

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 March 2012

Public Authority: Ministry of Defence
Address: Main Building
Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant requested information about the review of the system for awarding military medals, which is being conducted by the Ministry of Defence (the MoD). The MoD provided some information and exempted some under section 35(1)(a), 35(1)(b), 36(2)(a)(i), 37(1)(a) and 40(2).
2. The Commissioner's decision is that the MoD exceeded the permitted 20 day period for issuing a refusal notice but that the complainant was not entitled to the withheld information because it was exempt and, where relevant, the public interest favours maintaining the exemption.

Request and response

3. The MOD undertook a review of military medallic recognition during 2010/2011 as part of the Coalition Government's commitment in its Programme for Government (published May 2010) to review the rules governing the award of medals. This review was driven by a desire to ensure that personnel serving in today's Armed Forces are receiving proper medallic recognition for the service that they give.
4. On 12 June 2011, the complainant wrote to the MoD and requested information in the following terms:

"Would you please forward the following information:

1. *Who decided the MoD should be tasked with carrying out the Medal Review?*

2. What was the remit provided to the MoD to carry out the Medal Review?

3. The date the decision was made?

4. All documents appertaining to the Medal Review between the MoD and the Prime Minister in respect of the Review during the period June 2010 to May 2011.

5. All documents appertaining to the Medal Review between the MoD and the Cabinet Office during the period June 2010 and May 2011".

5. The MoD responded on 20 July 2011, which was outside the permitted response time of 20 working days from receipt of the request. It stated that it held information covered by the request but that it was exempt under section 35 (formulation of government policy). It asked for further time to consider whether the public interest nevertheless favoured disclosure, indicating that it would respond by 12 August 2011.
6. The MoD issued a refusal notice on 10 August 2011 stating that the information covered by questions 4 and 5 was exempt under section 36 (prejudice to effective conduct of public affairs). It did not explain why the exemption had changed from the one previously claimed or set out the public interest arguments it had considered in deciding to maintain the exemption.
7. The MoD addressed questions 1 – 3 by providing a summary of the information it held, as follows:

"Following discussions between the then MoD Permanent Secretary, Sir Bill Jeffrey, and the Honours Secretary of the Cabinet Office, it was agreed that advice should be given to the Secretary of State for Defence that the MoD should lead the review of military medallic recognition. The Defence Secretary subsequently decided on 18 Nov 11¹ that the MoD Review should be led by Air Vice-Marshal David Murray and report to Mr Robathan, who is able to draw on his military experience and insight. Terms of Reference were issued and are enclosed..."

8. Following an internal review, the MoD wrote to the complainant on 7 September 2011. It refuted the suggestion that it had exceeded the

¹ The refusal notice was dated 10 August 2011 and so the Information Commissioner assumes the year "11" is an error and has read the date as being "18 Nov 10".

permitted response time, referring the complainant to the Information Commissioner's published guidance which specifies a 40 working day response period as reasonable when a public interest test is involved. However, it accepted that it should have explained why section 36 had been substituted for section 35 in respect of questions 4 and 5.

9. It then went on to explain that information covered by question 4 was exempt under section 22(1) (information intended for future publication), section 35(1)(a) (formulation or development of government policy), section 35(1)(b) (information relating to Ministerial communications) and section 36(2)(a)(i) (prejudice to effective conduct of public affairs).
10. It exempted some information covered by question 5 under section 22(1) (information intended for future publication), 35(1)(a) (formulation or development of government policy), 36(2)(a)(i) (prejudice to effective conduct of public affairs), 37(1) (communications with Her Majesty), and 40(2) (personal information). It released the information which it did not consider exempt.
11. In respect of questions 1,2 and 3, it disclosed two emails which contained redactions under sections 37(1)(a) (communications with Her Majesty) and 40(2) (personal information). (The Information Commissioner has not considered the application of these exemptions to these emails as he is satisfied that they were applied to information which falls outside of the scope of the complainant's request).

Scope of the case

12. The complainant contacted the Commissioner and expressed dissatisfaction with the MoD's response on each of the five points of his request. He considered that the MoD had failed to properly answer his questions and that it was in the public interest for him to see the information.

Reasons for decision

Questions 1 and 3

13. The MoD initially advised the complainant that the Secretary of State for Defence made the decision on 18 November 2010. At internal review it supplied a copy of an email dated 18 November 2010 which stated "*...the Secretary of State has decided that Mr Robathan should lead an internal review into the rules governing the award of medals...*". It

clarified that the decision would have been made between 18 October 2010 and 18 November 2010.

14. The complainant has voiced concerns about the change in terminology used to describe the review between the refusal notice and the internal review (from *"review of military medallic recognition"* to *"the rules governing the award of medals"*). He considers this is indicative of a change in the scope of the review.
15. The Commissioner considers that such concerns fall outside the scope of the complainant's original request. He considers that the MoD provided the information it holds in respect of questions one and three and that any concerns the complainant has regarding the scope of the review should be addressed separately.
16. The Commissioner has not considered the MoD's application of exemption 37(1) to the email dated 18 November 2010, as he is satisfied that it has been applied to information which falls outside of the scope of the complainant's request.

Question 2

17. The MoD addressed this part of the request in its refusal notice by providing a copy of the terms of reference for the review. At the internal review it additionally provided a copy of an email dated 19 November 2010, summarising the direction the review was to take.
18. Again, the complainant's concerns seem to focus on the significance of the information he has received, rather than on whether his request has been complied with.
19. Once again, the Commissioner considers that such concerns fall outside the scope of the complainant's original request. He considers that the MoD provided the information it holds in respect of question 2 and that any concerns the complainant has regarding the scope of the medal review should be addressed separately.
20. The Commissioner has not considered the MoD's application of exemption 40(2) (personal information) to this email as he is satisfied that it has been applied to information which the complainant has confirmed he is not interested in receiving (ie the names of the recipients of the email).

Questions 4 and 5

Section 22(1)

21. The information which the MoD holds which is covered by this exemption is a draft version of the medal review report, which had been circulated to Ministers and officials for comment.

22. Section 22(1) states that information is exempt if:

*“(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
(b) the information was already held with a view to such publication at the time when the request for information was made, and
(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).”*

23. Section 22(1) is a qualified exemption, and so if it is engaged the public authority must show that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

24. In order to determine whether section 22 is engaged the Commissioner therefore needs to consider the following questions.

Was the requested information held by the MoD?

25. The MoD has supplied a copy of a memo dated May 2011 which makes it clear that a draft version of the medal review was held by the MoD at the time it received the request.

Did the MoD have an intention to publish the information at some date in the future when the request was submitted?

26. In the Commissioner's view, in order to demonstrate that the exemption under section 22(1) is engaged, a public authority must have an intention to disclose information at a future point and it must be able to demonstrate what information within the scope of the request it intends to publish.

27. The medal review came about from a Conservative Party Armed Forces Manifesto pledge to review the arrangements regarding the award of medals, and was referenced in the Coalition's Programme for Government published in May 2010. The memo supplied by the MoD makes reference to arrangements for the future publication of the review report.

28. The Commissioner is therefore satisfied that, when the request was submitted, the MoD had an intention to publish the requested information at some point in the future.

In all the circumstances of the case, was it 'reasonable' that information should be withheld from disclosure until some future date (whether determined or not)?

29. The main argument advanced by the MoD in support of it being reasonable – at the time the information request was submitted – for it to withhold the information is that publication of the review has been delayed pending further work, which might result in substantial revisions being made to the draft report. The draft held at the time of the complainant's request may be substantially different from the final version of the report.
30. The MoD argued that public disclosure of the draft would prejudice the Government's right to publish its report in a way that was consistent with parliamentary protocols and without harm to its relationships with those who have a stake in the review's outcome. It maintained that withholding it from disclosure while in its draft form is therefore reasonable.
31. The Commissioner considers the MoD's decision to withhold the information for these reasons to be a reasonable one and the exemption is therefore engaged.

Public interest arguments in favour of maintaining the exemption

32. The MoD argued that premature publication of the draft and immature review findings to any one of the medallic recognition interest groups before they are properly formulated and agreed by Ministers would undermine the development of the medal policy, prolong debate on draft proposals and be unfair to others interested in the outcome of the medal review.
33. Furthermore, premature disclosure of information would remove the safe space to allow officials to consider all opinions freely and without criticism of unrefined proposals. Ministers of the Crown are entitled to a free space to communicate between themselves when policies are still in the process of formulation, and disclosure of this information would undermine this. While there is a public interest in consulting medal campaign groups during the development of the review's conclusions, this was met by the targeted policy consultation process which formed part of the review.

Public interest arguments in favour of disclosing the requested information

34. The MoD acknowledged the general public interest in people being able to understand the way Government works, how decisions are made, and the extent to which various factors influence those decisions. The MoD also accepted that disclosure of the withheld information would provide greater transparency and accountability, which would be likely to increase trust in the conduct of public affairs.
35. The MoD has recognised the general public interest in openness and transparency in government decision making, including transparency with respect to the advice provided to Ministers which impacts on policy decisions. It has also recognised that there is specific public interest in transparency of information relating to debates about military recognition.
36. The Commissioner considers that the review of arrangements for awarding medals is of significant interest to particular sections of the public and is aware of the existence of a number of medallic recognition campaigns which have an active interest in the issue. Publication of the information would give those with an interest an opportunity to scrutinise whether their views are being taken account of in the review and whether the review, in its draft form, takes account of earlier pledges. This would promote accountability and transparency for decisions taken by the MoD and should encourage the public to have confidence in its final outcome.
37. However, in the Commissioner's view, the weight of the factors above is substantially mitigated when acknowledgment is given to the impending release of the final version of the medal review. This future disclosure will satisfy many of the concerns raised regarding openness, transparency and accountability.

Balance of the public interest arguments

38. The Commissioner's guidance note on section 22 explains that because the application of this exemption presupposes that the requested information will be disclosed, in balancing the public interest the focus is not on the harm that may arise from release of the information itself. Rather the balance of the public interest must focus on whether in the circumstances of the case it would be in the public interest for the public authority to keep to its original timetable for disclosure or whether the public interest would warrant an earlier disclosure. The Commissioner concludes that on balance the public interest in maintaining the exemption outweighs the public interest in disclosure.

39. In reaching this decision the Commissioner accepts that the draft review remains subject to change and that the MoD's ability to affect and manage any change is likely to be disrupted by its early disclosure.
40. The Commissioner has carefully balanced the public interest weighing the need for openness and transparency against the significant adverse impact on the MoD's ability to conduct a review efficiently and without undue external interference or pressure. While there are strong arguments on both sides, he has come to the conclusion that the stronger arguments favour the maintenance of the exemption.
41. For all the reasons above, the Commissioner therefore determines that the exemption found in section 22(1) has been applied correctly and in all the circumstances the public interest in maintaining the exemption outweighs that in early disclosure.

Section 35(1)(a)

42. The information which the MoD holds which is covered by this exemption is the draft medal review and an extract from a letter dated 28 October 2010 from a senior civil servant to a Minister.
43. Section 35(1)(a) of the Act states that information is exempt if it is held by a government department and relates to the formulation or development of government policy. Section 35(1)(a) of the Act is a class-based exemption, meaning that it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption. Instead, it is only necessary to show that the information falls within a particular class of information.
44. The Commissioner considers that the term 'relates to' can be given a broad interpretation. This is because the exemption is qualified and a public authority will be obliged to disclose information where it was in the public interest to do so. The Commissioner takes the view that the 'development' of policy comprises the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy
45. The medal review is a review of the nation's existing policy for awarding medals and the MoD was asked to undertake it in 2010. The terms of reference for the review make it clear that, depending on its findings, the review has the power to make changes to existing policy on the matter. The MoD has provided evidence which indicates that at the time of the request the review remained ongoing. The Commissioner therefore accepts that the draft review report document relates to the development of government policy and that section 35(1)(a) is engaged in respect of it.

46. Turning to the redacted section of the letter of 28 October 2010, this discusses proposals for the conduct of the review, and the involvement of other departments. Referring back to arguments considered above, the Commissioner accepts that the redacted section relates to the development of government policy and that section 35(1)(a) is engaged in respect of it.

Public interest arguments in favour of maintaining the exemption

47. The arguments in respect of withholding the draft review are the same as those summarised in paragraphs 32 and 33, above. In respect of the redacted section of the letter, the MoD argued that withholding was necessary in order that government business can be conducted in a spirit of openness and trust. Relations between the MoD and stakeholder departments must be protected so as to ensure that future policy formulation discussions and the quality of decision-making are not impaired. To release the proposed redacted information might have a chilling effect on future policy formulation in respect of this review, if there were worries about a lack of confidentiality and trust between departments. Disclosure may inhibit departments recording their honest views of another department's position, or the other department's officials' willingness to engage in an open and frank exchange of views with the department.

Public interest arguments in favour of disclosing the requested information

48. These arguments are the same as those summarised in paragraphs 34 to 37, above.

Balance of the public interest arguments

49. The Commissioner has recognised valid factors in favour of disclosure of this information, the most significant of which relates to the subject matter of the policy development recorded in this information. Added to these arguments that relate specifically to this information is the more general public interest in improving the transparency of the public authority in general and of the policy making process in particular.
50. However, that the policy development process to which this information relates was ongoing at the time of the request means that the Commissioner must give significant weight to the arguments relating to harm to the policy development process through disclosure of this information and to the public interest in avoiding such harm and to the MoD's safe space and chilling effect arguments. Given the importance of the area of policy recorded within this information, the Commissioner's

view is that the public interest in avoiding harm to the policy making process tips the balance in favour of maintenance of the exemption.

51. The conclusion of the Commissioner is, therefore, that the balance of the public interest supports the upholding of the exemption and the non-disclosure of the information.

Section 35(1)(b)

52. Section 35(1)(b) states that information is exempt from disclosure if it is held by a government department and 'relates to' Ministerial communications. The exemption protects ministerial communications where, on balance, their disclosure would be harmful to the public interest.
53. The information which is held by the MoD to which it is applying this exemption is a covering letter from one Minister to another, enclosing a copy of the draft medal review for comment.
54. The Commissioner is satisfied that this information clearly falls within the scope of the exemption contained at section 35(1)(b) of the Act.

Public interest arguments in favour of maintaining the exemption

55. The medallic review was ongoing at the time of the request; Ministers of the Crown are entitled to a free space to communicate between themselves when policies are still in the process of formulation, and disclosure of this information would undermine this.
56. The MoD also argued that the release of the information, at any time, would undermine the convention of collective ministerial responsibility, since it would provide insight into the views of an individual Minister which could prejudice any announcement of agreed Government policy, which is based on collective decision making. The MoD argued that the prejudice that would be caused by disclosure would not diminish following any formal announcement of the policy.
57. The Commissioner recognises that the convention of collective responsibility protects high-level government decisions from becoming personalised and also enables ministers to be totally frank and candid in their discussions.

Public interest arguments in favour of disclosing the requested information

58. The MoD acknowledged the general public interest in being able to understand the way government works, how decisions are made, and the extent to which various factors influence those decisions. The MoD

also accepted that disclosure of the withheld information would provide greater transparency and accountability, which would be likely to increase trust in the conduct of public affairs. Where disclosure reveals differences of opinion between individuals it can in fact promote accountability and transparency by showing that decisions have been made after a variety of views has been expressed and a robust debate has occurred.

59. The MoD has recognised the general public interest in openness and transparency in government decision making, including transparency with respect to the advice provided to Ministers which impacts on policy decisions. It has also recognised that there is specific public interest in the transparency of information relating to debates about military recognition.

Balance of the public interest arguments

60. The Commissioner considered the safe space arguments submitted by the MoD. "Safe space" arguments are about the need for a "safe space" to formulate policy, debate "live" issues, and reach decisions without being hindered by external comment and/or media involvement. The Commissioner accepts that there is a public interest in civil servants and ministers being able to formulate policy and debate "live" issues in Cabinet away from external scrutiny.
61. The Commissioner also accepts the argument that, in the context of the convention of collective responsibility, the need for a safe space extends beyond that related to the ongoing policy formulation and development process.
62. Collective Cabinet responsibility was described by the First-tier Tribunal (Information Rights) (formerly the Information Tribunal) in the Scotland Office case (EA/2007/0070) as:

"the long standing convention that Ministers are collectively accountable for the decisions of the Cabinet and are bound to promote that position to Parliament and the general public, regardless of their individual views. During the course of meetings of the Cabinet or of Cabinet Committees or through correspondence, Ministers may express divergent views, but once a decision is taken, the convention dictates that they must support it fully. When decisions are announced as Government policy, the fact that a particular Minister may have opposed it in Cabinet is not disclosed." (para 82)

63. The Tribunal in that case commented (para 88) in relation to section 35(1)(b) that:

“as with formulation of government policy under section 35(1)(a), timing is likely to be of paramount importance. Where the Ministerial communication is in relation to an issue that was ‘live’ when the request was made, the public interest in preserving a ‘safe space’ for Ministers to have a full and open debate, and the public interest in the Government being able to come together successfully to determine what may, in reality, have been a contentious policy issue, may weigh the balance in favour of maintaining the exemption.”

64. The Tribunal did not expand upon what it meant by a “live” issue; however, the Commissioner considers that it applies in respect of ongoing policy making, development and formulation. In this case, the requested information (a letter) discusses an issue (the medal review) which was live at the time of the request (the policy not having been finalised) and the issue involved was of considerable interest to a number of lobbying parties. The Commissioner finds these factors weigh heavily in favour of maintaining the exemption in this case, to protect the decision making process from unwarranted interference.
65. The Commissioner has also considered the MoD’s argument that it would not be in the public interest to undermine the collective decision making process. He accepts that there is a separate public interest in allowing the Cabinet to promote and defend an agreed position without revealing divergent individual views. However, the Commissioner does not accept that disclosure of the requested information (a covering letter) would do this to any significant degree. The letter includes the names of several people said to be supportive of the accompanying version of the draft review, but does not reveal any detail of their support or any points of difference. Since the draft review is being sent to the recipient for consultative purposes it is clearly accepted by the sender that further work may be required before the policy can be finalised (and the letter also makes reference to comments being sought from another consultee).
66. The Commissioner therefore does not accept the public interest argument that to disclose this letter would be to reveal divergent individual views, and thus undermine the convention of collective decision making.
67. Against this, the Commissioner has considered the pro-disclosure arguments. Since he rejects the MoD’s argument that the letter reveals individual, divergent viewpoints, he does not consider that the counterargument that disclosure would aid transparency by demonstrating that thorough examination of differing viewpoints should be given significant weight.

68. Furthermore, the letter contains no detail of the policy set out in the draft review, and so would not give an insight into the stage the policy was currently at, or its likely outcome. He questions whether disclosure of the letter would have any significant value, beyond that of encouraging public authorities to be as open and transparent in their work as they can be.
69. The conclusion of the Commissioner is, therefore, that the balance of the public interest supports the maintenance of the exemption and the non-disclosure of the information.

Section 36(2)(a)(i)

70. The MoD applied section 36 in relation to some information which was not covered by section 35. Section 36(2)(a)(i) of the Act states that information held by a government department is exempt where, in the opinion of a qualified person, disclosure of the information would or would be likely to prejudice the maintenance of the convention of the collective responsibility of Ministers of the Crown. In this case the MoD has specified that the lower level of prejudice (that of "would be likely") would occur.
71. Section 36(1)(a) states that the exemption only applies if the information is not exempt by virtue of section 35.
72. The MoD sought to apply section 36 to the following items of information:
- a) a covering letter dated 16 February 2011 enclosing a copy of the draft review for comment;
 - b) a letter dated 29 March 2011 from the Prime Minister's Office to the MoD;
 - c) an email dated 4 May 2011 from the Prime Minister's Office to the MoD; and
 - d) paragraph 4 of HD7934, dated May 2011.
73. As set out at paragraph 42, above, the MoD also applied section 35 in respect of item a). Since the Information Commissioner is satisfied that this information is exempt under section 35, it is not permissible to claim the exemption at section 36 in respect of the same information. The Commissioner has therefore not considered the application of section 36 further in respect of item a).

74. Turning to the remaining items, in order to establish that the section 36 exemption has been applied correctly the Commissioner considers it necessary to:
- ascertain who was the relevant qualified person;
 - establish that an opinion was given by that person;
 - ascertain when the opinion was given; and
 - consider whether the opinion was objectively reasonable and reasonably arrived at.
75. The MoD advised the Commissioner that the request to consider the application of section 36(2)(a)(i) was submitted in writing on 9 August 2011 to Gerald Howarth MP, the Minister for International Security Strategy. The Minister provided his opinion to the MoD the same day.
76. Section 36(5) of the Act sets out who may act as the qualified person in relation to a public authority. In the case of a government department, any Minister of the Crown may act as qualified person. Therefore, the Commissioner is satisfied that the Minister for International Security Strategy was authorised to act as the qualified person in this case.
77. The Commissioner has also been guided by the Tribunal's indication that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur, rather than the severity, extent or frequency of such inhibition or prejudice (although it must not be trivial).
78. The Commissioner has inspected the submission and accompanying information provided to the qualified person. The Commissioner notes that the submissions to the qualified person and consequent opinion do not identify which specific provision of section 36 the MOD is relying on. There is little meaningful discussion as to why the exemption is engaged because there is no analysis of the individual strands of the exemption. The Commissioner therefore has reservations about the quality of the process by which the qualified person formed his opinion, because the opinion appears to have been based on an assertion put to him, rather than an explicit consideration of the likely impact of the disclosure.
79. However, while the process by which the opinion was arrived at may have been flawed, the opinion itself appears to be reasonable for the purposes of section 36(2)(a)(i) and the Commissioner is satisfied that it is engaged in respect of the information.
80. In relation to the application of section 36(2)(a)(i), the qualified person took into account the sensitive political nature of the medal review and

the active interest shown by a number of lobbying organisations and weighed this against the need for Ministers and officials to have a safe space to discuss and explore policy options. He agreed that disclosure would be likely to have a negative effect on the delivery of effective government by removing this safe space, and that it would be likely to inhibit the free and frank exchange of views or advice.

81. Bearing in mind this information, and the nature of the submissions to the qualified person, the Commissioner is satisfied that the qualified person took into account relevant factors when reaching his opinion. In view of all the above, the Commissioner is satisfied that the qualified person's opinion that the exemption is engaged is a reasonable one.

Public interest in maintaining the exemption

82. The medallic review was ongoing at the time of the request; Ministers of the Crown are entitled to a free space to communicate between themselves when policies are still in the process of formulation, and disclosure of this information would undermine this.
83. The MoD also argued that the release of the information, at any time, would undermine the convention of collective ministerial responsibility, since it would provide insight into the views of an individual Minister which could prejudice any announcement of agreed Government policy, which is based on collective decision making. The MoD argued that the prejudice that would be caused by disclosure would not diminish following any formal announcement of the policy.
84. The Commissioner recognises that the convention of collective responsibility protects high level government decisions from becoming personalised and also enables ministers to be totally frank and candid in their discussions. Erosion of this convention could have a negative effect on the operation of Cabinet government.

Public interest in disclosing the information

85. The MoD acknowledged the general public interest in being able to understand the way Government works, how decisions are made, and the extent to which various factors influence those decisions. The MoD also accepted that disclosure of the withheld information would provide greater transparency and accountability, which would be likely to increase trust in the conduct of public affairs.
86. The MoD has recognised the general public interest in openness and transparency in government decision making, including transparency with respect to the advice provided to Ministers which impacts on policy decisions. It has also recognised that there is specific public interest in

transparency of information relating to debates about military recognition.

Balance of the public interest

87. The Commissioner acknowledges that the government undertaking to review the awarding of military medals is of considerable sensitivity and that a number of interested parties are actively monitoring the progress and outcome of the review. The Commissioner therefore takes the view that there is a strong public interest in protecting the nature of the discussions and exchanges that took place, in order to enable participants and interested parties to have trust in the process.
88. The Information Commissioner has considered the safe space arguments submitted by the MoD. The Commissioner accepts that there is a public interest in civil servants and ministers being able to formulate policy and debate "live" issues in Cabinet away from external scrutiny.
89. The Commissioner recognises the possibility that disclosure could lead to an erosion of the convention of collective Cabinet responsibility, and regards this as a valid factor of some weight in favour of maintaining the exemption in relation to this information.
90. The conclusion of the Commissioner is, therefore, that the balance of the public interest supports the upholding of the exemption and the non-disclosure of the information.

Section 37(1)(a)

91. Section 37(1)(a) 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"

92. For information relating to communications with the Sovereign, Heir to the Throne and second in line to the throne, this exemption is absolute. This means that if the exemption is engaged there is no requirement to consider whether the public interest nevertheless favours disclosure.
93. The MoD has applied this exemption to two items. One, a letter dated 17 December 2010 from the MoD to a distribution list, has been exempted in full. The second, a letter dated 28 October 2010, has two redactions. The redacted version has then been supplied to the complainant.
94. 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 Sovereign will not fall within this definition unless it specifically relates to a relevant communication.

95. With regard to the letter of 17 December 2010, the Commissioner is satisfied that, as one of the recipients of the letter is the Permanent Secretary to the Queen and as a response is solicited it relates to communications with the Sovereign, and the exemption is therefore engaged.
96. Turning to the letter dated 28 October 2010, the redacted information makes reference to communications with the Queen. The Commissioner is therefore satisfied that it fulfils the criteria of "relating" to communications with the Sovereign and that the exemption is therefore engaged in respect of it.
97. The Commissioner's view is therefore that section 37(1)(a) has been correctly applied and that the information need not be disclosed.

Section 40(2)

98. The MoD redacted the names of junior members of staff (below senior civil service level) from the information it disclosed to the complainant. This information comprised email addresses and signature blocks. The complainant has confirmed that he is not interested in receiving this information and so the Commissioner has not considered the MoD's application of this exemption.

Time for response

99. The assertion in the internal review (dated 7 September 2011) that the MoD met the time limits for responding to the request misinterprets the Commissioner's view on the time for consideration of the public interest test.
100. Whilst public authorities are permitted a further period to consider the balance of the public interest, they must notify the requestor of their intention to do this within the time limits set in respect of section 17; in other words, within the initial 20 working day timescale.
101. The MoD failed to notify the complainant of its intention to extend the time limit within 20 working days of receipt of his request, which is a breach of section 17(1) of the Act.
102. Furthermore, the extension can only be applied to allow for consideration of the public interest; any relevant exemption(s) must be applied within the original 20 working day timescale. In this case, the

MoD applied only section 36 within that time limit, and the other exemptions which it sought to rely on later were engaged late.

Right of appeal

103. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

104. 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.

105. 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

Graham Smith
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