

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 February 2024

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

Decision (including any steps ordered)

1. The complainant has requested honours related information regarding Sir Archibald David Stirling and Lieutenant Colonel Robert Blair "Paddy" Mayne – two founding members of the SAS. The Cabinet Office ("CO") denied holding information relating to Lieutenant Colonel Mayne. It said that any other information it held within the scope of the request was exempt under section 37(1)(b) (honours) and section 23 (security bodies) or section 24 (national security) in the alternative. CO upheld this position after internal review. During the course of the Commissioner's investigation, the complainant withdrew that part of his complaint which related to section 23 or section 24.
2. The Commissioner's decision is that CO does not hold any information relating to Lieutenant Colonel Mayne. The other information that it holds within the scope of the request is exempt under section 37(1)(b). However, CO failed to comply with its obligations under section 1, section 10 and section 17 in failing to substantively respond within the time allowed by those provisions.
3. The Commissioner does not require further steps.

Request and response

4. On 25 November 2022, the complainant requested information of the following description:
5. "I would like to request the following information via the Freedom of Information Act and the Environmental Information Regulations.

My request concerns honours (proposed and actual) for the following two individuals who served with distinction with [sic] the Second World War.

The late Sir Archibald David Stirling (born 15 November 1915 and died 4 November 1990)

The later Lieutenant Colonel Robert Blair "Paddy" Mayne (born 11 January 1915 – 14 December 1955).

I note the Information Commissioner's ruling that the relevant honours committee/bodies should be more prone to disclose information if the relevant honours recipient/nominee has been dead for ten years or more.

I note that the information relating to Lieutenant Colonel Mayne is likely to be more than sixty years old.

Please note that I am interested in all honour's [sic] recommendations irrespective of whether the original recommendation for an honour was proceeded with or not and irrespective of whether the honour was awarded or refused.

Please note that the reference to the Cabinet Office in the questions below should be taken to mean the relevant honours committee(s) and or Number 10 Downing Street and or the Prime Minister's private office and or those parts of the Cabinet Office specifically concerned with Honours recommendations and or the processing of those recommendations.

Please note that I am interested in information relating to ALL honours including but not limited to Knighthoods, MBEs, CBEs and or those honours in the personal gift of the Sovereign and or any military honours and decorations for which the Cabinet Office might hold information.

1. Does the Cabinet Office hold paper and or electronic or digital files [or similar] which relate to the issue of honours [proposed and or actual] for each of the two aforementioned individuals. If the answer is yes, can

you provide a copy of both files, their covers and title pages as well as every page and every single piece of paper within the files. Please also provide a copy of the back cover of the files. Please note that I am interested in receiving a copy of the entire contents of the files even if specific honours are not mentioned in that file.

2. Irrespective of whether you hold such files (or similar) can you list each and every honours recommendation for the aforementioned individuals. I am interested in all recommendations irrespective of who or what body is making the recommendation. In the case of each recommendation can you identify the relevant honour, the date the recommendation was made and the relevant Honours list. In the case of each recommendation can you state whether the recommendation was approved or not. In the case of each recommendation which was approved can you state whether the Honour was awarded or not and or whether it was refused.

3. In the case of each recommendation can you identify the individual and or organisation behind the recommendation. Please do not redact the names of the individual(s) making the recommendation if that individual was a serving or former prime minister, a member of the royal family, a serving or retired military officer, a serving or former cabinet minister including but not limited to Secretaries of State for War/Defence, a serving or former government minister or a serving or former MP.

4. In the case of recommendation can you provide a copy of the recommendation.

5. Did the Cabinet Office write to and or communicate with any of the individuals or organisations responsible for any of the recommendations about the recommendations. If the answer is yes, can you provide copies of the correspondence.

6. Did any of the individuals or organisations responsible for any of the aforementioned recommendations write to and or communicate with the Cabinet Office about the recommendations. If the answer is yes, can you please provide copies of this correspondence and communications."

6. On 26 April 2023, CO responded. It had, in the interim, written to the complainant to say that it needed further time to consider the balance of public interest. It subsequently explained to the Commissioner that:

"The complainant was provided with the extension letters and the extended deadline(s). We did not inform the complainant of the reasons for the delay".

7. It denied holding information relating to Lieutenant Colonel Mayne. Where the complainant was seeking information relating to military awards or honours, it directed them to the Ministry of Defence. It explained that any information it held within the scope of the request was being withheld under section 37(1)(b) and section 23 and/or section 24 of FOIA.
8. The complainant requested an internal review on 27 April 2023 on three grounds:
 1. They disputed the assertion that CO did not hold information relating to Lieutenant Colonel Mayne.
 2. They did not agree that section 37 could apply to information of the likely age of the requested information.
 3. They argued that disclosure of this information would not have any serious implications for national security due to its age.
9. CO sent them the outcome of its internal review on 26 June 2023. It upheld its original position.

Scope of the case

10. The complainant contacted the Commissioner on 21 July 2023 to complain about the way their request for information had been handled, referring to the position of the Cabinet Office and the time taken to respond to their request.
11. During the course of the Commissioner's investigation, the complainant withdrew their complaint with respect to any information within the scope of the request caught by section 23. The Commissioner had drawn to their attention that information about the founding members of the SAS (the two named individuals) is likely to include some information caught by section 23 and would therefore be exempt under that provision. This is an absolute exemption which means the balance of public interest in maintaining that exemption does not apply. Section 24 was considered in the alternative to section 23. Now that section 23 is not being included for consideration in this case, the Commissioner has not gone on to consider whether CO could rely on section 24 in the alternative to it.
12. The Commissioner considers that the scope of his investigation is therefore to determine:

- a) whether the Cabinet Office holds any information within the scope of the requests regarding Lieutenant Colonel Mayne;
- b) whether the Cabinet Office is entitled to rely on section 37(1)(b) as a basis for withholding that information within the scope of the requests which is not already exempt under section 23; and
- c) the delays in the Cabinet Office's handling of this request and whether they were permitted under the Act.

Reasons for decision

Does the Cabinet Office hold information relating to Lieutenant Colonel Mayne?

- 13. Section 1 states that "(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."
- 14. In cases where there is a dispute as to whether information is held, the Commissioner considers the matter to the civil standard, that is, on the balance of probabilities.
- 15. The Commissioner asked CO a number of questions about its searches and the likelihood of such searches being fruitful.¹
- 16. CO said:

"The Cabinet Office coordinates the honours system as a whole but it is only directly responsible for civilian honours. Lt Col Mayne was never awarded any form of honour, civilian or military, and there is no record in our files of an unsuccessful nomination. He did, however, hold several military medals and decorations; thus in our FOI response we directed [the complainant] to the MoD [Ministry of Defence]. The MoD is responsible for managing eligibility for military honours and medals, and holds the historic records. It is our reasonable expectation that should

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/key-questions-for-public-authorities-foi-act-2000/#1>

any record in scope of the request exist, it would likely be in files held by the MoD.”

17. It also responded to all the Commissioner’s questions about its searches it undertook and set out further information about this.
18. The Commissioner is satisfied with this explanation and has concluded that, on the balance of probabilities, CO does not hold information relating to Lieutenant Colonel Mayne. The Commissioner makes no findings as to whether such information is held by the MoD.

Section 37

19. Section 37(1)(b) states that information is exempt if it relates to the conferring by the Crown of any honour or dignity.
20. The request specifically seeks information which relates “to the issue of honours [proposed and or actual] for each of the two aforementioned individuals”.
21. The Commissioner has seen the withheld information. He is satisfied that it falls within the scope of the exemption at section 37(1)(b) because it relates to the conferring of honours. He is therefore satisfied that section 37(1)(b) is engaged.
22. Section 37(1)(b) provides a qualified exemption and is therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest test

Public interest in favour of disclosure

23. The Cabinet Office said:

“We accept that people might be interested in knowing the process behind decisions whether to award an honour to someone whose wartime exploits are a matter of public record, but we consider a general interest in that information to be significantly different from the public interest. Those who were involved in the process, even though it was over thirty years ago, took part with an expectation of confidence. We acknowledge the public interest in disclosure [it then referred to the work of the late David Stirling]. We fully appreciate the importance of transparency wherever possible and the public interest in understanding the workings of the honours system

24. The complainant emphasised the age of the information and the limited likelihood of harm where it is disclosed. Their arguments focused on the likelihood of harm to national security because, at the time they made those arguments, related exemptions were still under consideration. However, the Commissioner accepts that their arguments about the age of the information are transferrable to the consideration of the public interest regarding section 37.

Public interest in favour of maintaining the exemption

25. CO argued that it was important to maintain the integrity of the honours system and "to ensure that nominators can continue to nominate in confidence, and assessment of nominations may continue to be taken on the basis of full and honest information". It stressed the need for a safe space in which such matters can be deliberated upon.
26. It drew attention to the fact that Parliament specifically identified the importance of the honours exemption for protecting honours information. Under section 63(3), subject to the balance of public interest, honours information should remain exempt for sixty years². It argued that there was an inherent public interest in "the protection and preservation of the integrity and robustness of the honours system".
27. It said:

"Maintaining the exemption in this case will help ensure that those involved in the honours system can take part on the understanding that their confidence will be honoured and that decisions about honours are taken on the basis of full and honest information about the individual concerned.

We consider it essential that all those involved in the honours system are given the courtesy of confidentiality for a period of time after their case has closed. We consider it is our responsibility to respect the confidentiality of the process and system, as well as the confidentiality that the individuals involved would have undoubtedly expected at the time".

28. It also commented that disclosure may affect the future behaviour of those nominating, those nominated and those whose opinions are sought as part of this process. The Commissioner is, however, unclear

² <https://www.legislation.gov.uk/ukpga/2000/36/section/63>

from CO's arguments as to how the future behaviour of those nominated would be affected by disclosure.

The Commissioner's decision

29. The Commissioner's view is that there is a strong public interest in openness and transparency about the nature and extent of the deliberation process in relation to the conferring of an honour or dignity. However, this has to be balanced against that in order for the honours system to operate effectively and efficiently. It is important that there is a degree of confidentiality and a safe space for those involved in the process to discuss the issues freely and frankly that are at hand.
30. The Commissioner recognises that there are circumstances when the public interest strongly favours disclosure. This might arise, for example, where it becomes widely known (and confirmed by official sources) that the individual to whom an honour had been awarded has committed serious crimes.
31. In this case, the Commissioner recognises that David Stirling is an interesting historical figure who has already been the subject of books and television documentaries. He is, in other words, an individual about whom the public is understandably curious. However, the fact that many members of the public are interested in information about David Stirling does not equate to a public interest in disclosure. The Commissioner has not identified any additional factors which might add weight to the public interest in disclosure nor did the complainant draw any to his attention.
32. The Commissioner recognises that the age of the withheld information could reduce the public interest in maintaining the exemption. It is over 30 years old. The Commissioner notes the effect of section 63 (see Note 2) which recognises that honours information loses sensitivity with age. However, this could be seen as a "double edged sword" in that it also recognises an inherent public interest in protecting the confidentiality of honours information for a considerable length of time.
33. In light of the above, the Commissioner has concluded that the public interest favours maintaining the exemption. In reaching this view, he has noted that, while there is a public interest in transparency about the honours system, there is little specific public interest in disclosing the information related to David Stirling. Based on his consideration of the content of the information itself, the Commissioner has concluded that it would not add anything significant to the public's knowledge of this historical figure. In all the circumstances he therefore finds that, in respect of this case, there continues to be a public interest in protecting the integrity of the honours system which outweighs the public interest in disclosure.

Procedural matters

34. Sections 1, 10 and 17 of the FOIA work together to oblige a public authority to confirm requested information is held and, where it is held, to provide that information or to explain why that public authority is not obliged to do so. This must be done within 20 working days.³

35. In limited circumstances, a public authority can extend the time for compliance with a request in order to consider the balance of public interest.

36. In this case, CO took over 5 months to provide the complainant with a response.

37. In mitigation, it informed the Commissioner:

“The 20 working day period for response commenced on 29 November 2022 and the response was issued on 26 April 2023. Although this is a period of five months, the first month was the legally permitted time for compliance, and the second month was the first extension period”.

38. It then set out what steps it was taking during this period which contributed to the delay. The Commissioner notes that, at the time, it was seeking reliance on section 23 (or section 24 in the alternative) for some of the information. The complainant has since withdrawn his complaint regarding section 23.

39. By the Commissioner’s calculation, it took 102 working days to provide a response. Section 10 states that a public authority has 20 working days to provide a response. Section 10(3) allows a public authority to take further time “that is reasonable in the circumstances” to consider the balance of public interest. The Act does not define this further.

40. The Commissioner’s guidance says:

“FOIA does not define what a ‘reasonable’ extension of time might be. However, our view is that you should normally take no more than an additional 20 working days to consider the public interest. This means the total time spent dealing with the request should not exceed 40 working days. An extension beyond this should be exceptional.

Examples of such circumstances could include extreme pressures placed on you by a major incident or exceptional levels of complexity involving

³ <https://www.legislation.gov.uk/ukpga/2000/36/contents>

a number of external parties. You will need to demonstrate that the length of any time extension is justified".⁴

41. Taking off 20 working days for the standard requirements of section 10, this still means that it took CO a further 82 working days to provide a refusal notice. Section 23 is an absolute exemption – it is not qualified by a public interest test. CO initially argued section 24 (national security) in the alternative to section 23. Section 24 is a qualified exemption. It therefore took a further 82 working days to conclude the balance of public interest in respect of both section 24 and section 37.
42. The Commissioner appreciates the helpful explanations provided to him by CO as to the reasons for the amount of time taken. Nonetheless, in respect of section 10(3), he does not consider that there are significantly exceptional circumstances in this case that would justify a delay of this length to consider the balance of public interest.
43. The Commissioner has therefore concluded that in failing to consider the balance of public interest within a reasonable time, and in relation to the time taken to provide the complainant with a substantive response, CO did not comply with its obligations under section 1, section 10 and section 17 of the Act.

⁴ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/time-limits-for-compliance-under-the-freedom-of-information-act-section-10/#whatarethe>

Right of appeal

44. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

45. 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.
46. 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

Alexander Ganotis
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF