

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 March 2010

Public Authority: Foreign and Commonwealth Office
Address: Old Admiralty Building
Whitehall
London
SW1A 2PA

Summary

The complainant wrote to the Foreign & Commonwealth Office to request information regarding the decision to allow veterans to wear for a limited period the Pingat Jasa Malaysia Medal. The public authority refused to disclose the information it held 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 of any Honour or dignity). The Commissioner considered the complaint and found that section 37(1)(a) applied to all of the requested information and that the public interest in maintaining the exemption outweighed the public interest in disclosure. However, the Commissioner found that in its handling of the request the public authority breached section 17(1) (Refusal of a request) and section 10(1) (Time for compliance). 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 public authority's website.¹
11. The policy on the PJM was reviewed and upheld in 2007 when the veterans attending the 50th anniversary celebrations in Malaysia were exceptionally given permission to wear the medal for the duration of the celebrations (15 August 2007 to 9 September 2007).

The Request

12. On 15 January 2008 the complainant wrote to the public authority to request information regarding the awarding of the PJM. The request read as follows:

'...can I be advised as to where the recommendation that the PJM can be worn temporarily in Malaysia issued by Her Majesty the Queen on the advice of the HD Committee is kept, and can I obtain a copy of this written recommendation'.
13. The public authority responded to the request on 21 February 2008 at which point it confirmed that the report by the HD Committee and submission sent from the Foreign Secretary to The Queen were held in the Honours Secretariat at the public authority. However, it refused to disclose the information by relying on the exemptions in section 37(1)(b) (conferring of any honour or dignity) and section 35(1)(a) (formulation and development of government policy). The public authority concluded that the public interest in maintaining each exemption outweighed the public interest in disclosure of the information.
14. The complainant subsequently asked the public authority to carry out an internal review of its handling of his request on 26 February 2008.
15. The public authority presented the findings of its internal review on 6 June 2009 and confirmed that it was upholding the initial response to the request. However, the public authority now added that it considered that the information was also exempt by virtue of section 37(1)(a) (Communications with Her Majesty etc.) and that the public interest in maintaining this exemption outweighed the public interest in disclosure.

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

The Investigation

Scope of the case

16. The complainant contacted the Commissioner on 10 June 2008 in order to complain about the public authority's refusal to provide him with the information that he had requested.
17. The complainant has also complained about the length of time the public authority took to comply with his request for an internal review. 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. However, the Commissioner has commented on this point as part of the 'other matters' section.

Chronology

18. 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 7 September 2009 that the Commissioner contacted the public authority in relation to the complaint. In this letter the Commissioner asked the public authority to provide him with a copy of the information requested by the complainant, clearly marked to show where the different exemptions applied. The Commissioner also asked to be provided with detailed submissions to support the public authority's application of section 35(1)(a), section 37(1)(a) and section 37(1)(b).
19. The public authority responded to the Commissioner on 12 November 2009. It responded to the Commissioner's questions on the application of the exemptions and provided some background to the issues surrounding the awarding of the PJM medal.
20. The public authority provided the Commissioner with copies of the information falling within the scope of the request on 4 March 2010.

Findings of fact

21. The information which falls within in the scope of this request consists of a report from the HD Committee which proposes that veterans be allowed to temporarily wear the PJM during Malaysian Independence Celebrations together with a covering letter to HM The Queen from the Foreign Secretary.

22. In 2008 the Cabinet Office disclosed a letter from The Queen's Private Secretary, Sir Robin Janvrin, to the Foreign Secretary which was in response to the HD Committee's original recommendation in 2005 that the PJM may be accepted but not worn by those eligible to receive it.

Analysis

Exemptions

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

23. 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'.

24. 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 just simply communications with such parties.
25. 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.
26. 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.
27. The Commissioner is satisfied that the two pieces of information withheld by the public authority clearly fall within the scope of section 37(1)(a). The annotated letter from the Foreign Secretary is clearly a

communication with the Royal Household as it was communicated to HM The Queen and is annotated to show that she has read and approved the document. As the original enclosure to the letter, the HD Committee report, is an intrinsic part of the letter, and therefore by default also falls within the scope of section 37(1)(a). Furthermore the Commissioner notes that having considered the content of the report itself it is clear that the report was intended, in its own right, to be communicated to The Queen. It therefore falls within the scope of section 37(1)(a) even without having been enclosed with the Foreign Secretary's letter.

Public interest test

28. 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

29. 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.
30. 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

31. 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.

32. 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.
33. 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.
34. In the circumstances of this case the Commissioner also recognises that there is significant interest in, and debate surrounding, the HD Committee's recommendation, and The Queen's subsequent approval, that the PJM could be accepted but not worn, as well as the later decision to allow the temporary wearing of the PJM during the independence celebrations in Malaysia.

Balance of the public interest arguments

35. 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.
36. 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.

37. 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.
38. 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.
39. 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.
40. 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.
41. 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 FCO website referred to in paragraph 10 of this notice. The Commissioner does, however, accept that the Foreign Secretary's letter contains reference to some issues perhaps not fully reflected in the information that is already publically available.
42. Ultimately though the Commissioner believes that the public interest in disclosing the Foreign Secretary's letter is outweighed by the public

interest in maintaining the exemption because of the significant weight that should be attributed to maintaining the convention – i.e. a confidential space in which the Monarch and Ministers can communicate - and the concepts which underpin it, i.e. political neutrality and confidentiality. With regard to the HD Committee report, the Commissioner believes that the degree to which its disclosure would add to the information already in the public domain is limited. However 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.

43. Therefore, for both the letter and the report, the Commissioner has concluded that the public interest in maintaining the exemption at section 37(1)(a) outweighs the public interest in disclosing the information.
44. In reaching this conclusion the Commissioner has considered whether the disclosure of Sir Robin Janvrin's 2005 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.'

45. As noted above, key to any consideration of the public interest test is the content of the information. The Commissioner is satisfied that both the content of the Foreign Secretary's letter and the report are significantly different to the content of the letter that has been disclosed. 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 information requested by the complainant.

Procedural Requirements

46. The complainant submitted his request to the public authority on 15 January 2008. The public authority refused the request on 21 February 2008. Therefore, by failing to issue a refusal notice within 20 working days of receiving the request the public authority breached section 17(1) of the Act.
47. By failing to respond until 21 February 2010 the public authority also breached section 10(1) of the Act which requires public authorities to confirm or deny if requested information is held within 20 working days of receiving the request.

The Decision

48. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - The public authority dealt with the request in accordance with the Act to the extent that it correctly withheld the requested information under section 37(1)(a).
49. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - The public authority breached section 17(1) of the Act by failing to issue its refusal notice within 20 working days of receiving the request.
 - The public authority breached section 10(1) of the Act by failing to confirm or deny if it held the requested information within 20 working days of receiving the request.

Steps Required

50. The Commissioner requires no steps to be taken.

Other matters

51. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his *'Good Practice Guidance No 5'*², published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. In this case the complainant asked the public authority to carry out an internal review of his request on 26 February 2008 yet the internal review was not completed until 6 June 2008. The Commissioner is concerned that the public authority took over 3 months to complete the internal review and the Commissioner considers this a significant failure to conform to the Code of Practice.

²http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_5.pdf

Right of Appeal

52. 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 communicate 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 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and

- (c) states (if that would not otherwise be apparent) why the exemption applies."

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."