

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 March 2010

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

Summary

The complainant wrote to the Cabinet office to request information regarding the decision that veterans should exceptionally be allowed to accept, but not to wear, the Pingat Jasa Malaysia Medal. In response the public authority withheld a copy of a report of the Honours and Decorations Committee which was sent to Her Majesty The Queen and which included the recommendation that the medal may be accepted but not worn. This information was withheld under the exemptions in section 35(1)(a) (Formulation and development of government policy); section 37(1)(a) (Communications with Her Majesty etc.) and section 37(1)(b) (Conferring by the Crown of any honour or dignity). The Commissioner has investigated the complaint and has found that the information is exempt from disclosure under section 37(1)(a) of the Act and that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. Her Majesty's Government's (HMG) rules on the acceptance and wearing of foreign awards preclude the acceptance of medals for events in the distant past or more than five years previously. Furthermore, the rules do not allow for a foreign award to be accepted if a British award has already been given for the same service. All British citizens require permission from HMG to accept and wear foreign state awards.
3. In March 2005 the Malaysian Deputy Prime Minister, on behalf of the King of Malaysia and Malaysian government, made a formal request to HMG for permission to award the Pingat Jasa Malaysia medal (PJM) to British service personnel. The PJM commemorates service in the Emergency or Confrontation in Malaya between 1957 and 1966.
4. British service personnel who served in Malaysia, and who were thought to merit recognition of an award, had been previously awarded the British General Service Medal. Those personnel who had been seconded to the Malayan Armed Forces were allowed to accept and wear The Federation of Malaya Active Service Medal.
5. Therefore, acceptance of the PJM as offered by Malaysian government in 2005 would have breached both the 'five year' rule and the 'double medalling' rule.
6. The Committee on the Grant of Honours, Decorations and Medals (HD Committee) which provides the Sovereign with independent and non-political advice on the honours system, considered the request by the Malaysian government to award the PJM.
7. In December 2005 the HD Committee recommended to The Queen that veterans and others eligible should exceptionally be allowed to accept the PJM, offered by the King and Government of Malaysia, but that official permission to wear the medal should not be granted.
8. The Queen subsequently approved the HD Committee's recommendation and the government announced the decision to Parliament on 31 January 2006.
9. There followed a campaign by those dissatisfied with the decision, i.e. to allow the PJM to be accepted but not worn. Consequently, the HD Committee reviewed its decision but concluded that its original recommendation should not be changed.

10. A statement explaining the rationale behind HMG's position in respect of the PJM is available on the Foreign and Commonwealth Office website.¹

The Request

11. On 10 April 2008 the complainant wrote to the public authority to request information regarding the decision that the PJM may be accepted but not worn by those eligible to receive it. The request read as follows:
- a. What day and date was the recommendation of the Honours and decorations Committee on the Pingat Jasa Malaysia approved by Her Majesty the Queen as stated in the letter from Sir Robin Janvrin to Rt. Hon Jack Straw MP dated 21st. December, 2005.
 - b. Is there any document or other record, in addition to the letter dated 21st. December, 2005, from Sir Robin Janvrin to Rt. Hon Jack Straw MP which shows that Her majesty the Queen has approved for acceptance but not for wear the Pingat Jasa Malaysia.
 - c. May I be given a copy of the recommendation made by the Honours and Decorations Committee and presented to Her Majesty the Queen that the Pingat Jasa Malaysia can be exceptionally accepted but it cannot be worn.
12. The public authority wrote back to the complainant on 9 May 2008. In response to the first part of the request the public authority explained that Her Majesty's approval was conveyed to Government through Sir Robin Janvrin's letter of 21 December 2005 and that therefore it would take 21 December 2005 as the date on which The Queen approved the HD Committee's recommendations. It said that beyond this letter no further information was held.
13. As regards the second part of the request the public authority explained that the letter from Sir Robin Janvrin is the formal document conveying Her Majesty's approval. It added that no other documentation was required, and no further information is held.
14. For the third part of the request the public authority confirmed that it held a copy of the report of the HD Committee that was presented to

¹ http://www.fco.gov.uk/resources/en/pdf/pdf21/fco_pingatjasamalaysiamedal

The Queen. However, it explained that this information was being withheld under the exemptions section 37(1)(a) (Communications with Her Majesty etc.), section 37(1)(b) (Conferring by The Crown of any Honour or Dignity) and section 35(1)(a) (formulation and development of government policy). The public authority went on to say that having carried out a public interest test it had concluded that public interest in maintaining each exemption outweighed the public interest in disclosure.

15. On 12 May 2008 the complainant contacted the public authority to ask that it carry out an internal review of its handling of his freedom of information request. For the first part of the request the complainant said that he did not accept that it held no further information regarding the date of the Queen's approval. For the second part of the request the complainant said that he did not accept that the letter from Sir Robin Janvrin constitutes a formal document authorising the public authority's statements that the Queen had approved the recommendations of the HD Committee. For the third part of the request the complainant indicated that in his view the public interest has been misjudged.

16. The public authority presented the findings of its internal review on 30 June 2008 at which point the original response to the request was upheld. In response to the complainant's suggestion that Sir Robin Janvrin's letter was not a formal document, it explained that questions about the legitimacy of the document were not relevant as the Act deals only with questions over whether or not the requested information is held. It confirmed that no other information regarding the date of the Queen's approval was held. As regards the report of the HD Committee, which it explained was the document that was submitted to Her Majesty, it reiterated its reasons for withholding this information by virtue of the exemptions in section 35(1)(a), section 37(1)(a) and section 37(1)(b). It explained that it had looked again at the arguments in favour of releasing the information and the arguments in favour of maintaining the exemptions. It concluded that it was in the public interest to withhold the information and it did not believe that disclosure would add anything to the clear statements that had already been made about the decision which had been 'very comprehensively and extensively explained'.

The Investigation

Scope of the case

17. On 6 July 2008 the complainant contacted the Commissioner to complain about the public authority's response to his freedom of information request.
18. The complainant has also complained about the length of time the public authority took to comply with his request for an internal review. However, as this is not a requirement of Part I of the Act the Commissioner has not considered this matter as part of this decision notice.

Chronology

19. Unfortunately, due to a backlog of complaints received about the Act, the Commissioner was unable to begin his detailed investigation of this case immediately. Therefore it was not until 9 September 2009 that the Commissioner contacted the public authority with details of the complaint.
20. The Commissioner now asked the public authority to outline what steps it had taken to search for information falling within the scope of the first two parts of the request and to briefly explain why it does not hold any information beyond the letter from Sir Robin Janvrin.
21. The Commissioner also asked the public authority to provide him with a copy of the report of the HD Committee clearly marked to show where any exemption was being applied. For each exemption the Commissioner asked the public authority to explain why the exemption was engaged and to elaborate on its reasons for concluding that the public interest in maintaining each exemption outweighed the public interest in disclosure.
22. The public authority responded to the Commissioner on 8 February 2010 when it provided the Commissioner with a copy of the HD Committee. It responded to the Commissioner's questions on the application of the exemptions and provided some background to the PJM medal.

Findings of fact

23. The withheld information in this case constitutes a report from the HD Committee of December 2005 which recommended that the PJM may

be accepted but not worn by those eligible to receive it. The response to this recommendation was the letter from Sir Robin Janvrin to the Foreign Secretary. This letter is already in the public domain as it was disclosed by the Cabinet Office in March 2008.

Analysis

24. The full text of the relevant provisions of the Act referred to in this section is contained within the legal annex attached to this notice.

Substantive Procedural Issues

Information covered by the request

25. The public authority has explained that the only information falling within the scope of the first two parts of the request is the letter from Sir Robin Janvrin dated 21 December 2005. The public authority has explained that there is nothing unusual in the fact that it holds no information beyond the letter from Sir Robin Janvrin. The report of the HD Committee was forwarded to The Queen for Her approval and that approval was conveyed by a letter from Her Private Secretary. The public authority has explained that this is an accepted practice as one of the ways in which it receives notification of The Queen's approval.
26. The public authority has explained that all relevant electronic and paper files were searched and that no information beyond the letter from Sir Robin Janvrin was found. Given that a letter from The Queen's Private Secretary is an accepted means of conveying the Queen's approval, and in the absence of any evidence to the contrary, the Commissioner is satisfied that the public authority holds no further information falling within the scope of the first two parts of the request.
27. As regards the third part of the request the public authority has explained that the requested information constitutes the report of the HD Committee. This document was passed to the Royal Household under cover of a letter from the Foreign Secretary the Rt Hon Jack Straw MP. The public authority has said that it does not consider the letter to fall within the scope of the request because it is obviously not a 'recommendation made by the Honours and Decorations Committee'. The Commissioner also notes that the complainant has specified previously, in relation to the third part of the request, that it is the recommendations of the HD Committee which he is interested in. Therefore the Commissioner is satisfied that it is the report alone which falls within the scope of this part of the request.

Exemptions

Section 37(1)(a) – communications with the Royal Family and Royal Household

28. The Commissioner has initially considered the public authority's reliance on section 37(1)(a) to withhold the requested information.

This section states that:

'37 – (1) Information is exempt information if it relates to –

- (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household'.

29. In line with his approach to the term 'relates to' when it appears in other sections of the Act (for example section 35), the Commissioner interprets this term broadly and thus the exemption provided by section 37(1)(a) provides an exemption for information which 'relates to' communications with the Royal Family or with the Royal Household rather than simply communications with such parties.
30. Therefore, this exemption has the potential to cover draft letters, memorandums or references to the existence of meetings with the Royal Family or Royal Household irrespective.
31. However, information must still constitute, or relate to, a communication to fall within the exemption. So, for example an internal note held by a government department that simply references the Royal Family or Royal Household will not necessarily fall within this definition. It must be evident that the information is intended for communication, or has been communicated, or that it references some other communication falling within the definition.
32. The Commissioner is satisfied that the HD Committee report withheld by the public authority clearly falls within the scope of the section 37(1)(a). The letter from the Foreign Secretary is addressed to the Queen's Private Secretary so is clearly a communication with a member of the Royal Household. The report was sent under the cover of the letter from the Foreign Secretary which refers to the recommendations in the report and in that sense the report can be said to 'relate to' communications with Royal Household. Moreover, the Commissioner considers that the report is in itself a communication with Her Majesty because it is clear, having reviewed the content of the report, that it was intended in its own right to be communicated to The

Queen. Therefore the Commissioner has decided that this information falls within the scope of the section 37(1)(a) exemption.

Public interest test

33. Section 37 is a qualified exemption and is therefore subject to the public interest test set out in section 2(2)(b) of the Act, i.e. whether in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

34. The public authority has argued that disclosure of the information would undermine the constitutional right of the Sovereign, by convention, to counsel, encourage and warn the government and thus to have opinions on government policy and to express those opinions to Her Ministers. However, whatever personal opinions the Sovereign may hold She is bound to accept and act on the advice of Her Ministers and is obliged to treat Her communications with them as absolutely confidential. Such confidentiality is necessary in order to ensure that the Sovereign's political neutrality is not compromised in case Her Majesty has to exercise Her executive powers, e.g. initiating discussions with political parties in the scenario of a hung Parliament in order to ensure that a government can be formed.
35. Consequently, disclosure of the requested information would not be in the public interest because it would undermine the confidence central to the convention, which in turn would undermine the constitutional position of The Queen.

Public interest arguments in favour of disclosing the requested information

36. There is an inherent public interest in disclosure of information to ensure that the government is accountable for, and transparent about, its decision making processes.
37. Moreover, there is a specific public interest in disclosure of information that would increase the public's understanding of how the government engages with the Royal Family and the Royal Household, and in particular in the circumstances of this case, The Queen. This is because the Monarchy has a central role in the British constitution and the public is entitled to know how the various mechanisms of the constitution operate. This includes, in the Commissioner's opinion, how The Queen is consulted in respect of honours issues.

38. Linked to this argument, is the fact that disclosure of the withheld information could further public debate regarding the constitutional role of the Monarchy. Similarly, disclosure of the information could inform the broader debate surrounding reform of the British constitutional system.
39. In the circumstances of this case the Commissioner also recognises that there is significant interest in, and debate surrounding, the recommendation of the HD Committee, and The Queen's subsequent approval, that although the PJM could be accepted it could not be worn.

Balance of the public interest arguments

40. In the Commissioner's opinion, given the broad reading of the term 'relates to' the subject matter of information which can fall within the scope of section 37(1)(a) can be very broad because communications, and information relating to such communications, could potentially cover a variety of different issues. Therefore establishing what the inherent public interest is in maintaining the exemption provided by section 37(1)(a) is more difficult than identifying the public interest inherent in a more narrowly defined exemption, for example section 42, which clearly provides a protection for legally privileged information.
41. However, the Commissioner believes that the following two public interest factors can be said to be inherent in the maintaining the exemption and relevant in this case:
 - Protecting the ability of the Sovereign to exercise her right to consult, to encourage and to warn her government; and
 - Preserving the political neutrality of the Royal Family and particularly the Sovereign, to ensure the stability of the constitutional Monarchy.
42. The Commissioner accepts that there is a significant and weighty public interest in preserving the operation of the convention identified by the public authority, i.e. it would not be in the public interest for the operation of the established convention of confidentiality to be undermined. This is particularly so given that the convention is designed to protect communications at the heart of government, i.e. between the Monarch and government Ministers.
43. Furthermore, the Commissioner believes that significant weight should be attributed to the argument that disclosure could undermine the political neutrality of The Queen: it is clearly in the public interest that

the Monarch is not perceived to be politically biased, in order to protect her position as Sovereign in a constitutional democracy.

44. With regard to attributing weight to the public interest arguments in favour of disclosure, the Commissioner recognises that they are ones which are regularly relied upon in support of the public interest in favour of disclosure, i.e. they focus on the need for a public authority to be accountable for, and transparent about, decisions that it has taken. However, this does not diminish the importance of such arguments as they are central to the operation of the Act and thus are likely to be deployed every time the public interest test is applied.
45. Furthermore the Commissioner recognises the significant level of interest, and indeed dissatisfaction, some British recipients of the PJM continue to feel in respect of the decision to allow the PJM to be awarded but not worn. Whilst the Commissioner recognises that there is a significant amount of information already in the public domain about the decision regarding the PJM, there is always a public interest in disclosure of all relevant information to ensure the public have a complete and full picture.
46. Nevertheless, in reaching a conclusion about where the balance of the public interest lies the Commissioner has to focus on the content of the information. The Commissioner does not believe that the content of the HD Committee report would add significantly to the public's understanding of the reasoning behind the decisions that were taken in respect of the PJM beyond the significant levels of information already available in the public domain, not least the document on the Foreign and Commonwealth Office's website referred to in paragraph 10 of this notice.
47. Having said that, the Commissioner believes the degree to which its disclosure would add to the information already in the public domain is limited. This does not mean that the weight that should be given to the arguments in favour of maintaining the exemption is reduced. Disclosure of the report would still, in the Commissioner's opinion, undermine the confidential nature of communications between The Queen and Her advisers, in this case the HD Committee, at significant detriment to the public interest. Therefore the Commissioner has concluded that in this case the public interest in maintaining the exemption at section 37(1)(a) outweighs the public interest in disclosing the information.
48. In reaching this conclusion the Commissioner has considered whether the disclosure of Sir Robin Janvrin's response to the Foreign Secretary's letter affects the balance of the public interest in respect of the information that has been requested in this case. That is to say,

does the disclosure of correspondence which falls within the scope of the convention discussed above undermine the weight that should be attributed to the public interest in favour of maintaining section 37(1)(a). Having considered this point carefully the Commissioner is satisfied that it does not. This is because the content of Sir Robin Janvrin's letter is very brief and simply reads:

'Thank you for your letter of 19th December. The Queen has approved the recommendation of the HD Committee Meeting of 7th December that the Pingat Jasa Malaysia may be accepted but not worn by those eligible to receive it.'

49. As noted above, key to any consideration of the public interest test is the content of the information. The Commissioner is satisfied that the content of the report is significantly different to the content of Sir Robin Janvrin's response. Therefore the Commissioner is satisfied that disclosure of the response by the Cabinet Office does not undermine the conclusion that the public interest favours maintaining the exemption in respect of the information requested by the complainant.

Other exemptions

50. The Commissioner is satisfied that the withheld information is exempt under section 37(1)(a) of the Act and that the public interest in maintaining the exemption outweighs the public interest in disclosure. Consequently the Commissioner has not gone on to consider the other exemptions cited by the public authority.

The Decision

51. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act:
- The public authority dealt with parts a) and b) of the request in accordance with section 1(1)(b) of the Act by disclosing all of the information it held falling within the scope the request.
 - For part c) of the request the public authority was entitled to withhold the requested information under section 37(1)(a).

Steps Required

52. The Commissioner requires no steps to be taken.

Right of Appeal

53. 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
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 29th day of March 2010

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1(1) provides that -

“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.”

Section 2(1) provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

- (a) the provision confers absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

Section 35(1) provides 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,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 37(1) provides that –

“Information is exempt information if it relates to-

- (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or

(b) the conferring by the Crown of any honour or dignity.”