

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 23 August 2010**

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

### Summary

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The complainant asked the Cabinet Office for copies of any documents where The Queen approved the wearing of The Pingat Jasa Malaysia medal for those visiting Malaysia during that country's independence celebrations in August and September 2007. The Cabinet Office refused to disclose the information it held citing the exemptions contained at sections 35(1)(a) – formulation and development of government policy; 37(1)(a) – communications with the Royal Family; and 37(1)(b) – information relating to the conferring of an honour or dignity. During the course of the Commissioner's investigation the Cabinet Office disclosed one piece of correspondence falling within the scope of this request but continued to withhold the remaining information. The Commissioner has concluded that this remaining information is exempt from disclosure section 37(1)(a) and furthermore that the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information.

### The Commissioner's Role

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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

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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 the Malaysian government in 2005 would have breached both the 'five year' rule and the 'double medalling' rule.
6. The Committee on the Grant of Honours, Decorations and Medals (HD Committee) which provides the Sovereign with independent and non-political advice on the honours system, considered the request by the Malaysian government to award the PJM.
7. In December 2005 the HD Committee recommended to The Queen that veterans and others eligible should exceptionally be allowed to accept the PJM, offered by the King and Government of Malaysia, but that official permission to wear the medal should not be granted.
8. The Queen subsequently approved the HD Committee's recommendation and the government announced the decision to Parliament on 31 January 2006.
9. There followed a campaign by those dissatisfied with the decision, i.e. to allow the PJM to be accepted but not worn. Consequently, the HD Committee reviewed its decision but concluded that its original recommendation should not be changed.

10. A statement explaining the rationale behind HMG's position in respect of the PJM is available on the Foreign and Commonwealth Office (FCO) website.<sup>1</sup>
11. In 2007 the HD Committee recommended to The Queen that those who had been awarded the PJM be allowed to wear it in Malaysia during the main independence celebrations, the dates of which were 15 August 2007 to 9 September 2007.
12. The Queen subsequently approved this recommendation.

## The Request

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13. On 8 April 2008 the complainant contacted the Cabinet Office and submitted the following request for information:

‘I am requesting sight of **any** [emphasis in original] documents under the Freedom of Information Act 2000 where the Queen approved the temporary wear of The Pingat Jasa Malaysia for those visiting Malaysia during the Merdeka 50<sup>th</sup> anniversary celebrations during August/September of 2007’.
14. The Cabinet Office issued a refusal notice on 27 June 2008 in which it confirmed that it held information falling within the scope of the request but it considered it to be exempt from disclosure of the basis of sections 35(1)(a), 37(1)(a) and 37(1)(b).
15. The complainant contacted the Cabinet Office on 2 July 2008 and asked for an internal review to be conducted.
16. The Cabinet Office informed him of the outcome of the internal review on 5 August 2008. The review upheld the application of the exemptions cited in the refusal notice.

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<sup>1</sup> [http://www.fco.gov.uk/resources/en/pdf/pdf21/fco\\_pingatjasamalaysiamedal](http://www.fco.gov.uk/resources/en/pdf/pdf21/fco_pingatjasamalaysiamedal)

## The Investigation

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### Scope of the case

17. The complainant initially contacted the Commissioner on 14 July 2008 in order to complain about the Cabinet Office's handling of another request he had submitted to it which had also sought information about the PJM.<sup>2</sup> In October 2009, during the Commissioner's discussions with the complainant about this linked complaint, it became clear that the complainant also wished the Commissioner to consider the Cabinet Office's handling of the request he submitted to it on 8 April 2008. The Commissioner agreed to do so.
18. During the Commissioner's investigation of this complaint, the Cabinet Office reassessed the balance of the public interest in relation one of the documents which it believed to fall within the scope of the request – the letter from the Deputy Private Secretary to The Queen to an official in the FCO dated 8 August 2007 – and agreed to provide this document to the complainant. The Commissioner has confirmed that the complainant was provided with this document on 23 June 2010.
19. Therefore this notice does not consider whether the Cabinet Office was correct to initially withhold this document. Rather the notice focuses on whether the Cabinet Office was correct to withhold the remaining information that the Commissioner has determined to fall with the scope of the request.

### Chronology

20. The Commissioner contacted the Cabinet Office on 15 October 2009 and asked to be provided with a copy of the information which fell within the scope of the complainant's request along with detailed arguments to support its reliance on the exemptions quoted in the refusal notice.
21. The Cabinet Office provided the Commissioner with a substantive response on 20 May 2010. In this response the Cabinet Office provided the Commissioner with copies of the three pieces of information which fell within the scope of the request. As noted above in the 'Scope' section, the Cabinet Office also confirmed that it was now prepared to provide the complainant with one of these documents. Rather than provide the Commissioner with detailed arguments to support its

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<sup>2</sup> A decision notice has been issued in relation this complaint under reference number [FS5020275](#).

reliance on the exemptions cited, the Cabinet Office asked the Commissioner to consider the detailed submissions which had already been provided to him both by the Cabinet Office and the FCO in relation a number of other cases which also concerned requests for information about the PJM.

## Findings of fact

22. The information that falls within the scope of the request relevant to this complaint consists of the following three documents:
  - A letter from Christopher Geidt, the then Deputy Private Secretary to The Queen, to an official in the FCO dated 8 August 2007;
  - A report of HD Committee dated 1 August 2007; and
  - An undated submission from the then Foreign Secretary to The Queen which was approved by The Queen.
23. The first document – which is the one that has now been provided to the complainant – clearly falls within the scope of the request because it explicitly records The Queen’s approval of the temporary wearing of the PJM medal. The Commissioner is satisfied that the two further documents fall within the scope of the request because they effectively record the decision and grounds of this approval and thus can be said to fall within the scope given that request was seeking ‘any’ documents which recorded the approval.
24. The Commissioner has also established that on 19 December 2005 the Foreign Secretary wrote to the then Private Secretary to The Queen, Sir Robin Janvrin, about the HD Committee’s recommendation that the PJM be accepted but not worn. The response from Sir Robin Janvrin to the Foreign Secretary is already in the public domain as it was disclosed by the Cabinet Office in March 2008.

## Analysis

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### Exemptions

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

25. The Commissioner has initially considered the Cabinet Office’s reliance on section 37(1)(a) to withhold the remaining information which has not been disclosed to the complainant.

26. 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'.

27. 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 contained at section 37(1)(a) provides an exemption for information which 'relates to' communications with the Royal Family or with the Royal Household rather than simply communications with such parties.

28. Therefore, this exemption has the potential to cover draft letters, memorandums or references to the existence of meetings or correspondence with the Royal Family or Royal Household.

29. 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.

30. The Commissioner is satisfied that the two pieces of information that continue to be withheld by the Cabinet Office clearly fall within the scope of the section 37(1)(a): The submission from the Foreign Secretary to The Queen is clearly a communication with a member of the Royal Family. The Commissioner understands that the HD Committee report was included with the Foreign Secretary's submission and therefore relates to a communication with a member of the Royal Family, as it formed part of that communication.

### **Public interest test**

31. 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**

32. The Cabinet Office 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.
33. 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**

34. 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.
35. Moreover, there is a specific public interest in disclosure of information that would increase the public's understanding of how the government interacts with the Royal Family and the Royal Household, and in the particular 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 advised and consulted in respect of honours issues.
36. 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 broader debate about reform of the British constitutional system.
37. In the circumstances of this case the Commissioner also recognises that there is significant interest in, and debate surrounding, the recommendation of the HD Committee, and The Queen's subsequent approval, that in the unique circumstances of this case the PJM be allowed to be worn temporarily.

## Balance of the public interest arguments

38. 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.
39. However, the Commissioner believes that the following two public interest factors can be said to be inherent in the maintenance 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.
40. The Commissioner accepts that there is a significant and weighty public interest in preserving the operation of the convention identified by the Cabinet Office, 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.
41. 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.
42. 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.



43. 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 initial decision to allow the PJM to be awarded but not worn, and the further decision to allow the PJM to be worn but only temporarily. Whilst the Commissioner recognises that there is a significant amount of information already in the public domain about these decisions 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.
44. 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. The Commissioner does however accept that the Foreign Secretary's submission contains reference to some issues perhaps not fully reflected in the information that is already publically available.
45. Ultimately though the Commissioner believes that the public interest in disclosing the Foreign Secretary's submission 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, at significant detriment to the public interest.
46. Therefore, for both the Foreign Secretary's submission and the HD Committee 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.
47. In reaching this conclusion the Commissioner has considered whether the disclosure of Sir Robin Janvrin's response to the Foreign Secretary's letter and the disclosure of Christopher Geidt's response affects the balance of the public interest in respect of remaining information that has not been disclosed. That is to say, whether the disclosure of correspondence which falls within the scope of the

convention discussed above undermines the weight that should be attributed to the public interest in favour of maintaining section 37(1)(a) in respect of the remaining information. Having considered this point carefully the Commissioner is satisfied that it does not.

48. This is because the content of both letters is very brief. Sir Robin Janvrin's simply reads:

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

49. Christopher Geidt's reads:

'Thank you for your letter of 6<sup>th</sup> August to Sir Robert Janvrin attaching the 1,283<sup>rd</sup> Report of the Committee on the Grant of Honours, Decorations and Medals. I have laid this report, concerning temporary permission to wear Pingat Jasa Malaysia, before The Queen who was pleased to give her approval. Accordingly, I return the Foreign Secretary's submission herewith'.

50. 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 submission and the HD Committee report are significantly different to the content of the correspondence disclosed by the Cabinet Office. Therefore the Commissioner is satisfied these disclosures by the Cabinet Office do not undermine the conclusion that the public interest favours maintaining exemption in respect of the remaining information requested by the complainant.

51. In light of his conclusion in relation to section 37(1)(a), the Commissioner has not considered the Cabinet Office's application of sections 35(1)(a) or 37(1)(b).

### **Procedural Requirements**

52. Part I of the Act includes a number of procedural requirements with which public authorities must comply.
53. These include section 10(1) which requires a public authority to respond to a request within 20 working days following the date of receipt.

54. Furthermore, section 17(1) of the Act requires a public authority to provide an applicant with a refusal notice, within the time for compliance set out at section 10(1), stating the basis upon which it has refused a request for information.
55. As the Cabinet Office failed to provide the complainant with a refusal notice within 20 working days following the date of his request the Commissioner has concluded that it has breached section 17(1) of the Act.

## **The Decision**

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56. 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 Foreign Secretary's submission and the HD Committee report are exempt from disclosure on the basis of section 37(1)(a) of the Act and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
57. However the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act
  - The Cabinet Office breached section 17(1) of the Act by failing to issue its refusal notice within 20 working days following the date of the request.

## **Steps Required**

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58. The Commissioner requires no steps to be taken.

## Right of Appeal

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59. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://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 sent.

**Dated the 23<sup>rd</sup> day of August 2010**

**Signed .....**

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

## Legal Annex

### General Right of Access

**Section 1(1)** provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

**Section 1(2)** provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

### Effect of Exemptions

**Section 2(2)** provides that –

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

### Time for Compliance

**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."

### Refusal of Request

**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.”

### **Government policy etc**

**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.

### **Communications with Her Majesty**

**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.”