Appeal number: EA/2016/ 0078

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ANTHONY MORLAND **Appellant**

- and -

THE INFORMATION COMMISSIONER **Respondents**
THE CABINET OFFICE

TRIBUNAL: JUDGE ALISON MCKENNA
Ms ANNE CHAFER
Mr PAUL TAYLOR

Determined on the papers, the Tribunal sitting in Chambers on 27 September 2016 and 10 January 2017

Promulgation Date: 16 January 2017

DECISION

1. The appeal is allowed. The Decision Notice is set aside and substituted by this Decision. The steps in paragraph 2 below are to be taken by the Cabinet Office.

2. The Cabinet Office is required to release a redacted copy of the withheld minutes to the Appellant, so that only item 3, paragraph 4 headed "National Defence Medal" may be read.

REASONS

Background to Appeal

3. The Appellant is involved with a campaign for the Government to create a National Defence Medal ("NDM"), to honour veterans who did not participate in a specific conflict but who stood ready to do so as members of the Armed Forces. This would include those who were conscripted into the Armed Forces after the Second World War. Other Commonwealth countries, such as New Zealand and Australia confer such a medal for service of three and four years respectively. United States veterans are awarded a similar medal after three years' service. In the United Kingdom, length of service is recognised only after fifteen years.

4. The Honours and Decorations Committee ("HDC") is the permanent standing committee of the Cabinet Office which provides advice to the Sovereign regarding honours, decorations and medals. Its 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.*

5. In April 2012 the Prime Minister appointed Sir John Holmes to conduct an independent review of policy concerning medals, including consideration of the case for a National Defence Medal. Sir John recommended that the case for a NDM should ultimately be considered by the HDC, which should then make a recommendation to government. Following that process, a written Ministerial Statement was issued on 29 July 2014 to the effect that the HDC "*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 HDC considered the matter again at a meeting in February 2015.

6. On 8 April 2015 the Appellant made a request to the Cabinet Office for minutes of the HDC. His request was in the following terms:

> *Perhaps you could also pass on (under the FOI Act) a request to see the minutes of the HD Committee meeting which reached this conclusion. At least we will then be able to address the perceived weaknesses in the case, and you can stop fielding the same questions.*

7. The Cabinet Office refused the Appellant's information request in reliance upon s. 37 (1) (b) and s. 35 (1) (a) of the Freedom of Information Act 2000 ("FOIA").

8. The Information Commissioner issued Decision Notice FS50588594 on 1 March 2016, upholding the Cabinet Office's reliance on s. 37 (1) (b) of FOIA. The Decision Notice found (at paragraph 13) that the exemption under s. 37 (1) (b) was engaged by the request and (at paragraph 25) that the public interest favoured maintaining the exemption "*by a narrow margin*". The Decision Notice expressly did not consider the Cabinet Office's reliance on s. 35 (1) (b).

Appeal to the Tribunal

9. The Appellant's Notice of Appeal dated 27 March 2016 relied on grounds principally concerned with the balance of public interest test and argued strongly that the public interest favoured transparency and disclosure. He very fairly accepted that the requested minutes may need to be redacted so as not to impact on any individuals. He enclosed a report from the United Kingdom National Defence Medal Campaign and a copy of its official submission to the government.

10. The Information Commissioner's Response to the appeal dated 29 April 2016 maintained the analysis as set out in the Decision Notice. It did not refer to s. 35 (1) (a) FOIA at all.

11. The Cabinet Office's Response dated 28 June 2016 generally supported the stance taken by the Information Commissioner. It was also asserted at paragraph 18 that, even if the Tribunal were to take a different view from the Information Commissioner as to disclosure under s. 37 (1) (b) of FOIA, the information requested would still not be disclosable because s. 35 (1) (a) would apply. We consider that argument in our conclusions below.

12. The Appellant replied to both Responses, emphasising the public interest in transparency and disclosure in relation to the honours system, and suggesting that the HDC was not truly independent. That is not of course a matter on which the Tribunal may adjudicate.

13. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended.

14. The Tribunal considered an agreed open bundle of evidence comprising some 200 pages, including submissions made by all parties, for which we were grateful. We also considered a closed bundle, consisting of the withheld information only.

15. The Tribunal initially convened on 27 September 2016, but adjourned without determining the appeal and directed further submissions from the parties. The Tribunal re-convened on 10 January 2017 to consider the submissions made and reach its decision.

The Legal Framework

16. The duty of a public authority to disclose requested information is set out in s.1 (1) of FOIA. The exemptions to this duty are referred to in section 2 (2) as follows:

> *"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."*

17. The categories of exemption which were initially relied upon under FOIA in this case are: s. 35 (1) (a) and s.37 (1) (b). These exemptions are both so-called qualified exemptions, giving rise to the public interest balancing exercise required by s. 2 (2) (b).

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

> *"(1) Information held by a government department…is exempt information if it relates to –*
>
> *(a) The formulation or development of government policy".*

19. Section 37 (1) (b) FOIA provides that:

> *"(1) Information is exempt information if it relates to –*
>
> *(b) the conferring by the Crown of any honour or dignity".*

20. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

> *"(1) If on an appeal under section 57 the Tribunal consider -*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*
>
> *(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

21. The burden of proof in satisfying the Tribunal that the Information Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant. The standard of proof to be applied by the Tribunal is the balance of probabilities.

Scope of the Request

22. It seems to us that there is a certain amount of ambiguity in the information request as to which HDC minutes were being requested. It is possible to read the request, in context, as being one for the minutes of the HDC which considered the matter in accordance with Sir John's recommendations and preceded the written Ministerial Statement as to its conclusions. The HDC minutes which the Information Commissioner considered and which were included in the closed bundle for the Tribunal were from a meeting which took place some months later in February 2015, after the written Ministerial Statement and at which HDC had discussed further correspondence on the subject of the NDM (open bundle page 161).

23. The Information Commissioner and the Cabinet Office responded to our enquiry about this by confirming that the closed material which we had before us was the correct document. Considering the ambiguity in the request and applying the balance of probabilities standard, we find this to be a reasonable understanding and we do not consider that the Decision Notice was erroneous in this regard. We note that it is still open to the Appellant to make a more clearly-worded request for the minutes of the earlier HDC meeting should he choose.

24. The Decision Notice concludes at paragraph 11 that the requested minutes cover more than one issue. However, we take the view that the request (set out at paragraph 6 above) is, properly understood, much narrower in scope than the Information Commissioner understood it to be. We therefore conclude that the Decision Notice was erroneous in its findings as to the scope of the Appellant's request.

25. We understand the request to be limited to the specific section of the HDC minutes which dealt with the NDM. We take this view on a plain reading of the request, taken in the context of the exchange of correspondence on 8 April 2015 (pages 160 to 161 of the open bundle). The official from the Honours and Appointments Secretariat states in his letter to the Appellant that the HDC *members remain unpersuaded of the case for an NDM at this time* and the Appellant replies with a request for the minutes of the committee *which reached this conclusion*. It does not seem to us that the information request is concerned with the HDC's wider work or with the minutes of the HDC in relation to any other issue. We note that the Appellant envisaged and accepted in his Notice of Appeal that there may be other matters contained in the HDC minutes which should be redacted.

26. We conclude that the scope of the request is limited to item 3, paragraph 4 of the February HDC minutes contained in our closed bundle, headed "National Defence Medal". We have therefore considered the engagement of the exemption under s. 37 (1) (b) in respect of that paragraph alone.

Engagement of s.37 (1) (b)

27. When we adjourned on 27 September 2016, we directed the parties to make submissions on the question of whether the s. 37 (1) (b) FOIA exemption was engaged in relation to the conferral of <u>existing</u> Honours and Dignities only, or

whether its scope also extended to the creation of a new Honour or Dignity. The Information Commissioner submitted that the exemption refers to both existing and proposed Honours and Dignities, and referred us to the Commissioner's own published guidance to that effect. The Cabinet Office submitted that the wording of s. 37 (1) (b) FOIA was deliberately broad and that the word "*any*" is all-encompassing, so that the natural reading of the section was wide enough to include "*all honours, past and future*". It refers us to archived Ministry of Justice Guidance which supports this view. The Appellant submitted that an Honour or Dignity cannot be conferred by the Crown if it does not exist.

28. We share the Appellant's concern as to the scope of s. 37 (1) (b). If the exemption was in respect of information that merely related to any Honour or Dignity then the creation of a new award would be caught. However, Parliament chose to use the words "*conferring by the Crown*" in this section of FOIA. The meaning of "conferring" is "the act of bestowing". We appreciate the policy behind the exemption and note that the public interest balancing exercise tends to refer to the need to protect confidences, and to ensure candour in the recommendation process, but such considerations do not seem to us to be relevant in relation to a medal which does not exist and so cannot be conferred.

29. The Cabinet Office submitted that, were we to take the view that s. 37 (1)(b) were not engaged by information pertaining to the creation of a new medal, that this view would be inconsistent with previous decisions of the Information Commissioner and of the First-tier Tribunal. We acknowledge this to be the case, but remind the parties that differently-constituted panels of the First-tier Tribunal are not bound by each other's decisions and are at liberty to disagree with each other and indeed with the Information Commissioner.

30. The Cabinet Office and Information Commissioner also submitted that the guidance issued by ICO and the Ministry of Justice was relevant in interpreting FOIA. We found the guidance useful but we do not consider that it is strictly appropriate to rely on it in interpreting a statutory provision as it does not meet the criteria for the use of extrinsic materials as an aid to interpretation set out by the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3[1]. We note that the IC's guidance is in itself somewhat ambiguous in referring to "new awards[2]". This could be understood to refer to the conferral of a new award on an individual, rather than the creation of a new Honour.

31. Having considered the issue carefully, we have concluded that the exemption under s.37 (1) (b) is not engaged by information relating to a proposed new medal. We conclude that Parliament's use of the word "conferring" in s. 37 (1) (b) FOIA is intended to relate to Honours and Dignities which already exist and so may be "conferred". Having reached this conclusion, we have not found it necessary to go on

[1] http://www.bailii.org/uk/cases/UKHL/1992/3.html

[2] https://ico.org.uk/media/for-organisations/documents/1194/communications_with_her_majesty_and_the_awarding_of_honours.pdf

to consider the relevant public interest arguments. We note that the Decision Notice (paragraph 25) described that issue as "*finely balanced*".

Engagement of s. 35 (1) (a)

32. The Decision Notice did not reach any conclusions as to the engagement of s. 35 (1) (a) FOIA. The Cabinet Office has suggested that we may nevertheless decide to withhold the disputed information in reliance upon s. 35 (1) (a) FOIA.

33. We have considered carefully whether it would be within the scope of our powers under s. 58 FOIA (see paragraph 20 above) for us to determine here whether the withheld information engaged the s.35 (1) (a) exemption and, if so, whether the balance of public interest favoured disclosure. We note that, despite the apparently limiting terms in which the scope of s. 58 FOIA is expressed, the nature of a First-tier Tribunal hearing has been described as *de novo*, so that we "stand in the shoes"[3] of the Information Commissioner and can make any decision that she could have made. That would suggest that we do have power to consider at this stage the exemption on which the Cabinet Office originally relied but which was not adjudicated upon by the Information Commissioner.

34. We note that this is not a question of whether to allow the public authority to rely on a completely new exemption, which was the situation considered by the Court of Appeal in the context of the Environmental Information Regulations in *Birkett v DEFRA* [2011] EWCA (Civ) 1606[4]. In that case, the Tribunal's own case management powers were prayed in aid in ensuring that the Appellant would not be surprised by a new argument at the last minute. In this case, the Appellant was on notice that s.35 (1) (a) FOIA was at issue when he made his complaint to the Information Commissioner, but he has understandably been left in the position of considering it no longer to be relevant, due to the Information Commissioner's non-determination of that issue. We wonder whether it is fair and just in those circumstances for the Cabinet Office to be allowed to revert to its pre-Decision Notice reliance on that exemption? We note that the Cabinet Office has not appealed against the Decision Notice on the basis that it's initial reliance upon s. 35 (1) (a) FOIA should have been adjudicated upon by the Information Commissioner. It would have been open to it to do so. We are left with a situation where, as the Decision Notice did not reach a conclusion on that issue, none of the parties appear to have regarded s. 35 (1) (a) as being seriously in play in this appeal, with the effect that we have received limited argument on that issue.

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[3] See *Guardian Newspapers Limited v IC and BBC*, IT, 8 January 2007 (referred to in *Coppell: Information Rights Law and Practice*, Fourth Edition, 28-020; see also the discussion of the First-tier Tribunal's jurisdiction in the Upper Tribunal's decision in *Birkett* [2011] UKUT 39 AAC http://www.bailii.org/uk/cases/UKUT/AAC/2011/39.html and in *IC v Bell* [2014] UKUT 0106 (AAC) at [22].

[4] http://www.bailii.org/ew/cases/EWCA/Civ/2011/1606.html

35. In all the circumstances, we express considerable reservations as to whether we are technically seized of the s. 35 (1) (a) issue, given that it did not feature in the Decision Notice against which we are considering an appeal. Alternatively, if we are seized of it in the exercise of our *de novo* jurisdiction, then we are concerned that it is not fair and just to reach a determination on an issue which the Appellant was not properly fore-warned may feature in our conclusions. We regard the failure of the Decision Notice to determine a key issue between the parties as rather unsatisfactory, especially given that the Information Commissioner has concluded at least one other matter in relation to the NDM where her Decision Notice was in respect of s. 35 (1) (a) FOIA[5]. We note that we have no power to remit the matter to the Information Commissioner for her further consideration before determining this appeal – see *Information Commissioner v Bell* [2014] UKUT 106 (AAC)[6].

36. Notwithstanding our concern as to whether it is right to do so, we have set out below our findings in relation to s.35 (1) (a) FOIA. When considering the Cabinet Office's submission in relation to s. 35 (1) (a), we asked the parties in our adjournment directions to comment on whether government policy in relation to the NDM was still being formulated or developed at the time of the Appellant's request. The Cabinet Office's response to our query was that the phrase "*might usefully be reconsidered in the future"* contained in the Ministerial Statement meant that the policy was left open and live. The Information Commissioner's response was that the matter was unclear and that the Cabinet Office was better placed to assist the Tribunal. The Appellant submitted that the NDM is no longer under consideration and so there is no process of policy formulation to protect by withholding the requested information.

37. It does seem to us that, if it were the case that policy in relation to the NDM were still being formulated or developed, then s. 35 (1) (a) would be the most natural provision of FOIA to be engaged in relation to consideration of the creation of a completely new medal. We note that a differently-constituted panel of the First-tier Tribunal considered s. 35 (1) (a) FOIA in relation to the minuted discussion of the NDM by HDC's Advisory Military Sub-Committee in *Halligan v IC and MOD* EA/2015/0291. It was not disputed before that Tribunal that s. 35(1)(a) was engaged, although the Tribunal at paragraph [23] noted the arguments to the effect that policy development in relation to the NDM was no longer live. The Tribunal in that case decided that the public interest did not favour maintaining the exemption and directed that redacted minutes should be disclosed.

38. In the evidence and submissions before us in this appeal, we note that there is evidence that policy is still being formulated or developed. This is in the form of a letter from the Cabinet Office to the Information Commissioner (see p.190 of the open bundle) where it is stated: "*policy in relation to the National Defence Medal was at the time of the request, and continues to be, a live issue….".*

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[5] DN FS50584583, appealed to the Tribunal and mentioned in paragraph 37 of this Decision.

[6] *IC v Bell* [2014] UKUT 0106 (AAC).

39. However, we also have evidence before us which would lead us to a contrary conclusion. This is the letter from the HDC Secretariat to the Appellant (see p.161 of the open bundle) which states: *"there are no plans for further work on this issue"*.

40. We also have before us evidence which we regard as ambiguous, namely the written Ministerial Statement (see p.202 of the open bundle) which states: "*The Committee on the grant of Honours, Decorations and Medals is not persuaded that a strong enough case can be made at this time, but has advised that this issue might usefully be reconsidered in the future"*.

41. Applying the balance of probabilities test to the totality of the evidence, we conclude that we cannot be satisfied on the evidence before us that it is more likely than not that policy in relation to the proposed NDM was still being formulated or developed at the time of the Appellant's request. We are not persuaded by the Cabinet Office's submission that the terms of the Ministerial Statement left the issue open. As the Information Commissioner did not reach a conclusion on that issue, we regard the Cabinet Office, in seeking to rely on s. 35 (1) (a) FOIA, as bearing an evidential burden in relation to that issue. We find that this has not been discharged to the required standard.

Conclusion

42. For the above reasons, we conclude that the Decision Notice was not in accordance with the law. We find that (i) the scope of the Appellant's request was narrower than the Decision Notice found it to be; (ii) that s. 37 (1) (b) FOIA is not engaged by the information request; (iii) we express doubt that it is open to us to reach a view as to s. 35 (1) (a) FOIA when it was not adjudicated upon by the Information Commissioner, but if we may properly do so, then we find that that exemption was not engaged at the time of the request. Accordingly, this appeal is allowed, and the Cabinet Office is required to take the steps set out at paragraph 2 above

(Signed on the original)

ALISON MCKENNA **DATE: 16 January 2017**

PRINCIPAL JUDGE