonathan Stephens on 15 January 2018. He asserted that the investigation and its conclusions were flawed. His letter requests either that the military medal review is reopened or that the matter is referred to the parliamentary ombudsman for an in-depth evaluation of the whole process, with a view to reopening the review.

Request, Decision Notice and appeal

Request

25. This appeal concerns the following request made on 10 January 2016:

> 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 submissions 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.

Reply and review

26. The Cabinet Office responded on 29 January 2016. It did not hold some of the information. In relation to the information that it held, it refused the request on the basis of s 35(1)(a) and s 37(1)(b). It upheld its decision on internal review on 4 March 2016. Mr Farrar referred the matter to the Information Commissioner on 14 March 2016.

Decision Notice

27. In a decision notice dated 1 November 2016 the Commissioner decided that the Cabinet Office did not hold any information within the scope of the request that related to the review team. In relation to the rest of the information, the Commissioner decided that s 35(1)(a) and s 37(1)(b) were engaged. Under s 37(1)(b), the Commissioner held that the competing public interests were finely balanced. In relation to some of the information the Commissioner decided that the public interest in disclosure outweighed the public interest in maintaining the exemption. In relation to some of the information the Commissioner decided that the public interest in disclosure was outweighed by the public interest in maintaining the exemption. The Commissioner drew a distinction between information that recorded confidential discussions and was created in a safe space compared to information that did not record confidential discussions in relation to which safe space and chilling effect arguments were weak.

28. Under s 35(1)(a) the Commissioner decided that the balance of public interest was the same as identified under s 37.

29. The Commissioner decided that the Cabinet Office should have provided a link to the publicly available Brigadier Parritt review.

30. The Commissioner ordered disclosure of some of the information, as identified in a closed annex to her decision notice.

Notice of Appeal

31. The Cabinet Office appealed the Commissioner's decision notice. It does not challenge the decision in relation to Brigadier Parritt's review. The grounds of appeal are:
    31.1. Ground 1: The Commissioner's exercise of discretion was wrong.
    31.2. Ground 2: It was an error of law to take account of Mr Farrar's complaint that the HD Committee and medal-decision making process is generally perceived to operate in a non-transparent manner.

Ground 1 – exercise of discretion

32. The Commissioner was wrong to take account of the different approaches of other Commonwealth countries.
33. There is a heightened public interest in ensuring that the HD Committee's deliberations are full, frank and confidential compared with the AMSC. Greater weight should therefore be given to the safe space. The Commissioner was wrong to take the approach that material held in relation to the HD Committee based on disclosed AMSC material can and should be disclosed.

Ground 2 – error of law

34. The Commissioner erred in placing weight on a general concern that the HD Committee and the medal decision-making process was not transparent. This is not a factor which can properly be considered in determining whether the public interest balance was in favour of disclosure or against it. It was an error of law to take account of general criticisms of the medal decision-making process rather than specific public-interest factors in relation to the Korean Post-Armistice Medal.

35. Further, Mr Farrar's allegation that the process has been 'largely invisible' significantly overstates the extent to which considerations have been kept private. It was an error of law to have found this to be a persuasive point.

The Commissioner's response

36. The Commissioner's response dated 30 January 2017 submits that:
    36.1. It was not inappropriate to take account of the different approach in other Commonwealth countries. The prima facie discrepancy gives rise to a legitimate public interest in understanding the reason for it. Disclosure of

the disputed information would inform enable more informed public debate.

36.2. To the extent that there is a greater need for a safe space in the HD Committee there is a greater countervailing public interest in the disclosure of its discussions.

36.3. Where information was genuinely created in a safe space, the Commissioner found this to be a decisive factor in favour of withholding the information.

36.4. The First Tier Tribunal in *Halligan* (EA/2015/0291) did not draw a hard and fast distinction between the AMSC and the HD Committee. There is no rule that minutes of the AMSC fall to be disclosed and those of the HD Committee do not. The Tribunal criticised the Cabinet Offices' apparent blanket policy of non-disclosure of that material.

36.5. HD Committee minutes have no special status. Civil servants on the HD Committee will be no less robust than those on the AMSC Committee.

36.6. If there are well-founded concerns that a particular decision-making process is less transparent than it should be, then there is an enhanced public interest in disclosure of information which would render that process more accountable.

36.7. The Decision Notice in FS50303365 is not binding and does not support the submission made by the Cabinet Office.

Mr Farrar's response dated 10 February 2017

37. Mr Farrar makes the following points:

37.1. It was appropriate to take the approach of other Commonwealth Nations into account.

37.2. The reasoning of the First Tier Tribunal in *Halligan* EA/2015/0291 should apply to the HD Committee as well.

37.3. Mr Farrar believes that the AMSC was not provided with all the relevant documentation and did not consult adequately. Disclosure of the AMSC minutes is essential because there are concerns about the rigour of the discussions that took place.

37.4. It was appropriate to take account of concerns about transparency in the light of the Prime Minister's promise for greater openness and transparency in government.

37.5. Stage two of the medal review process was not open and transparent.

37.6. Mr Farrar submitted a rebuttal to Brigadier Parritt's review which he believes was not provided to the AMSC.

37.7. There are doubts about the AMSC's independence from the Ministry of Defence.

37.8. The Deputy Prime Minister, in a letter to Colonel Scriven on the subject of NDM, stated:

> …I agree with you that the HD Committee should do more to achieve transparency and accountability so that veterans can understand fully the decisions taken.

37.9. It is difficult to understand why the reasons and justification for the decision on Korea post-Armistice medallic recognition should be kept secret.
37.10. The inconsistency of approach with other Commonwealth countries calls for an explanation.
37.11. Disclosure of the information would enable a more informed public debate on these issues.

The Cabinet Office's reply dated 27 February 2017

38. The Cabinet Office makes the following points:
38.1. It confirms that it agrees with the Commissioner in relation to the information which the Commissioner held should not be disclosed.
38.2. Australia, New Zealand and Canada are separate sovereign states which happen to be members of the Commonwealth. Their different medallic recognition policies are entirely irrelevant to the question of the public interest balance.
38.3. It is wrong to submit that any greater need to afford a safe space to the HD Committee is countervailed by a greater public interest in disclosure and contradicts para 3 of the confidential annex.
38.4. A complaint about general lack of transparency should have been given very little, if any weight.
38.5. The impartiality or otherwise of the chair of the AMSC is not relevant the appeal.

Mr Farrar's reply dated 3 March 2017

39. Mr Farrar submits that the impartiality of the chair of the AMSC is relevant. It is a vital aspect of the public interest to be able to demonstrate that the process was fair and unbiased.

Legal framework

40. The relevant parts of s 1 and 2 of the FOIA provide:

> General right of access to information held by public authorities.
> 1(1) Any person making a request for information to a public authority is entitled—
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
> (b) if that is the case, to have that information communicated to him.
>
> Effect of the exemptions in Part II.
> .....
> 2(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or

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

41. Section 35(1)(a) of FOIA provides as follows:

> 35 Formulation of government policy, etc.
> (1) Information held by a government department or by the Welsh Assembly government is exempt information if it relates to—
> (a) the formulation or development of government policy

42. The question of whether the policy-making process is still 'live' is an issue that goes to the assessment of the public interest balancing test (**Morland v Cabinet Office** [2018] UKUT 67 (AAC).

43. The inter-section between the timing of the FOIA request and its relevance to the public interest balancing test is helpfully analysed by the First-tier Tribunal in **Department for Education and Skills v Information Commissioner and the Evening Standard** (EA/2006/0006) ("**DFES**") at paragraph 75(iv)-(v) (a decision approved in **Office of Government Commerce v Information Commissioner** [2008] EWHC 774 (Admin); [2010] QB 98 ("**OGC**") at paragraphs 79 and 100-101):

> (iv) The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy. We note that many of the most emphatic pronouncements on the need for confidentiality to which we were referred, are predicated on the risk of premature publicity. In this case it was a highly relevant factor in June 2003 but of little, if any, weight in January 2005.
>
> (v) When the formulation or development of a particular policy is complete for the purposes of (iv) is a question of fact. However, s. 35(2) and to a lesser extent 35(4), clearly assume that a policy is formulated, announced and, in many cases, superseded in due course. We think that a parliamentary statement announcing the policy, of which there are examples in this case, will normally mark the end of the process of formulation. There may be some interval before development. We do not imply by that that any public interest in maintaining the exemption disappears the moment that a minister rises to his or her feet in the House. We repeat – each case must be decided in the light of all the circumstances. As is plain however, we do not regard a "seamless web" approach to policy as a helpful guide to the question whether discussions on formulation are over.

44. The public interest can wax and wane and the need for a safe space changes over time in relation to development of policy. If disclosure is likely to intrude

upon the safe space then there will, in general terms, be significant public interest in maintaining the exemption, but this has to be assessed on a case by case basis.

45. S 37 FOIA provides where relevant as follows:

> **37 Communications with Her Majesty, etc. and honours.**
> (1) Information is exempt information if it relates to –
> …
> (b) the conferring by the Crown of any honour or dignity.

46. Sections 35 and 37 are not absolute exemptions. The Tribunal must consider if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

47. In considering the factors that militate against disclosure the primary focus should be on the particular interest which the exemption is designed to protect, in the case of s 35 this is the efficient, effective and high-quality formulation and development of government policy (see e.g. para 57 in the FTT decision in **HM Treasury v ICO** EA/2007/0001).

48. The Upper Tribunal in **Morland v Cabinet Office** [2018] UKUT 67 (AAC) held that:

> …the purpose of section 37 itself is to protect the fundamental constitutional principle that communications between the Queen and her ministers are essentially confidential. Section 37(1)(a)-(ad)…specifically protects the actual communications with the Sovereign and certain other members of the Royal Family and the Royal Household. Section 37(1)(b) must be concerned with activities other than communications with the Sovereign. The logical purpose of section 37(1)(b) is to ensure candour and protect confidences in the entire process of considering honours, dignities and medals.

49. The balance of public interest should be assessed as it stood at the time of the outcome of the internal review (**Savic v ICO AGO and CO** [2016] UKUT 0534 (AAC) at para 10).

50. The **APPGER** case gives guidance on how the balancing exercise required by section 2(2)(b) of FOIA should be carried out:

> … when assessing competing public interests under FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This … requires an appropriately detailed identification of, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure of the relevant material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote.

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

52. When a qualified exemption is engaged, there is no presumption in favour of disclosure. The proper analysis is that, if, after assessing the competing public interests for and against disclosure having regard to the content of the specific information in issue, the Tribunal concludes that the competing interests are evenly balanced, we will not have concluded that the public interest in maintaining the exemption (against disclosure) outweighs the public interest in disclosing the information (as section 2(2)(b) requires) (**Department of Health v Information Commission and another** [2017] EWCA Civ 374).

The role of the Tribunal

53. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Evidence and submissions

54. The Tribunal was provided with a number of bundles of documents which it took account of where relevant.

Cabinet Office submissions dated 20 April 2018

55. The overall purpose of s 37 as a whole is to protect the fundamental constitutional principle that communications between the Queen and her advisors are essentially confidential. This heightens the importance of a safe space for discussion when considering the public interest balance in relation to s 37(1)(b).

Submissions of Mr Farrar dated 4 May 2018

56. The youngest member of the armed forces who served in post-Armistice Korea is 80. It is in the public interest for maximum transparency on the subject to be provided.

57. The *Agreed guidelines on the conditions and the criteria surrounding the award of Military Campaign Medals and related issues* ('the Guidelines') issued in October 2014 provide:

> …there is at the same time a need to maintain a degree of consistency between British practices and those of allies and friends, with whom military deployments have been made and will continue to be made, to avoid a sense of injustice on the part of British

service personnel and veterans compared to others with whom they have served in the same campaigns.

58. Correspondence from the MoD and the Cabinet Office show that they considered that decisions by other Commonwealth countries had no bearing on the decision the British Government might make under similar circumstances. This suggests that the guidelines were ignored by the HD Committee. It is in the public interest to know if the HD Committee was provided with the Guidelines, if not, why not, and why they were not followed.

59. All five factors set out in para 4 of the Guidelines concerning exposure to a significant degree of risk were present post-Armistice. It is in the public interest to know if these factors were taken into account by the HD Committee in reaching its decision on the Korea post-Armistice medal.

60. It is in the public interest to know why the Cabinet Office wishes to keep this information out of the public domain. It is of public interest to know why the British practice is contradictory to the medallic recognition by Commonwealth allies for the same service.

61. Veterans were promised an open and transparent medal review. They do not know what information the HD Committee had before it in relation to the Korea post-Armistice medal. This information should be disclosed so they can understand why their service has not been recognised.

The Commissioner's submissions dated 22 May 2018

62. The Commissioner accepts that the constitutional principle underpinning s 37 heightens the importance of a safe space for discussion. The Commissioner drew a distinction between information that recorded confidential discussions which the Commissioner found to be created in a safe space and to be exempt from disclosure and information that did not record confidential discussions, in relation to which safe space and chilling effect arguments were weak. Where information does not record a confidential discussion, it does not engage the constitutional principle.

Discussions and Conclusions

The scope of the appeal

63. We have had no evidence or submissions in relation to (a) the conclusion by the Commissioner that the Cabinet Office did not hold certain information and (b) the conclusion by the Commissioner that the Cabinet Office was entitled to withhold certain information.

64. For the reasons set out below, we have concluded that the Decision Notice is wrong in law because we have assessed the public interest balance differently

and decided that the Cabinet Office is entitled to withhold certain information which the Commissioner decided should be disclosed. We must therefore issue a fresh Decision Notice. In making this fresh decision it is our view that we are required to look at all the issues that arise out of the request and our jurisdiction is not limited to those challenged on appeal.

65. The Decision Notice decided that the Cabinet Office did not hold information relating to the independent review team. We have heard no submissions on this point. We note that paragraph 43 of the First Tier Tribunal's decision in **Davies v Information Commissioner and the Cabinet Office** EA/2017/0006 provides compelling reasons for that tribunal's conclusion that the Cabinet Office did on the balance of probabilities hold information relating to the independent review team. The date of the request is later in this case, and therefore this difference does not affect the reasoning in **Davies.** We are not bound by the decision in **Davies,** but we find that the facts in this case are materially identical and that the reasons for that tribunal's decision are persuasive and compelling. On this basis we conclude that the Cabinet Office did, on the balance of probabilities, hold information relating to the independent review team.

66. We are conscious that we have not had submissions or evidence on this point from any of the parties. We considered whether it would be in accordance with the overriding objective to seek submissions or evidence from the parties on this issue before making a decision. We concluded, in the light of the time that this case has already taken, that it would not be proportionate or in the interests of justice to delay the case further. The Cabinet Office and the Commissioner had the opportunity to make submissions on this identical point in the case of **Davies**. Mr Farrar suffers no prejudice because it is a decision in his favour. Further, we have ordered that the Cabinet Office either disclose the information or issue a new s 17 response in relation to this aspect of the claim. This gives the Cabinet Office the opportunity to review its position in the light of **Davies,** and to raise any points specific to this particular case that it would have raised in submissions.

67. In relation to the information which Commissioner decided could be withheld, we consider that we are fully aware of the arguments that the Cabinet Office would make in relation to this part of the minutes. The Cabinet Office does not take a contents-based approach and therefore its submissions apply equally to all the requested material relating to the HD Committee. The Commissioner's position is set out fully in relation to this material in the Decision Notice and in her submissions. Mr Farrar has not seen the material and therefore his submissions, by necessity, are intended to apply across the board. We therefore conclude that it is proportionate and in the interests of justice to proceed on the basis of the information before us and we consider afresh where the public interest balance lies in relation to all the information.

The scope of the request

68. Neither the Commissioner nor the Cabinet Office appear to have considered whether the scope of the request was limited to information relating to the decision taken by the HD Committee relating to the Korea post-Armistice Medal Review.

69. We find that the request in paragraph 2 for '[a] list and copies of documents provided to the HD Committee […] at its meetings pertaining to the Post-Armistice Korea Medal review' is not limited to documents relating to that particular medal. 'Pertaining to' refers to the meetings, rather than the documents.

70. In contrast we find that the request for minutes in paragraph 5 is limited to the sections of the minutes which indicate '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.'

71. In relation to the rest of the request, we find that the wording of the paragraphs makes it clear that the scope is not so limited.

Aggregation

72. We have looked at the aggregate effect of the s 35 and s 37 exemptions in an impressionistic rather than a mathematical way, considering where the different exemptions add weight and, conversely, where they overlap. While carrying out this exercise we have kept in mind the different interests protected by the different exemptions.

The relevant date at which to assess the public interest

73. The public interest balance has to be assessed at the time of the request or at the latest at the date of the outcome of the internal review which took place in this case on 4 March 2016. The Tribunal cannot take account of matters that have happened since then, save where they shed light on the position at the relevant date.

A contents-based approach

74. In our view it is not appropriate to assess the public interest in relation to a particular category of document (here, for example, 'minutes of the HD Committee'), irrespective of content. We find the following paragraphs in the Upper Tribunal's judgment in **Department of Health v Information Commissioner** [2015] UKUT 159 to be of assistance in relation to a contents-based approach to public interest:

30. So a contents based assertion of the public interest against disclosure has to show that the actual information is an example of the type of information within the class description of an exemption (e.g. formulation of policy or Ministerial communications or the operation of a Ministerial private office), and why the manner in which disclosure of its contents will cause or give rise to a risk of actual harm to the public interest. It is by this route that:

i) the public interest points relating to the class descriptions of the qualified exemptions, and so in maintaining the exemptions, are engaged (e.g. conventions relating to collective responsibility and Law Officers' advice) and applied to the contents of the information covered by the exemption, and
ii) the wide descriptions of (and so the wide reach of) some of the qualified exemptions do not result in information within that description or class that does not in fact engage the reasoning on why disclosure would cause or give rise to risk of actual harm (e.g. anodyne discussion) being treated in the same way as information that does engage that reasoning because of its content (e.g. examples of full and frank exchanges).

31. That contents approach will also highlight the timing issues that relate to the safe space argument. The timing issues are different to the candour or chilling effect arguments in that significant aspects of them relate to the likelihood of harm from distracting and counterproductive discussion based on disclosure before a decision is made.

32. Finally, I record that I agree that a contents approach does not mean that the information is not considered as a package (see Foreign and Commonwealth Office v Information Commissioner and Plowden [2013] UKUT 275 (AAC) at [16]). Indeed, such a consideration accords with the nature of a contents-based assessment because it reflects the meaning and effect of the content of the relevant information.

75. These parts of the judgment remain binding on us. Further the Court of Appeal [2017] EWCA Civ 374 approved a contents-based approach at para 46 (my emphasis):

I agree with Charles J that, when a qualified exemption is engaged, there is no presumption in favour of disclosure; and that the proper analysis is that, if, after assessing the competing public interests for and against disclosure **having regards to the content of the specific information in issue**, the decision-maker concludes that the competing interests are evenly balanced, he or she will not have concluded that the public interest in maintaining the exemption (against disclosure) outweighs the public interest in disclosing the information (as section 2(2)(b) requires.)

76. We note the decision in **Plowden** referred to by the Upper Tribunal above, and we look at the information in context, i.e. on the basis that it appears in the minutes of discussions of the HD Committee. However, this does not mean that we must treat the document as a whole without regard to its contents. The FOIA regime is concerned with information not documents. When considering the public interest, we must look at the particular information contained in the

document (see e.g. paras 33-36, **DBERR v Information Commissioner and Friends of the Earth EA/2007/0072.**

77. Further, we note that some of the information contained in the documents relates to different matters which were at different stages of 'liveness' at the date of the request. This makes it difficult to assess the public interest in disclosing or not disclosing the document as a whole.

Timing and the public interest

78. The question of the timing of the request is important because of the risks of the adverse effects of premature publicity on the particular interest which s 35 is intended to protect: the efficient, effective and high-quality formulation and development of government policy.

79. We do not consider that the question of the 'liveness' of a policy nor the question of the effect on the public interest should be seen as binary. Looking firstly at the effect on the public interest, it is clear that the public interest waxes and wanes with the circumstances: it is not a question of any public interest in maintaining a safe space disappearing the moment a policy is announced. The corollary of this, in our view, is that a policy's liveness can also wax and wane. We do not accept that the policy development process should be seen a seamless web, because this suggests that the policy development process is always live. Nor do we accept that a policy development process is necessarily 'dead' the moment a policy is announced publicly.

80. All the circumstances must be taken into account in order to assess, at the relevant point in time, whereabouts on the spectrum the facts fall: a policy in the very early stages of development or at a critical point in its development process would fall near the live end of the spectrum and consequently the weight of the public interest in maintaining the exemption would be much greater. A policy which is announced with no intention of further work would fall near the other end of the spectrum. Somewhere in between lie policies which have been 'placed on the backburner', or that are due to be reviewed after a certain period of time. The policy development process does not move smoothly from one end of the spectrum to the other – as stated above, its 'liveness' waxes and wanes. The task for the Tribunal is to consider, taking into account the facts before it on the state of policy development at the relevant date, what impact the disclosure of this particular information at the relevant time might have on the particular interest of protecting the efficient, effective and high-quality formulation of government policy.

81. The information requested by Mr Farrar contains reference to other claims for medallic recognition, including the NDM.

82. On the facts we find that, at the relevant time, there was no ongoing process of substantive policy formulation and development on whether or not to introduce the NDM. The question of whether, at some point, that process would be rekindled was explicitly left open. On occasion, the decision on whether or not to re-open that substantive process was considered and taken. For example, the question of whether or not to re-open the process was considered and taken at the meeting of the HD Committee on 23 February 2015. We also accept that it was likely that the question of whether or not to re-open the substantive discussion on NDM would have to be considered again in the future. Further there were related discussions and decisions as to how to respond to correspondence on the issue from the campaign.

83. In relation to the other claims for medallic recognition the government had made clear that, absent significant new evidence of injustice, there would be no reconsideration of the claims. This was confirmed in relation to the Korea post-Armistice medal in, for example, the letter to Mr Farrar from Gareth Rogers in the Honours and Appointments Secretariat dated 29 October 2015 which states: 'I can confirm that there are no plans for further work on this issue.'

84. Leaving aside the broader chilling effect arguments, which we consider below, we have asked ourselves whether, in the light of all the circumstances, the efficient, effective and high-quality formulation and development of government policy would be harmed or prejudiced by disclosure of this information in March 2016. In relation to the information which relates to the Korea post-Armistice medal and other medallic claims we consider that the risk to the future policy development process by their disclosure in March 2016 rather than at a later date is extremely small, and we conclude that this adds little weight to the public interest in maintaining the exemption. These matters had been concluded in July 2014 with extremely limited opportunity for re-opening the issue. We do not think there is any risk of an adverse impact on the related subordinate policy development issues i.e. the question of whether or not to re-open the issue, or on how to respond to correspondence from the campaigners.

85. In relation to the NDM, the government had left the door open in July 2014, but only by a crack. Any consideration which had taken place between 2015 and 2017 had not been a substantive reconsideration of the matters discussed at the meetings on 29 January 2014 and 9 June 2014. There is a slim chance that the matter will be substantively re-opened, and if so, a slim chance that the issues would remain so similar that revealing certain aspects of the discussions in 2014 would have an adverse impact on policy development. We find that this adds some, but limited, additional weight to the public interest balance in relation to the sections which we have decided should be redacted. In relation to the matters which we have decided should be disclosed, we do not think that there is more than a negligible risk that disclosure of this particular

information would have such an adverse impact. We do not think there is any risk of an adverse impact on the related subordinate policy development issues i.e. the question of whether or not to re-open the issue, or on how to respond to correspondence from the campaigners.

The public interest under s 37 and s 35

86. The purpose of s 37(1)(b) is to ensure candour and protect confidences in the entire process of considering honours, dignities and medals. We accept that the HD Committee is a Committee that makes recommendations that are put before The Queen. We accept that underlying s 37 as a whole is the fundamental constitutional principle that communications with The Queen are confidential.

87. We do not accept that this means that minutes of the HD Committee or the documents put before it should never be disclosed. In our view, the content and context of the information will affect the public interest balance. Where the information contains or reveals confidential information or candid discussions, the public interest in maintaining the exemption will be stronger. Where that confidential information or those candid discussions result directly in recommendations to The Queen, the public interest in maintaining the exemption will be stronger.

88. We accept in relation to some of the requested information that it consists of confidential information or candid discussions. Some of it, in relation to specific claims for medallic recognition, results in recommendations that are put before The Queen. We accept that revealing that information might compromise the candour of future discussions. We find that this carries significant weight in the public interest balance.

89. We accept that this effect on the candour of future discussions might also have an adverse effect on future policy formulation under s 35 in this area, in terms of a more general chilling effect. There is a greater expectation of confidentiality in this sphere compared with other areas of policy development because of the role of The Sovereign and the underlying constitutional principle. We are therefore prepared to accept the risk of a chilling effect, even taking account of the robustness expected of civil servants. We find that the s 35 'chilling effect' mainly overlaps with the matters set out above and therefore only adds limited additional weight. It does however add some weight: it is policy that is being discussed rather than a one-off decision on whether to award an individual a medal, and that has been statutorily recognised as a particular interest which is worthy of specific protection under s 35.

90. In relation to the rest of the information, we do not accept that revealing the information could compromise the candour of future discussions. It is either a fairly anodyne description of the issues and an outline of the action that would

be taken, or it is information the substance of which is already in the public domain. We conclude that the public interest in maintaining the exemptions, taken together, in relation to this part of the information is very limited.

91. In terms of the public interest in disclosure there are many matters raised in this case, and the other cases we heard at the same time, that we do not think weigh in the balance, because they are not interests that would in fact be served by the disclosure of the particular information.

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

93. Firstly, whilst we accept that much other information relating to the medals process has now been put in the public domain, we find that the general public interest in transparency in decision making in the medals process is heightened because the process was said, in the Holmes Report, to be 'vulnerable to the charge of being a "black box" operation, where those outside have no knowledge of what is being decided or why'. It is clear that matters have moved on since the Holmes Report to some extent, but we find that there remains an enhanced general public interest in transparency in relation to the operation of the entire process. We do not accept that this it is an error of law to take this factor into account.

94. Secondly, we accept that there are a large number of people affected by the claims for medallic recognition that were considered in these meetings and there is consequently a substantial public interest in knowing how those matters were finally concluded. This has a greater weight in relation to a full set of unredacted documents, and we find that this interest will be only be served to a fairly limited extent by the disclosure of the remaining information.

95. Thirdly, we accept that there is a legitimate interest in those people affected by the 21 claims that the AMSC agreed did not need to be subject to detailed review by the independent review team in knowing what discussions took place in relation to their claims when they came before the HD Committee. Again, whilst this has more significant weight in relation to the full, unredacted minutes, it will only be served to a much more limited extent in relation to the disclosed sections.

96. Finally we accept that there is some public interest in knowing the HD Committee's approach to the relevance of the medals awarded in similar circumstances by other Commonwealth nations, in the light of the correspondence that suggest that this is an irrelevant factor compared to the guidance later adopted by the HD Committee which suggests that this is a relevant factor. Having reviewed the closed information in full, we conclude that neither the disclosure of a full set of unredacted information nor the disclosure of the remaining information will cast any significant light on this

issue and consequently it does not add materially to the public interest in disclosure.

97. Overall, we find that there is a significant public interest in the disclosure of the full information and a more limited public interest in disclosure of the remaining information.

98. Despite the significant public interest in disclosure of the full set of minutes/documents set out above, we conclude that for certain sections this is outweighed by a very strong public interest in maintaining the exemption. We have set out in summary our reasons for concluding that there is a very strong interest above.

99. There are some sections of the minutes or documents which do not relate to matters arising out of the military medal review. In relation to those sections we have concluded that the public interest arguments in favour of disclosure set out above do not apply. On the other hand, some of the arguments in favour of maintaining the exemptions are of more general application. In relation to these sections of the minutes we have concluded that the public interest favours maintaining the exemptions.

100. In relation to the rest of the information we have concluded that the public interest in maintaining the exemptions is very limited. For the reasons set out above we have concluded that there is some public interest in disclosure of this information and in our view, it outweighs the very limited public interest in maintaining the exemption.

101. Our decision is unanimous.

Judge of the First-tier Tribunal
Date: 20 February 2019