

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 19 March 2019

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

#### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the Cabinet Office seeking a copy of the 2017 minutes of the Committee on the Grant of Honours, Decorations and Medals (HD Committee) meeting that related to the subject of the National Defence Medal. The Cabinet Office sought to withhold the information on the basis of sections 35(1)(a) (formulation and development of policy) and 37(1)(b) (conferring of any honour or dignity) of FOIA. The Commissioner accepts that the withheld information is exempt from disclosure on the basis of each exemption. However, she has concluded that for each exemption the public interest favours disclosure of the information.
  2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
    - Provide the complainant with the parts of the minutes of the HD Committee of 1 February 2017 which relate to the National Defence Medal.
  3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.
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## Background

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4. 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 request, including the introduction of new awards. The Committee's more general recommendations are also put forward for The Sovereign's formal approval.
5. This request arises out of a campaign for the introduction of a National Defence Medal (NDM). The NDM which is proposed is a medal in recognition of service, which subject to certain criteria, would be awarded to all Regular and Reserve servicemen and women who have served in the Armed Forces since the end of the Second World War. It is intended to honour veterans who did not participate in a specific conflict, but who stood ready to do so as members of the Armed Services.
6. In May and June 2012 Sir John Holmes conducted an independent review of the policy concerning military medals including the case for NDM. In respect of the latter it concluded that:

*'Its merits, and examples from other countries, should be looked at by a Cabinet Office-led working group in the first place, before consideration by the reconstituted HD Committee and its sub-committee. Any recommendations should be made initially to the government, rather than The Queen, and would then need to be the subject of wider political and other consultation, since this is a decision of broad national significance which would require a broad political and public consensus.'*<sup>1</sup>

7. Following the 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. As a result of this further work, such claims, including the NDM were considered by the HD Committee in 2014.
8. On 29 July 2014 a written ministerial statement from Baroness Stowell informed the House of Lords that the review was complete, stating that:

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<sup>1</sup> [Holmes Report](#), page 14

*'Sir John was 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 had in some case 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...'*<sup>2</sup>

9. 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 that there would be no possibility of reconsideration in the absence of significant new evidence of injustice.
10. The HD Committee's considerations of the merits of the NDM have been the subject of a number of FOI requests which have resulted complaints to the Commissioner and subsequent appeals to the First Tier Tribunal (FTT). For the purposes of this decision notice, whilst noting that decisions of the FTT are not binding on her, the Commissioner has taken in account a number of recent decisions concerning the NDM and/or the HD Committee. Namely:
  - EA/2016/0078 (remitted appeal) which concerned a request for the HD committee minutes from February 2015 concerning the NDM;
  - EA/2017/0295 which concerned a request for the names of the members of the HD committee who did not attend three particular meetings;
  - EA/2016/0281 which concerned a request for various information concerning the Holmes review, including HD Committee minutes; and
  - EA/2018/0098 which concerned a request for HD committee minutes from January and June 2014 concerning the NDM.
11. In all four cases the FTT concluded that sections 35(1)(a) and 37(1)(b) were engaged but for at least some of the requested information the public interest favoured disclosure.

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<sup>2</sup> <https://publications.parliament.uk/pa/ld201415/ldhansrd/text/140729-wms0001.htm>

## Request and response

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12. The complainant submitted a request to the Cabinet Office on 13 July 2018 asking for a copy of the 2017 HD Committee meeting that related to the subject of the NDM.
13. The Cabinet Office responded on 10 August 2018 and confirmed that it held the information falling within the scope of the request but considered it to be exempt from disclosure on the basis of sections 35(1)(a) (formulation and development of government policy) and 37(1)(b) (conferring of an honour or dignity) of FOIA. The Cabinet Office concluded that the public interest favoured maintaining each exemption.
14. The complainant contacted the Cabinet Office on 14 August 2018 and asked it to conduct an internal review of this refusal.
15. The Cabinet Office informed him of outcome of the internal review on 17 September 2018. The review upheld the application of the exemptions cited in the refusal notice.

## Scope of the case

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16. The complainant contacted the Commissioner on 25 September 2018 in order to complain about the Cabinet Office's decision to withhold the information he requested. During the course of the Commissioner's investigation, the complainant confirmed that his request was limited to the parts of the meeting minutes relating to the NDM. Therefore, this decision notice simply considers whether the parts of the minutes of the HD Committee meeting from 1 February 2017 which related to the NDM are exempt from disclosure on the basis of the exemptions cited by the Cabinet Office.

## Reasons for decision

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### Section 35 – formulation and development of government policy

17. 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'*

18. 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.
19. The phrase 'relates to' can be interpreted broadly. This means the information does not itself have to be created as part of the formulation or development of government policy making. Rather, any significant link between the information and the policy making is enough. Information may 'relate to' the activity due to its original purpose when created, or its later use, or its subject matter.
20. 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.
21. Ultimately 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.
22. 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.
23. The Cabinet Office argued that the withheld information related to the government policy on military medals. The Commissioner accepts that the HD minutes in question clearly relate to the formulation and development of government policy in respect of the subject matter in question and therefore the exemption is engaged.

### **Public interest test**

24. 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*

25. The Cabinet Office argued that there is a public interest in maintaining the exemption in order to preserve the safe space required for those involved to formulate and develop policy in this area. In support of this position it explained that there has been ongoing policy formulation and development in terms of responding to the NDM campaign's further arguments for the introduction of such a medal.
26. The Cabinet Office also argued that it is in the public interest that such policy discussions are kept confidential so that ministers and senior officials may candidly discuss the issues at hand, confident that their discussions will remain confidential during that period and will not be prematurely disclosed. Similarly, the Cabinet Office argued that ministers and officials need to be free to take stock and, if necessary, challenge proposals and ideas raised during medals policy development, without concern that any dissenting views expressed in the earlier stages will be released for public scrutiny. The Cabinet Office argued that this is imperative for the delivery of effective government, which relies on sound decision making based on the best advice available.
27. In respect of the particular circumstances of this case, the Cabinet Office argued that at the time of request the NDM issue remained live and subject to lobbying by veterans groups and others. In support of this position the Cabinet Office referred to the Written Ministerial Statement of July 2014 which announced that, in relation to the NDM, 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 reconsidered in the future'*. The Cabinet Office explained that this policy still stands. Therefore, it argued that although ministers decided not to introduce a NDM, the fundamental questions underlying how military medals are awarded remains a current policy issue for government.
28. The Cabinet Office explained that the Advisory Military Sub-Committee (AMSC) of the HD Committee has been re-established. In response to a Parliamentary Question asked on 3 December 2018, the Cabinet Office Minister Chloe Smith explained that:

*'Both the Cabinet Office and the Ministry of Defence have received requests from campaigners for either historic decisions on the award of medals to be reconsidered, or for new claims to be considered. It is for these reasons that the Committee on the Grant of Honours, Decorations and Medals recommended to Her Majesty The Queen that the Advisory Military Sub-Committee be re-instituted earlier this year. Her Majesty graciously agreed to their request.'*

*Details of the Sub-Committee's independent membership and terms of reference will be announced by the Cabinet Office in due course.'*

29. The Cabinet Office emphasised that at no point had a decision been made that the NDM will never be reviewed.
30. The Cabinet Office argued that disclosure of the withheld information would be likely to prejudice future discussions on this subject. It also argued that it is also likely to undermine the Committee's ability to respond appropriately and effectively to lobbying by groups with particular interests, thereby ensuring that its decision-making processes duly weigh and balance all interests, not simply those with the most effective lobbying strategy. The Cabinet Office suggested that public scrutiny would be likely to impair the candid exchange of views and risks fettering ministers' ability to consider this matter objectively and on the basis of the most free and frank advice.
31. The Cabinet Office also argued that it is desirable for both administrative and historic purposes that meeting minutes are full and frank. It suggested that it was unlikely that the minutes would have been drafted in the terms that they were had disclosure/publication been intended. Therefore, it argued that disclosure of the the information requested in this case would be likely to negatively affect how the HD Committee minutes are drafted in future. This would be detrimental to the administrative and historical record.
32. In conclusion the Cabinet Office emphasised that the military medals issue is still live and is not going away, and will be subject to further consideration. In support of this the Cabinet Office emphasised that while there is no current intention to review the NDM decision the re-establishment of the AMSC means that historic medals claims may be under active review again, should the AMSC decide to exercise their prerogative to do so. Consequently, the Cabinet Office argued that whilst it might be argued that the policy regarding the military medals review had been agreed at the time of the complainant's request, it took the position that the matter is more complex than simply deciding that the policy making was complete at the point that the complainant submitted his request.

*Public interest in favour of disclosing the information*

33. The complainant argued that the public interest was better served by the information being disclosed than in withholding the information. He also argued that in withholding this information the government had shown a complete disregard for the transparency. He argued that disclosure of the basic information that he had requested would not undermine security or policy, but by withholding it showed very little



respect to the public generally and to our Armed Forces Veterans specifically.

*Balance of the public interest arguments*

34. 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.
35. With regard to the arguments advanced by the Cabinet Office, the Commissioner accepts that significant weight should be given to the safe space arguments - ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making.
36. 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.
37. Clearly then the weight that should be attributed to both of these arguments depends on upon the timing of the request and whether, at the point the request is submitted, the policy making remained live and ongoing. In terms of assessing this, as the Commissioner's own guidance makes clear, she does not accept that there is inevitably a continuous process or 'seamless web' of policy review and development. Rather, in most cases, the formulation or development of policy is likely to happen as a series of discrete stages, each with a beginning and end, with periods of implementation in between. However, the Commissioner also accepts that there are no universal rules and it is not necessarily the case that a policy development process is completed the moment a policy is publicly announced.
38. Having considered the circumstances of the case, at the point that the complainant submitted the request in July 2018, the Commissioner is



not persuaded that there was any *significant* ongoing policy formulation and development in terms of whether or not to introduce the NDM. The decision had been taken in 2014 not to introduce the NDM and whilst a potential change to that position in the future had never been ruled out, the Commissioner would be resistant to a line of argument that said that policy making was still considered to be live simply because a decision could potentially be revisited at some unspecified point in the future. However, the Commissioner acknowledges that following the decision taken in 2014 up to and including the point at which the complainant submitted his request, campaigners for the NDM continued to contact the government about this issue and that the government had to consider how to respond to such lobbying. Moreover, the Commissioner also accepts that the reinstitution of the ASMC means that there is a possibility that historic medals claims could potentially be actively considered again. In summary then, in July 2018 the Commissioner does not accept that there was any ongoing policy formulation and development in respect of the NDM that could be considered to be substantial and significant. Equally, though she accepts that policy making on this issue at that point had not completely stopped or finished; rather consideration was still being given to this issue if only to the extent that this involved addressing the continued lobbying from campaigners.

39. In terms of the impact this has on attributing weight to the safe space and chilling effect arguments, the Commissioner accepts that they are both relevant and cannot be dismissed entirely. However, in assessing the weight that should be attributed to them, the Commissioner obviously has to consider the content and sensitivity of the particular information which has been withheld. In the circumstances of this case, the Commissioner is not persuaded that the part of the HD Committee minute which discusses the NDM is particularly sensitive; rather it is relatively anodyne (and factual) description of the current position in respect of the NDM. In the Commissioner's view it is difficult to see how disclosure of this particular information would have any significant impact on the safe space in which to reach decisions about the NDM or indeed other historical medal claims. Equally, it is difficult to see how disclosure of this information would have a genuine impact on the candour of future discussions on this subject. Therefore, whilst the Commissioner accepts that some weight should be attributed to the public interest in maintaining the exemption, in her view this is very limited.
40. With regard to attaching weight to the public interest in disclosure of the information, the Commissioner considers there to be a general public interest in the government being open in order to enable the public to understand how important decisions have been made. Such transparency also encourages informed public engagement and helps to

build trust and confidence. In the particular circumstances of this case the Commissioner recognises that there have been some concerns expressed by campaigners as to how the case for the NDM has been assessed by the HD Committee in the past. It is not the Commissioner's role to consider the merits, or otherwise, of such concerns. However, in her view disclosure of the withheld information would lead to greater transparency in respect the HD Committee's considerations of the ongoing issue of the proposed NDM and could potentially assist in building trust and confidence in its decision making in respect of this issue. Furthermore, the Commissioner is also aware of a comment by the FTT in one of the cases referred to above in respect of attributing weight to the public interest in disclosure of the information, namely:

*'...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.'*<sup>3</sup>

41. The Commissioner considers this comment to apply equally to this request and the balance of the public interest arguments.
42. In conclusion, the Commissioner considers the public interest arguments in maintaining the exemption to be very limited and whilst the public interest arguments in disclosure of the information are not overly weighty, they nevertheless outweigh the public interest in maintaining the exemption.

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<sup>3</sup> EA/2016/0078 (remitted decision), paragraph 133.

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

- 43. Section 37(1)(b) of FOIA states that information is exempt if it relates to the conferring by the Crown of any honour or dignity.
- 44. The Commissioner is satisfied that the withheld information falls within the scope of this exemption given that it relates to discussions by the HD Committee about the proposals to create a new honour, namely the NDM.

### **Public interest test**

- 45. However, section 37 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 37(1)(b) outweighs the public interest in disclosing the information.

#### *Public interest arguments in favour of maintaining the exemption*

- 46. The Cabinet Office explained that in withholding the information under this exemption it was intending to maintain a safe space so that those who offer opinions and advice, ultimately to HM The Queen, can continue to do so freely and candidly, in confidence, on the understanding that their confidence will be honoured.
- 47. The Cabinet Office argued that there was a strong constitutional convention that communications with the Sovereign are confidential, and this is reflected in the absolute exemption in FOIA for such communications, ie section 37(1)(a). It acknowledged that whilst the information withheld in response to this request did not fall within that absolute exemption, the Cabinet Office considered that weight must nonetheless be given to that constitutional convention where relevant to information falling within section 37(1)(b). The Cabinet Office emphasised that the information requested in this case is for the minutes of a meeting of a Committee appointed to advise the Sovereign and thus the convention is relevant since it forms the foundation for the general rule and expectation that the Committee's deliberations will be confidential.
- 48. The Cabinet Office explained that it recognised the public interest in transparency relating to the consideration given to possible cases for medallic recognition. However, it noted that there is a lot of information already in the public domain about the NDM and the decisions the government have reached, including the evidence base on which recommendations were made. It argued that releasing the requested information would not materially enhance public understanding of the

issues or the decision-making process. However, release would damage the integrity and robust nature of the honours system by challenging the long-standing confidentiality of the process for consideration of medallic recognition in particular and the creation of honours more generally and thus risk the candour of contributions by those attending the Committee.

49. The Cabinet Office also noted that Parliament recognised the particular sensitivity of releasing information about honours by expressly providing that the exemption relating to honours information does not expire after 30 (now 20) years but instead remains applicable for 60 years after the date of its creation (see section 63(3) of FOIA).

*Public interest arguments in disclosure*

50. The complainant's arguments to support the disclosure of the withheld information are set out above.

*Balance of the public interest arguments*

51. With regard to the weight that should be attributed to maintaining the section 37(1)(b) exemption, as a general principle the Commissioner accepts the Cabinet Office's fundamental argument that for the honours system to operate efficiently and effectively there needs to be a level of confidentiality which allows those involved in the system to freely and frankly discuss nominations. Furthermore, the Commissioner accepts that if views and opinions, provided in confidence, were subsequently disclosed then it is likely that those asked to make similar contributions in the future may be reluctant to do so or would make a less candid contribution. Moreover, the Commissioner also accepts that disclosure of information that would erode this confidentiality, and thus damage the effectiveness of the system, would not be in the public interest. Furthermore, in the context of this request given that the HD Committee was established at the request of the Sovereign and provides policy advice to her on honours, decorations and medals the Commissioner accepts that in balancing the public interest consideration has to be given to the constitutional convention referred to be the Cabinet Office.
52. However, section 37(1)(b) is not an absolute exemption and there will be cases where the public interest favours disclosure of information. The approach to determining whether this is the case was well set by the FTT in EA/2016/0078:

*'We do not accept that this means that minutes of the HD Committee 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.*<sup>4</sup>

53. Having considered the content of the withheld information, for the reasons discussed above in the context of section 35(1)(a), the Commissioner is not persuaded that disclosure of the parts of the minutes which discuss the NDM would have any particular chilling effect on future discussions of the HD Committee nor would they materially undermine the confidential nature of discussions about honours. Furthermore, the information in question does not relate to recommendations that would be put before the Sovereign. Given these factors the Commissioner considers the weight that should be attributed to the public interest in maintaining the exemption is relatively limited. For the reasons discussed above in the context of section 35(1)(a), the Commissioner considers there to be clear, albeit not huge, public interest disclosure of the information. Taking this factors into account, in respect of the balance of the public interest under section 37(1)(b), as with section 35(1)(a), the Commissioner finds that the public interest arguments in maintaining the exemption to be limited and whilst the public interest arguments in disclosure of the information are not vast, they do outweigh the public interest in maintaining the exemption.

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<sup>4</sup> Paragraph 127.

## Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

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

**Signed .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**