First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2023/0246
NCN: [2024] UKFTT 00613 (GRC)

Decided in chambers on 28 June 2024

Before

JUDGE ANTHONY SNELSON

Between

COLONEL TERRY SCRIVEN

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE CABINET OFFICE

Second Respondent

DECISION ON REVIEW

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The decision of the Tribunal is that:

(1) Pursuant to the Tribunals, Courts and Enforcement Act 2007 ('TCEA'), s9 and the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ('The Rules'), rule 44, the Tribunal reviews its Decision dated 15 April 2024 and, pursuant to TCEA, s9(4)(b), amends the Reasons given for that Decision.

(2) The Amended Reasons are annexed to this Decision on Review, the amendments being confined to paras 31 and 44 and identified by strikethrough or underlining as appropriate.

(3) The substance of the Tribunal's Decision dated 15 April 2024 is unaffected by the amendment of the Reasons.

REASONS

1. In seeking permission to appeal against the Decision dated 15 April 2024 under Appeal Reference EA/2023/0246 the Second Respondent complains that the Tribunal erred in law in purporting to find as a fact that the HD Committee did not publish its recommendations.

2. On reflection, the Tribunal is satisfied that it was wrong to make the finding of fact under challenge. The evidence to which the Second Respondent draws attention demonstrates that the HD Committee does publish its recommendations to the limited extent that it publishes its decisions to accept (and, it may be, on occasions, not to accept) the recommendations of the AMSC.

3. The Tribunal is further satisfied that the finding was made in error of law in that there was no evidential basis for it.

4. Accordingly, as the Second Respondent agrees, the Tribunal has jurisdiction to review its decision (see the Rules, rule 44(1)(b)).

5. Further, as the Second Respondent again agrees, the Tribunal is satisfied that it is right and in accordance with the overriding objective to correct the error by means of the review procedure.

6. Accordingly, upon review the Tribunal amends paras 31 and 44 of the Reasons given for the Decision dated 15 April 2024, as shown in the Amended Reasons appended hereto.

7. The Tribunal is satisfied that the error in the original Reasons, and the correction thereof, do not affect the substance of the original Decision. That Decision rested on a number of grounds set out in the Reasons. Moreover, the ground at paragraph 44 is itself unaffected by the error. The essential point made by the Tribunal, that the HD Committee does not publish the 'grounds' for its recommendations (rather than the bare fact that it has accepted (or perhaps not accepted) a recommendation of AMSC) stands. Accordingly, the submission on behalf of the Second Respondent that, upon review, the Tribunals should revoke its Decision under Appeal Reference EA/2023/0246 is rejected.

(Signed) Anthony Snelson
Judge of the First-tier Tribunal

Dated: 28 June 2024

ANNEX

EA/2023/0246

AMENDED REASONS

Introduction

1. The Appellant, Col Terry Scriven, is the Chair of the UK National Defence Medal Campaign, which seeks medallic recognition for UK forces veterans. He is also active in support of other campaigns seeking similar remedies in favour of discrete groups of veterans. Since 2017 he has submitted numerous requests for information to the Cabinet Office concerning the system by which decisions are taken concerning the grant of honours, decorations and medals. At least one of the resulting appeals has reached the Upper Tribunal. Besides pursuing remedies under freedom of information legislation, Col Scriven has presented complaints about the conduct of individual civil servants, which he has attempted to escalate to members of the Government including the Prime Minister. He has complained to the Parliamentary and Health Service Ombudsman. He has also (unsuccessfully) launched judicial review proceedings against the Cabinet Office.

2. In these proceedings, Col Scriven pursues appeals against three separate determinations of the Information Commissioner ('the Commissioner') arising out of unsuccessful requests for information directed to the Cabinet Office concerning processes by which decisions are taken as to whether or not to award medals to particular groups of veterans for their service in various conflicts and locations over an extended period of years.

3. The appeals were listed before us in consolidated form for determination on the papers on 19 March this year. Being satisfied that it was just and proportionate to determine them without a hearing, we arrived at the unanimous conclusions embodied in the Decision above.

4. For reasons which will become clear, it is convenient to explain our Decision in two parts, dealing first with Appeal References EA/2023/0246 and EA/2023/0308 together before addressing Appeal Reference EA/2023/0320 separately.

EA/2023/0320 and EA/2023/0308

Procedural history - EA/2023/0320

5. On 16 March 2022 Col Scriven sent to the Cabinet Office a request for information pursuant to the Freedom of Information Act 2000 ('FOIA')[1]:

> **Part One**
>
> **The AMSC met on the following dates to discuss the submissions they had received in respect of historical medallic recognition:**

[1] To which all references to section numbers below refer. It was not in question that the Cabinet Office was the proper 'public authority' for the purposes of any FOIA request.

1 May 2019
3 September 2019
19 November 2019
4 February 2020
29 January 2021
26 April 2021
Unknown date between 1 May to 31 December 2021
Unknown date from 1 January 2022 to 16 March 2022

Would you please forward to me the dates of the HD Committee Meetings which received the advice from each of these AMSC meetings

Part Two

Would you please forward to me the minutes of the HD Committee Meetings which made decisions and recommendations in respect of the advice on medal submissions which the AMSC made to the HD Committee.[2]

6. The Cabinet Office responded on 14 April 2022, providing five dates in respect of Part One (9 October 2019, 21 May 2020, 6 May 2021, 20 July 2021 and 31 January 2022) but refusing to supply the information requested under Part Two, citing s22(1) (information intended for future publication), s35(1) (formulation of government policy etc) and s37(1)(b) (honours and dignities).

7. Col Scriven took issue with that response but on 14 June 2022, following an internal review, the Cabinet Office reaffirmed its stance.

8. Col Scriven complained to the Commissioner about the way in which his request for information had been handled. An investigation followed, in the course of which the Cabinet Office confined its case to reliance upon s37(1)(b).

9. By a decision notice dated 19 April 2023 the Commissioner determined that the Cabinet Office had appropriately applied s37(1)(b) and that the public interest favoured maintaining the exemption.

10. By a notice of appeal dated 9 May 2023, Col Scriven challenged the Commissioner's adjudication.

11. In early course, the Cabinet Office was joined as Second Respondent.

12. The Cabinet Office and the Commissioner resisted the appeal in responses dated 5 July and 4 August 2023 respectively, to each of which Col Scriven delivered lengthy replies.

13. By 4 August 2023 at the latest, it was clear that the collective position of the Respondents was that, despite the Cabinet Office having initially (on 14 April 2022) referred to five AMSC meetings, there had only been three within scope of the request, namely those on 21 May 2020, 20 July 2021 and 31 January 2022.

14. On 11 November 2023, Scriven delivered a further lengthy document entitled 'Opening Statement and Final Submission'.

[2] The nature and functions of the two Committees referred to will be explained in our narrative below.

Procedural history – EA/2023/0308

15. On 20 January 2022 (*ie* before the request in EA/2023/0246), Col Scriven sent a request to the Cabinet Office asking for information under FOIA in the following terms:

> **Part One. Please provide me with the authority and details where it has been agreed by Parliament that a sub-committee of the HD Committee which is a part of the Cabinet office and as such a part of Government can be designated as an independent organisation from Government.**
>
> **Part Two. Judge Buckley in GRC FTT EA/2018/017 decided without a hearing on 11 March 2019 paragraph 108 and 109 the following in relation to a precedent in respect of the Public Interest Test in the relinquishment of the minutes of the AMSC meetings (sic):**
>
> > **Overall we find that there is a fairly significant public interest in the disclosure of these minutes.**
>
> **Judge Buckley made that finding as a result of the fact that the AMSC does not make recommendations that are put before the Queen. It does however provide advice to the HD Committee which makes recommendations that are put before the Queen. You are therefore requested to forward to me the minutes of the following meetings of the AMSC, I accept that there may be some redactions.**
>
> - **1 May 2019**
> - **3 September 2019**
> - **19 November 2019**
> - **4 February 2020**
> - **29 January 2021**
> - **26 April 2021**
> - **23 June 2021**

16. The Cabinet Office responded on 15 March 2022. In answer to Part One, it stated that the requested information was not held but offered an explanation about the history and functioning of the AMSC and drew attention to its terms of reference, available online. As to Part Two, it refused to disclose the information requested, citing s35(1)(a), s 37(1)(b) and s40(2) (personal information).

17. Col Scriven challenged the response but, following a review, the Cabinet Office maintained its position.

18. Col Scriven then complained to the Commissioner. An investigation followed, in the course of which the Cabinet Office withdrew its reliance on s35(1)(a).

19. By a decision notice dated 21 June 2023, the Commissioner held that s37(1)(b) was engaged but that, in respect of the entirety of the information requested, the public interest favoured maintaining the exemption. By an oversight, the Commissioner also purported to find that the Cabinet Office was entitled to rely on s40(2), but nowhere set out any reasoning in support of this finding. We were asked to ignore it for the purposes of this appeal and did so.

20. By responses dated 19 September and 6 October 2023 respectively, the Commissioner and the Cabinet Office joined issue with Col Scriven on his appeal.

21. Col Scriven challenged both responses in written replies. In addition, he served two lengthy documents entitled 'Final Submissions', one dated 29 September 2023 and the other 5 November 2023.

The law

22. FOIA, s1 includes:

> **(1) Any person making a request for information to a public authority is entitled–**
>
> **(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and**
> **(b) if that is the case, to have that information communicated to him.**

23. FOIA, s37 includes:

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

24. In *Cabinet Office v Information Commissioner and Morland* [2018] UKUT 67 (AAC), a case concerning the National Defence Medal campaign, the Upper Tribunal ('UT') offered some guidance on s37, including (at para 20) the following:

> **We also accept … that section 37 (1)(b) must be read against the backdrop of section 37 as a whole. Thus we agree with the First-tier Tribunal in Luder v Information Commissioner and the Cabinet Office (EA/2011/011 at para 16) that the purpose of section 37 itself is to protect the fundamental constitutional principle that communications between the Queen and her ministers are essentially confidential. Section 37(1)(a)-(ad), as noted in the previous paragraph, specifically protects the actual communications with the Sovereign and certain other members of the Royal Family and the Royal Household. Section 37(1)(b) must be concerned with activities other than communications with the Sovereign. The logical purpose of section 37(1)(b) is to ensure candour and protect confidences in the entire process of considering honours, dignities and medals. Col Scriven's argument that where a decision is made not to recommend the creation of a particular award or medal than Her Majesty may well not be informed does not avail him once it is recognised that the provision is not confined to communications with the Sovereign.**

25. The exemption under s37(1)(b) is not 'absolute' under s2(3) and accordingly, provided that it is engaged, determination of the disclosure request will turn on the public interest test under s2(1)(b), namely whether, 'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information'. The proper approach in applying the test was explained by the UT in *APPGER v IC* [2013] UKUT 560 (para 149). The First-tier Tribunal must:

> **… identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This … requires an appropriately detailed identification, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure would (or would be likely to or may) cause or promote.**

26. The relevant date for the purposes of applying any public interest balancing test and, it seems, determining the applicability of any exemption, is the date on which the request

for information was refused, not the date of any subsequent review: see *Montague v ICO and DIT* [2022] UKUT 104 (AAC), especially at paras 47-90.

27. The appeal is brought pursuant to the FOIA, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

> **(1) If on an appeal under section 57 the Tribunal considers –**
>
> **(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.**

Background facts in outline

28. The Committee of the Grant of Honours, Decorations and Medals ('the HD Committee') is the main body responsible for making recommendations to the Sovereign on honours, awards and medals. Constitutionally, those matters are the sole preserve of the Sovereign, and are not in the gift of politicians. The HD Committee is described on the Government website as 'the policy-making body for the honours system.' Its function is described as, '[giving] advice directly to the Sovereign about possible changes to the honours system and military medals policy, including considering new awards.' It currently has seven members, all of whom are very senior officials drawn either from the Civil Service or from the Royal Household.

29. In about 2012, the Advisory Military Sub-Committee ('AMSC') was set up as a standing sub-committee of the HD Committee, charged with considering medals policy and advising and making recommendations to the HD Committee. The creation of the AMSC was one result of a report by Sir John Holmes, which had noted (among other things) a need for greater transparency in relation to medals policy. The AMSC is chaired by an independent member and has independently-appointed membership. Its current membership, terms of reference and recommendations since 2019, together with an outline of its procedures, are all publicly available online.

30. In 2014 the Government published guidelines concerning conditions and criteria to be applied in the award of military campaign medals and other honours, which were adopted by the HD Committee and approved by the then Sovereign.

31. Meetings of the HD Committee are minuted but the minutes are not published. ~~Nor are the recommendations of the HD Committee published~~. The recommendations of the HD Committee are published to the limited extent that the Cabinet Office publishes with the AMSC recommendations a bare note stating whether the HD Committee has accepted the advice of the AMSC. The HD Committee's reasons for accepting (or, it may be, declining to accept) the AMSC's advice are not published.

32. By contrast, the AMSC publishes its recommendations to the HD Committee (as already noted), as well as guidance from time to time concerning particular medals and conditions of eligibility therefor.

The rival cases

Submissions of Col Scriven

33. Col Scriven's arguments are set out at inordinate length. They are to be found in nine documents (beginning with the first notice of appeal and ending with the second 'Opening Statement & Final Submission') which, inclusive of attachments and supporting items, cover more than 400 pages. The obvious danger of this is that the reader struggles to see the wood for the trees. Doing the best we can, we understand his principal points to be the following.

    (1) The five AMSC meetings acknowledged in the Cabinet Office's initial response of 14 April 2022 had subsequently been wrongfully reduced to three for the purposes of its defence before the Tribunal. That was not permissible and put the Cabinet Office in breach of its obligations under the Act.
    (2) Although s37(1)(b) applies to the HD Committee minutes, it does not apply to the AMSC minutes.
    (3) In any event, in relation to both requests, the public interest balance strongly favours disclosure for a number of reasons, of which the following are salient. First, the Cabinet Office has not responded appropriately to the request for the HD Committee minutes: the request cited more than five meetings and the minutes of five are certainly within the relevant scope.
    (4) Second, there is an obvious public interest in ensuring that military service should be properly recognised through medals.
    (5) Third, the numbers of veterans involved is very substantial.
    (6) Fourth, the system under which medallic recognition decisions are taken is, in the view of Col Scriven and those of like mind, 'dysfunctional' and in urgent need of overhaul, which will only come as a consequence of proper, public scrutiny.
    (7) Fifth, these considerations argue compellingly for the view that the public interest in transparency is much more powerful than any countervailing public interest in favour of withholding the disclosure sought.
    (8) Sixth, although Col Scriven stoutly denies making or maintaining allegations of wrongdoing against the HD Committee, the AMSC, the Cabinet Office, or anyone else, questions are raised (without any individual being singled out) about propriety and competence in the matter of medals policy and practice and these questions lend further support to the central transparency ground on which the appeals rest.
    (9) Seventh, the appeals draw support from decisions of the Tribunal in other cases which, although not binding, are persuasive.

Submissions of the Commissioner and the Cabinet Office

34. We will also leave counsel's (mercifully much more concise) submissions largely to speak for themselves. The principal points which we take from those submissions may be summarised as follows.

(1) Having regard to the wording of the request for the HD Committee minutes, the Cabinet Office has rightly identified the meetings of 21 May 2020, 20 July 2021 and 31 January 2022 as the only relevant meetings.
(2) The exemption under s37(1)(b) is clearly engaged in relation to both requests.
(3) The policy underlying s37(1)(b), and indeed the entire section, of protecting the confidentiality of advice given to the Sovereign argues for a restrictive approach where the exemption is engaged.
(4) The clear and important public interest in members of the HD Committee and the AMSC being free to give frank and uninhibited advice in pursuance of their functions favours withholding the information sought. Conversely, disclosure would be liable to have a 'chilling effect' and impair the quality of the advice given.
(5) In the case of the AMSC at least, recommendations are published, which amply satisfy the legitimate case for transparency. In the cases of both Committees, the request for information about the individual contributions in the course of collective deliberations is a step too far.
(6) That is all the more clearly so in circumstances where both Committees have had every expectation that their private deliberations will remain private.
(7) Col Scriven's allegations (or, to put the matter at its lowest, imputations) concerning the probity of the two Committees provide further grounds for the contention that the public interest favours withholding the information requested.
(8) Decisions in first-instance cases are of no assistance. They turn on their own facts and have no binding force. Moreover, they do not lend even tangential support to Col Scriven's case.

Analysis and Conclusions

Previous decisions in other cases

35. It was rightly not argued that any judgment of any higher tribunal or court of record was determinative of the outcome of any of the appeals before us. Col Scriven relied on some decisions of the First-tier Tribunal. We took the view that decisions at first-instance level in other cases, arrived at by other Tribunals in disputes on different points determined on the basis of evidence and submissions not presented before us, were of no assistance.

Scope of the first request (EA/2023/0246)

36. In our judgment, the Cabinet Office has correctly interpreted Col Scriven's request. It was for minutes of meetings of the HD Committee at which 'decisions and recommendations in respect of the advice on medal submissions which the AMSC made' were taken. The attempt by Col Scriven to read his own request as extending to HD Committee meetings not within those limits is obviously impermissible.

37. Since Col Scriven forswears any allegation of wrongdoing (which any misrepresentation by the Cabinet Office of the subject matter of any relevant Committee meeting would surely involve) and certainly makes no positive, evidence-based claim that any HD Committee meeting on any date other than 21 May 2020, 20

July 2021 and 31 January 2022 involved consideration of AMSC advice on medal submissions, we can only take at face value the Cabinet Office's case that the minutes of the meetings on the other dates cited by Col Scriven were not within the scope of the request. The reasoning which follows is confined to those three meetings.

Is s37(1)(b) engaged?

38. Col Scriven did not dispute that the exemption was engaged in the case of the deliberations of the HD Committee. In a late change of position, however, he did argue that the exemption was not applicable to the minutes of the AMSC. With due respect, that was a point (and not the only one) which Col Scriven would have done better to consign to the waste-paper basket. Self-evidently, the work of AMSC does, and did, 'relate to' the conferring by the Crown of honours or dignities. AMSC exists to perform such work. The fact that it does not offer recommendations directly to the Crown is nothing to the point. If authority were needed, it can be found in the Decision of the UT in the *Morland* case cited above, in which Col Scriven was directly involved.

The public interest balance

39. On the public interest balance, we have arrived at different conclusions in relation to the two relevant requests and so must set out separate reasons on each.

EA/2023/0246 – the HD Committee minutes

40. On this appeal, we are persuaded that Col Scriven is entitled to succeed, subject to one minor qualification (to which we will return in due course). We acknowledge the real force of the arguments made on behalf of the Respondents concerning the policy underlying s37. We agree that the Tribunal must be wary of arguments tending to undermine the confidentiality of advice given to the Sovereign in relation to honours and dignities. And we see some force at least in the points made about the somewhat intemperate style which has been adopted by Col Scriven and others in the course of advancing their campaigns.

41. Nonetheless, we are satisfied that these concerns are, in the present context, overstated and that the powerful public interest in transparency outweighs them. We have several reasons for reaching this view. First, we have reminded ourselves that, despite counsel urging upon us the proposition that, for the purposes of deciding whether or not to order disclosure, we should start from the position that 'the bar is set high', the overall structure of the Act has at its heart what amounts (implicitly) to a mild presumption *in favour* of disclosure (see *Coppel on Information Rights*, 6th Ed (2023), 5-026-032).[3]

42. Second, we bear in mind the general public interest in transparency in public affairs and, in the specific context of honours and dignities, the policy push in favour of openness consequential upon the Holmes report (including the establishment of the AMSC). It would be wrong to ignore the fact that the changes brought in since 2012 have been intended to address the concern about a public perception that the conferment of honours was a 'Black Box operation'.

[3] The presumption is explicit under the Environmental Information Regulations 2004, reg 12(1)(b).

43. Third, we bear in mind the obvious importance of the subject-matter to which the request is directed and the huge number of people whose feelings may be deeply affected by decisions whether or not to acknowledge in a formal way the sacrifices made by them or their loved ones in conflicts over many years all around the world. There is a clear and powerful public interest in such decisions, and the means by which they are reached, being explained.

44. Fourth, it is, we think, significant that the HD Committee does not publish the reasons for the recommendations which it makes. It follows that, without publication of the relevant minutes, there is no public record, even in outline, of the grounds on which any particular recommendation is made. Here, the processes of the HD Committee differ markedly from those of the AMSC which, as we have noted, makes public its recommendations and reasoning, thereby enabling citizens (and any other interested persons) to grasp the basis of its advice to the HD Committee. Without disclosure of the HD Committee minutes, the chain of reasoning is obscured from that point on.

45. Fifth, we see very little weight in the argument about 'safe space' at the HD Committee level. The members of that body are exceedingly senior public servants who, no doubt, have responsibility day in and day out for weighty decisions and are publicly accountable for them. As case-law too well-known to call for citation amply demonstrates, 'safe space' and 'chilling effect' arguments must always be treated warily, and there is a special need for caution where they seek to shield from scrutiny senior and high-ranking professionals whose independence and ability to withstand the pressures inherent in any public controversy cannot reasonably be called into question.

46. Sixth, the argument that the HD Committee will have had an expectation of its deliberations being private and the minutes unpublished again takes the case for the Respondents little further. Any Civil Servant knows that FOIA may intrude at any time upon what has hitherto been private territory. That awareness is all the more inculcated into those that the senior end of the profession. The fact that a practice of keeping minutes private exists is no argument for perpetuating that practice. If it were otherwise, the Act would be a dead letter. One would expect that, at all times, like any senior public servant exercising his or her official function, members of the HD Committee would be likely to temper their contributions to meetings with an eye to the possibility of them being made public pursuant to a request under the Act.

47. Seventh, we are also unpersuaded by the argument that Col Scriven's surprising and somewhat regrettable remarks appearing to cast aspersions upon the integrity of (among others) members of the HD Committee should be seen as militating against disclosure of the minutes. If anything, we would have thought the contrary. Of course, this is not to say that a requester has only to make allegations of wrongdoing (however unfounded) in order to bolster his case for disclosure. But in the present context at least it seems to us that making the minutes public would be likely to improve the level of debate, if only by substituting informed comment for feverish speculation.

48. Finally, we must return to the small qualification to which we referred at the start of this analysis. In our judgment, there is no public interest in disclosure of the identities of the (relatively junior) officials who attended the HD Committee meetings in their capacity as members of the Honours and Appointments Secretariat. There was no suggestion that they played any part in the decision-making of the Committee. We are

satisfied that they would have had every expectation that their involvement in its work would not be publicly disclosed. In the circumstances, the minutes should be disclosed with the names of those individuals redacted.

EA/2023/0308 – the AMSC minutes

49. On Col Scriven's second request, our foundational reasoning is the same as that applied to the first. We acknowledge, and see no need to comment further upon, the evident force of the core competing arguments, namely the powerful public interests in, on the one hand, protecting advice offered to the sovereign in confidence and, on the other, ensuring transparency, so far as possible, in a very important area of public decision-making. In relation to the AMSC minutes, we have reached the conclusion that the public interest balance favours maintaining the exemption. We have two main reasons for deciding this appeal differently to that arising out of the first request.

50. In the first place, we consider Col Scriven's transparency arguments markedly weaker in relation to the AMSC's deliberations than those directed to the workings of the HD Committee because, as we have explained, the recommendations of the AMSC are made public and contain, albeit in brief form, an explanation of the thinking which underlies them. Moreover, this information is supplemented by publicly-available details of the composition of the AMSC, its terms of reference and the guidance which it issues from time to time. In the circumstances, interested members of the public already have a valuable set of resources to aid an understanding of the part played by the AMSC in any relevant process relating to medallic recognition. (For reasons explained above, that cannot be said of the contribution of the HD Committee.)

51. Our second principal reason relates to the standing of the AMSC. This is a body of much lower status than that of the HD Committee. Its membership is drawn from a wide range of sources. We do not intend to disparage them in any way by saying that members of the AMSC do not, for the most part at least, consist of very senior public servants accustomed to stressful, demanding, high-level decision-making and the burdens of accountability that go with such responsibilities. Nor is there any reason to suppose that they would have had any expectation of their private deliberations ever being made public. In our judgment, the Respondents' 'safe space' and 'chilling effect' arguments (which we have been careful to measure with a sceptical eye) have real force in this context.

52. These two considerations persuade us that the public interest balance here comes down in favour of maintaining the confidentiality of the AMSC's private deliberations and that the public interest in transparency is amply met by the fact that its ultimate recommendations and other information relating to its work are published.

EA/2023/0320

Procedural history

53. Between 19 July and 9 September 2022 Col Scriven sent 12 requests for information to the Cabinet Office. They were directed very largely to points concerning the AMSC, including its composition, powers, terms of reference (and any changes thereto, in 2022 or at any other time), decision-making, delays (or perceived delays) in decision-

making, operating costs (including but not limited to details of remuneration paid to its members), the extent to which the HD Committee had been involved in questions to do with its (AMSC's) composition and terms of reference, and numerous other matters. Countless documents generated over and/or relating to a span of at least five years (2018 to 2023) were demanded. Most of the requests were formally subdivided into sub-requests. Even those that were not asked for multiple pieces of information. Some requests were tendentious (for example, the sixth, which sought to build in the premise that AMSC had acted outside the scope of its terms of reference, and the seventh, which asked for an explanation as to why there was 'such a disparity between what was recommended by Sir John Holmes and endorsed by Prime Minister Cameron in respect of Membership of the AMSC and what was recruited by the Cabinet Office').[4]

54. The Cabinet Office responded promptly on various dates, providing substantive answers to two requests and advising that the remaining 10 were considered vexatious and accordingly would not be responded to. This appeal is concerned with those 10 requests.

55. Col Scriven raised lengthy challenges and internal reviews followed, which resulted in the Cabinet Office upholding the original responses and further noting that the requests might also have been properly refused under FOIA, s12 (excessive cost of compliance). The Cabinet Office intended its review decision to relate to all 10 of the 'live' requests, but by an oversight it failed to refer to one, namely that presented on 28 August 2022.

56. Col Scriven then complained to the Commissioner about the way in which the Cabinet Office had dealt with the disputed requests. The Commissioner wrote to Col Scriven and the Cabinet Office on 4 November 2022 stating that Col Scriven's complaint had been accepted. Unfortunately, the slip in the Cabinet Office Review decision was repeated: the Commissioner identified only nine requests, omitting that of 28 August 2022. Neither Col Scriven nor the Cabinet Office drew attention to the error. An investigation followed.

57. By a Decision Notice dated 26 June 2023, the Commissioner determined that the nine requests which he had considered were vexatious and the Cabinet Office had been entitled to refuse them. At para 18 of the reasons, particular emphasis was placed on the number of requests made and the disproportionate burden which answering them would have placed on the public authority.

58. By his notice of appeal dated 5 July 2023, Col Scriven challenged the Commissioner's determination. His grounds of appeal and accompanying annexes occupied well over 110 pages and included some further documents by reference only, including his own treatise of some 245 pages, 'Scandal of Medallic Recognition for a Generation of the Nation's Armed Forces Veterans'.

59. Again, the Cabinet Office was joined as Second Respondent.

60. In due course, responses to the appeal were delivered by counsel instructed on behalf of the Commissioner and the Cabinet Office.

[4] References are to the Commissioner's numbering.

61. To each of those responses Col Scriven delivered long and repetitive replies.

62. Finally, Col Scriven delivered an 'Opening Statement and Final Submission of some 27 pages.

The law

63. By FOIA, s14(1), a public authority is excused from complying with a request for information in accordance with s1(1) if the request is 'vexatious'. In *Dransfield v Information Commissioner and Devon County Council* [2012] UKUT 440 (AAC), the UT (Judge Nicholas Wikeley), at para 27, expressed agreement with an earlier first-instance decision that –

> **… "vexatious", connotes manifestly unjustified, inappropriate or improper use of a formal procedure.**

The judge continued (para 28):

> **Such misuse of the FOIA procedure may be evidenced in a number of different ways. It may be helpful to consider the question of whether a request is truly vexatious by considering four broad issues or themes – (1) the burden (on the public authority and its staff); (2) the motive (of the requester); (3) the value or serious purpose (of the request) and (4) any harassment or distress (of and to staff). However, these four considerations … are not intended to be exhaustive, nor are they meant to create an alternative formulaic check-list.**

64. *Dransfield* and a conjoined case were further appealed to the Court of Appeal. Giving the only substantial judgment (reported at [2015] 1 WLR 5316), Arden LJ (as she then was) did not question the UT's guidance, but added these remarks (para 68):

> **In my judgment, the UT was right not to attempt to provide any comprehensive or exhaustive definition. It would be better to allow the meaning of the phrase to be winnowed out in cases that arise. However, for my own part, in the context of FOIA, I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and this is consistent with the constitutional nature of the right. The decision-maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious.**

65. The appeal is brought pursuant to FOIA, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

> **(3) 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.**

(4) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

Submissions

66. In bare summary, Col Scriven strongly maintains that it is unfair and wrong in principle to stigmatise his behaviour as vexatious. On the contrary, he has done nothing more than exercise his constitutional right to request information in support a deserving cause to which he is deeply committed. On his case, that cause has been obstructed and frustrated by officialdom with the consequence that the truth about decisions concerning medallic recognition and the way in which they are arrived at has been wrongfully suppressed, to the great disadvantage of the public interest. He accepts that he has used direct language in advancing his case but denies impropriety in the style and tone which he has adopted.

67. Counsel for the Respondents advanced very similar arguments in opposing the appeal. They relied on the background and submitted that, in the requests under challenge, Col Scriven had gone well beyond permissible use of the freedom of information legislation, employing it as a tactical device in support of his general campaign for medallic recognition and his more specific complaints about the AMSC and the way in which it performs its role. In doing so, he had sought to place a wholly unreasonable burden on the Cabinet Office, strayed into areas of secondary relevance a long way from the points of genuine public interest to which his prior requests had been directed, and made numerous unwarranted allegations against individuals which amounted to harassment.

Analysis and conclusions

68. We are satisfied that this appeal is without merit and that the Commissioner's decision was plainly right. In our view this could almost stand as paradigm case. We have several reasons. First, in view of the number of requests and the wide range of information sought, we are quite satisfied that answering them would place an entirely unreasonable burden upon the Cabinet Office. The burden is all the greater given the short space of time over which the requests were delivered. And the background history strongly reinforces the vexatiousness argument: the requests must be evaluated in the context of the period of years over which Col Scriven has made numerous requests for information and pressed numerous complaints, which have necessitated long and painstaking investigations, none of which on examination have been found to be valid.

69. Second, we agree with counsel for the Commissioner that the requests under consideration illustrate the unhealthy tendency of many presenters of vexatious requests towards what the UT in *Dransfield* called 'vexatiousness by drift', which involves broadening the areas of inquiry from the original substance to matters of (at best) tangential relevance. Such 'drift' typically manifests itself in fishing expeditions in pursuit of secondary and even trivial information in the mere hope that it may lend incidental support to a requester's special interest campaign or yield ammunition for a

public relations offensive. The important constitutional right to freedom of information does not exist to satisfy improper motivation of this sort.

70. Third, the phenomenon of 'drift' brings with it a further, closely related and no less undesirable consequence, namely that the value of requests is likely to be diminished and any public interest in it correspondingly reduced.

71. Fourth, we see force in the complaint that Col Scriven's allegations against individuals in the course of these proceedings have in some instances exceeded the reasonable limits of robust debate and can properly be characterised as amounting to harassment. As the UT in *Dransfield* noted, such behaviour is often a feature of vexatious litigation. In the context of an appeal listed for consideration over one day, with no witness evidence, we are not in a position to make findings on the many remarkable allegations of wrongdoing on the part of a number of Civil Servants and members of the Commissioner's staff (and perhaps the Commissioner himself) contained in the papers. One example here will suffice, namely the apparent claim in Col Scriven's Grounds of Appeal (para 63) and Reply to the Cabinet Office's Response (para 31) of some form of conspiracy between the Cabinet Office and the Commissioner involving criminal conduct by the former (altering records etc to prevent disclosure, contrary to FOIA, s77) and connivance in such conduct by the latter (in declining to investigate). For the reasons given by counsel for the Commissioner, we can only agree that the allegation appears wild and bizarre.

72. Having taken due account of the many representations made by Col Scriven, we are very clear that the nine requests under consideration here were properly identified as vexatious and accordingly, by operation of FOIA, s14(1), the Cabinet Office was not under a duty to provide the information requested and the Commissioner was right so to find.

Overall Outcome

73. For the reasons stated, the appeal under EA/2023/0246 succeeds to the extent stated in our Decision above. The appeals in EA/2023/0308 and EA/2023/0320 are dismissed.

74. We note from the Commissioner's written case that he envisages issuing a fresh Decision Notice in respect of the request of 28 August 2022 as soon as possible. If he finds that request also vexatious, it will, of course, be open to Col Scriven to issue a fresh appeal if he sees fit, although we would hope that he would not do so unless he could put forward some arguable basis for saying that it fell to be treated differently from the nine which we have considered.

75. More generally, we would remind the parties that the question for us is not whether Col Scriven is vexatious but whether the requests which we have considered were vexatious. Our findings adverse to him could not entitle the Cabinet Office to reject out of hand any fresh request for information which he might choose to present. Any such request would need to be considered on its merits.

76. That said, however, we would hope that Col Scriven will think carefully in future before putting himself at risk of further findings of making vexatious requests. FOIA

exists to safeguard freedom of information. It was not enacted to serve as a tool for use routinely and repeatedly in furtherance of campaigns and causes, however noble.

(Signed) Anthony Snelson
Judge of the First-tier Tribunal

Dated: 15 April 2024
Re-dated: 28 June 2024