

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 12 July 2011

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

Summary

The complainant requested information relating to a named ex-serviceman's entitlement to campaign stars or medals for service during the Second World War. The public authority refused to provide this citing section 44 of the Act (Statutory Bar). At internal review it maintained this position and also sought reliance on the exemption at section 21 (Accessible to the requester by other means) because the information fell within its publication scheme, subject to certain restrictions relating to next of kin consent and the passage of time. In correspondence with the Commissioner, it also introduced reliance on section 22 (Information intended for future publication). The Commissioner has concluded that the public authority is entitled to rely on section 22 as a basis for withholding the information. However, in failing to cite this in its response to the complainant, it contravened provisions of sections 1, 10 and 17 of the Act.

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. The complainant had been in correspondence with the public authority regarding access to information contained on the service records of a number of individuals who served in the armed forces during the Second World War. Early in 2010, he sought access to a particular ex-serviceman's record of entitlement to the Efficiency Medal. The complainant had submitted a copy of the Commando Association Newsletter of September 1991 as proof of the ex-serviceman's death. The public authority originally refused this request but it revised this upon internal review noting that information relating to Long Service and Good Conduct was already available in the public domain and may have been published in the London Gazette. It therefore disclosed information within the scope of this request to the complainant. The complainant then made a further request under the Act and it is this request which is the subject of this decision notice.

The Request

3. On 16 May 2010, the complainant made a request for information of the following description:

"Will you now please let me have a copy of his [the named soldier's] Medal Index Card or other record of the issue or his entitlement to any other campaign stars or medals for service during the Second World War?"
4. On 22 July 2010 the public authority's Service Personnel and Veterans Agency (SPVA) issued a refusal notice. In this letter it confirmed that the public authority did not hold a Medal Index Card for the named soldier but it did hold a Statement of Services for him. It argued that this was exempt from disclosure under the Act by virtue of section 44 of the Act in that disclosure would breach Article 8 of the Human Rights Act. Section 44 is set out in a Legal Annex to this Notice. It explained that its policy was to withhold information about service personnel who had been deceased for less than 25 years where no consent for disclosure had been provided by the service person's next of kin. In this letter the public authority gave an address at its main office for contact purposes when requesting an internal review.

5. On 26 July 2010, the complainant wrote to SPVA requesting an internal review rather than the address given in the public authority's letter of 22 July 2010. There then appears to have been an attempt by SPVA to resolve the matter informally in a letter to the complainant dated 23 August 2010. An unclear statement in this letter about the right of appeal put the complainant and the public authority at cross purposes as to whether he had formally requested an internal review. Following the intervention of the Commissioner, this matter was resolved and the public authority wrote to the complainant on 7 October 2010 detailing the outcome of its internal review.
6. In this letter the public authority reiterated its view as to the application of section 44(1)(a) and (b) emphasising its duty of care to the families, friends and colleagues of deceased service personnel. It also commented that because this information was available via its publication scheme it was also exempt under section 21 of the Act.

The Investigation

Scope of the case

7. On 26 August 2010, the complainant contacted the Commissioner to complain about the way his request for information had been handled. However, his complaint was not valid on that date because the public authority had not yet completed its internal review. The Commissioner is not obliged to proceed with a case where a requester has not exhausted a public authority's internal review procedure. As noted above, following the Commissioner's intervention, the public authority undertook an internal review and advised the complainant of the outcome of this on 7 October 2010.
8. Due to the high volume of much older cases that the Commissioner was dealing with at the time, he was unable to take forward his investigation of this complaint until mid-March 2011. The Commissioner wrote to the complainant about this on 27 October 2010, 2 November 2010 and 9 February 2011.
9. The Commissioner next wrote to the complainant on 16 March 2011 to confirm the scope of the case as follows:

- Whether the public authority was entitled to rely on the exemptions it had cited as its basis for refusing the complainant's request of 16 May 2010.

Chronology

10. Following on from his discussions with the public authority regarding the internal review, the Commissioner wrote to that authority on 9 March 2011 to confirm that he was now taking the complaint forward. In this letter, he set out a series of questions regarding the application of the exemptions that the public authority had so far sought to rely on. At the same time, the Commissioner drew attention to a judgment promulgated by the First-Tier Tribunal (Information Rights) which had previously been known as the Information Tribunal (the "Tribunal"). This Tribunal¹ had commented that the Human Rights Act 1998 did not provide a statutory bar to disclosure under the Act.
11. The Commissioner also drew attention to what he described as speculative arguments provided by the public authority regarding the impact of disclosure on veterans and their families. The Commissioner stressed that he was particularly interested in evidence that the public authority may be able to provide from veterans of the Second World War and their families.
12. The Commissioner said that based on the public authority's arguments to date he was not wholly persuaded that section 44 could apply. He noted that the late application of other exemptions by public authorities could cause considerable delay to his investigations and, as a consequence, causes considerable inconvenience to complainants. However, he invited the public authority to provide its full and final arguments as to the application of any other exemptions that it believed were applicable.
13. The Commissioner added that he intended to give a copy of those arguments to the complainant (excluding any direct reference to the detail of the withheld information) because it was fair and reasonable to do so.
14. The public authority responded on 28 March 2011. It reiterated earlier comments it had made regarding the need for a generic

1

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i25/mrspbluckvinformationcommissioner17sept07.pdf>

approach when responding to requests under the Act for service records. This approach took into account whether consent for disclosure had been obtained from next-of-kin. It also took into account the duty of care owed to the families of service personnel. Where next-of-kin consent had not been obtained, information was generally made available 25 years after date of death (where this date could be satisfactorily evidenced) or 116 years after date of birth where no proof of death was available. It explained that it relied on this approach in the interests of efficient administration in meeting such a high demand for information of this type. The policy, in its view, ensured consistency and transparency and provided clarity for its request handling staff.

15. It also acknowledged:

"We are conscious, however, that taking a generic approach to handling for the sake of consistency risks conflict with the "request by request" approach to handling enshrined in the Act. Its [sic] often possible to argue "an exception to the rule" because the Act requires us to look at the specific substance of the information within a specific record being requested – often on sentence by sentence, or in some cases word for word basis – especially when challenged".

16. It then set out its arguments about the application of section 21. It referred specifically to the provisions of section 21(3) which provides that:

"For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme."

17. It said that section 19 of the Act (which covers publication schemes) explicitly states that a publication scheme can include items due for later publication. It was therefore wrong to determine that section 21(3) only covers part of the information provided under the scheme:

"Although the information withheld from the complainant is not reasonably accessible to him immediately, it will be accessible to him in a few years time."

18. Turning to the application of section 22 (which it sought to apply in the alternative), it argued that the information was intended for future publication and that therefore this exemption was engaged. It set out its arguments as to the balance of public interests. It described these as *"Arguments in favour of disclosure immediately on death of subject"* and *"Arguments against disclosure immediately on the death of subject"*. These arguments are analysed later in this notice.

19. Prompted by comments from the complainant's submissions, the Commissioner had drawn the public authority's attention to information of a similar nature to that request in this case which was available via the website of The National Archives. Referring to the age of the information, the public authority said:

"Whilst this is an important criterion in deciding the point at which records as a class of information should be considered for transfer to The National Archives for open public access, it is not a factor that MOD takes into account in disclosure policy in respect of the information MOD holds relating to deceased Service personnel requested under the publication scheme and FOI."

20. It concluded that the public interest in the disclosure of the records of deceased service personnel was adequately satisfied through its current publication scheme arrangements.

21. It also provided a copy of a letter it had sent to a veterans' association inviting its views regarding the disclosure under the Act of *"personal information contained in the personnel records of deceased Service personnel"*. In this letter, it said:

"In particular, MOD would be interested to know whether Service families agree that we should withhold sensitive information from third party requesters for 25 years after death without next of kin consent or would they be content for it to be released sooner".

22. The Commissioner supplied the complainant with the public authority's arguments as to the application of section 22 given that these would be new to him.

23. On 3 May 2011, the complainant wrote that, in his view, section 22 was not engaged in the first instance. He also advised that he had now obtained the requested information from another unspecified source and that therefore his need for a binding decision notice (subject to appeal) in order to provide guidance for future applications was less urgent.
24. On 9 May 2011, the Commissioner wrote to the complainant inviting him to withdraw his complaint given that he had already obtained the information in question. He set a deadline for response of 18 May 2011.
25. When no response was received, the Commissioner telephoned the complainant on 25 May 2011 to check whether he now no longer wished to proceed given his lack of response to the Commissioner's letter of 9 May 2011. The complainant said that he was not prepared to withdraw his complaint. However, he agreed to withdraw another related complaint because he had obtained next-of-kin consent and had, as a consequence, received the information he had sought in that case directly from the public authority.
26. The Commissioner then emailed the public authority on 25 May 2011 to advise that the related complaint had been withdrawn. He asked the public authority to provide further comment as to why it believed section 22 was engaged. He also prompted the public authority to provide any comments it had from relevant veterans' associations in support of its position regarding the balance of public interest in relation to section 22.
27. The public authority responded later the same day and provided copies of letters it had received from a number of organisations who represented service families. These were members of a group called COBSEO² which is a confederation of service charities.
28. It also provided arguments as to why, in its view, section 22 was engaged. These will be analysed later in this Notice.

² <http://www.cobseo.org.uk/>

Background

29. The public authority's publication scheme has the following arrangement for access to service records³:

*"Under the scheme, and in recognition of the duty of care owed to the family of the deceased subject, for a period of 25 years following the date of death of the subject and without the consent of the Next of Kin, MOD will disclose only: **surname; forename; rank; service number; regiment/corps; place of birth; age; date of birth; date of death where this occurred in service; the date an individual joined the service; the date of leaving; good conduct medals (i.e. Long Service and Good Conduct Medal (LS&GCM)), any orders of chivalry and gallantry medals (decorations of valour) awarded, some of which may have been announced in the London Gazette.***

*After this period, and if it is held, in addition MOD will disclose without the requirement for Next of Kin consent: **the units in which he/she served; the dates of this service and the locations of those units; the ranks in which the service was carried out and details of WWII campaign medals.***

The administration fee of £30 will be waived for requests from those who were the spouse or civil partner of the subject at the time of death (or parent if there was no spouse or civil partner).

Where the consent of the immediate next of kin has been given for its release to a third party, the 25 year threshold will not apply allowing the release of all the information available under the publication scheme at any time, subject to the payment of an administration fee of £30 per record and the provision of a death certificate (except where death was in service)."

3

<http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/Personnel/ServiceRecords/>

30. The Commissioner notes that there had been discussions between the parties as to what constituted an adequate proof of death. There is no dispute between the parties in this case as to whether the subject had been deceased for more than 25 years and therefore the question of adequacy of proof of death does not arise here.

Analysis

Exemptions

Section 21 – Information reasonably accessible to the applicant by other means

31. Section 21 provides that:-

“(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)-

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.”

32. The Commissioner has previously issued a decision notice regarding access to service personnel records and the application

of section 21 (FS50229110)⁴. In this earlier notice, the Commissioner had stated (at paragraphs 39 and 40) that:

"39.... The Commissioner has therefore concluded that any information which the complainant was able to obtain via the public authority's publication scheme was exempt from disclosure to him under section 1 of the Act by virtue of section 21(3).

40. As a consequence of the above, any information which was not available to the complainant in accordance with the public authority's publication scheme constitutes information which must be considered for disclosure under section 1 of the Act."

33. In this case, the complainant cannot satisfy the public authority's publication scheme criteria because the subject of the information has not been deceased for 25 years. He does not, in the alternative, have consent from the subject's next-of-kin.
34. In the Commissioner's view, if the applicant must wait several years before accessing information, that information cannot be construed as reasonably accessible to that applicant even if another applicant might be able to access the information because they can provide next-of-kin consent. The Commissioner would add that as the information is not actually *available* under the scheme, it can be included in it but this does not mean that s21(3) applies as the public authority asserts.
35. Analysis of section 21 turns on whether information is reasonably accessible to the applicant. If it is not, it follows that section 21 cannot therefore apply.

Section 21 - Conclusion

36. For the reasons outlined above, the Commissioner is not satisfied that section 21 is engaged. The withheld information is therefore not exempt from disclosure under that exemption. This notice will now consider the application of section 22 which was eventually cited by the public authority in the alternative.

4

http://www.ico.gov.uk/~media/documents/decisionnotices/2010/fs_50229110.ashx

Section 22 – Information intended for future publication

37. Section 22(1) provides that information is exempt information if-

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

38. This exemption is therefore engaged where each of the three limbs set out above are satisfied. This exemption is also subject to a balance of public interest test by virtue of section 2(2)(b) of the Act.

Is section 22 engaged?

39. The starting point for the Commissioner’s analysis of section 22 is that the requested information is not reasonably accessible to the complainant via the public authority’s publication scheme because he cannot satisfy any of the criteria for access that are set out in that scheme. However, the complainant will be able to access the information 25 years after the subject’s death.

40. The complainant has argued that the information is not intended for future publication and cannot therefore fall within this class of information described in this exemption. He expressed concern that the information may be weeded out and destroyed at some point and argued that without a statement from, for example, a relevant Secretary of State, confirming that the information was to be published in the future, section 22 could not apply. He also drew attention to comments made by the public authority in the copy arguments he had received which indicated that there were ongoing discussions by the public authority as to the length of time certain information about service personnel should remain closed. In the absence of a fixed policy, the complainant also argued that section 22 could not be said to apply. He has also repeatedly drawn attention to information available about the war-time generation from The National Archives.

41. In its submissions, the public authority drew attention to the Commissioner's own published guidance⁵ which states that:

*"The Act provides an exemption from the **right to know** if the information requested by an applicant is intended for future publication. To be covered by the exemption, the information must be held with the intention of publication at the time the request was made. It will not be permissible to argue an intention to publish the information when that decision was only made after the request was made. It is not, however, necessary to have set a publication date. Publication will often be publication in accordance with the publication scheme of the public authority."*

42. It also drew attention to the following points in the Commissioner's guidance regarding section 22(c) and the public interest test:

"in both cases the underlying thinking is that if the applicant can or will be able to obtain the information he or she wants by another means, there is no need for a separate statutory route".

It underlined the phrase "will be able to" to emphasise its relevance.

43. It further drew attention to the following statement in the guidance:

"in the case of s22 because the information is not yet available, the public authority must consider whether it should keep to the original timetable for publication or whether the circumstances of the case, including the public interest, would warrant earlier disclosure."

44. It observed that without next-of-kin consent, the information within the scope of the complainant's request will not be disclosed for several years. It noted that:

5

http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detail_d_specialist_guides/awareness_guidance_7_-_information_intended_for_future_publication.ashx

"[Although] this is some way in the future, it was important to recognise that the 25 year policy is aimed at protecting the information of a deceased soldier who served last year as well as those whose service was many years ago. As can be seen by the evidence attached to this email, organisations representing veterans are as equally concerned about the disclosure of information about those who served a significant number of years ago as they are about those who served more recently. Whilst I recognise that the records in scope of this request are relatively old, the MOD does not believe that it would be either safe or appropriate to introduce a disclosure criterion based on when the service was undertaken since this is not the relevant consideration regarding the potential sensitivity of the information."

45. As noted above, there are three limbs to section 22(1). The Commissioner will now consider each in turn having regard for the submissions of both parties.

Is the information intended for future publication?

46. The Commissioner is following his own published guidance (quoted above) and is satisfied that the withheld information is intended for future publication. The requested information is clearly within the scope of information described in its publication scheme although it is not yet available via that scheme unless certain criteria are satisfied. Once these criteria are satisfied the information will be made available via the public authority's publication scheme. The Commissioner has already stated in his guidance on section 22 that *"Publication will often be publication in accordance with the publication scheme of the public authority"* and he remains of this view in this case. The first limb of section of section 22(1) is therefore satisfied.

Was the information held with a view to such publication at the time when the request for information was made?

47. The requested information falls within the description of information which is available via the public authority's publication scheme (subject to certain criteria). The Commissioner is therefore satisfied that the requested information was already held with a view to being made available via its publication scheme at the time the request for information was made. The second limb of section 22(1) is therefore satisfied.

Is it reasonable in all the circumstances that the information should be withheld until the intended date of publication (whether determined or not)?

48. The public authority has set generic criteria whereby service records will not be made available via its publication scheme until 25 years after the date of death of the subject or 116 years after the date of the subject's birth. Implicit in the complainant's arguments for disclosure is that this is unreasonable in the circumstances. He has drawn attention to the age of the information in question and the relatively trivial nature of what he is requesting. As noted above, he has also commented that a high threshold should be met, e.g., authorisation from a Secretary of State, before section 22 can be engaged. He has also drawn attention to other information about the Second World War generation that is available from The National Archives and to previous inconsistencies in the public authority's disclosure regime.
49. The public authority has argued that given the volume of service records that it holds, it is reasonable for it to set these generic criteria rather than to consider each request for service records on its merits. Focussing on the criterion of 25 years from date of death, it explains that it set this period having taken into account the views of service veterans. It has also noted that the Commissioner has already accepted its criteria when it approved the public authority's publication scheme in accordance with section 19(1) of the Act.
50. The Commissioner recognises that there is some merit in the complainant's arguments although it is simply not the case that section 22 requires authorisation from a Secretary of State before it can be relied upon. On the face of it, and as the complainant asserts, the information appears to be of the type which loses sensitivity over time. However, the Commissioner has concluded that the public authority's arguments carry greater weight, particularly given that the Commissioner has already accepted these criteria when approving the public authority's publication scheme. The third limb of section 22(1) is therefore satisfied.

Section 22 - Public interest test

51. Although the Commissioner has accepted that it is reasonable in the circumstances for the public authority to engage section 22 as a basis for withholding the requested information, the exemption

can only be applied where the public interest in maintaining this exemption outweighs the public interest in disclosure. Some of the complainant's arguments as to reasonableness are also applicable when considering the balance of public interest and these will be analysed below.

Public interest arguments in favour of disclosing the requested information

52. The complainant has drawn attention to information about the Second World War generation that is available via The National Archives and to previous inconsistencies in the public authority's access regime. He believes that these add weight to the argument for disclosing the withheld information.
53. He has also argued that the information in question is trivial in nature and, implicitly, will not give rise to harm to the interests of the subject's surviving family.
54. The public authority's arguments as to the balance of public interest relate to disclosure immediately upon the death of the serviceman or woman in question. It took the view that if it were not to apply the criterion of 25 years then it would follow that information should be made available immediately following the death of the subject.
55. The public authority set out the following points in favour of disclosing the requested information:
 - There is a public interest in disclosure where that assists understanding of military history, particularly if the events in question are high profile or where the serviceman or woman in question is of a senior rank. However, it expressed scepticism as to the merits of this argument where a significant period of time had not yet elapsed since the date of the subject's death where there was no consent for disclosure from next of kin.
 - There is a public interest in assisting individuals in researching family histories, particularly the history of the requester's own family.

Public interest arguments in favour of maintaining the exemption

56. In correspondence with the public authority prior to the request under consideration in this notice, the complainant had excluded

any information which, in his view, could be considered sensitive, such as health information or next-of-kin details. However, for obvious reasons, he submitted no arguments in favour of maintaining the exemption, nor did the Commissioner require him to do so.

57. The public authority commented that some medal collectors sought information about medal entitlement in order to prove provenance and increase the value of the medals in their possession. However, it dismissed this as a pecuniary interest and as irrelevant to the balance of public interest test under the Act.
58. It also said that there was relatively little public interest in early disclosure of the detail of specific postings of an individual without next of kin consent.
59. It explained that one of the reasons for the 25 year limitation period was to protect bereaved families of ex-servicemen from the unwanted approaches of medal collectors immediately upon the death of the subject in question. It explained that it had a duty of care to the families of ex-servicemen to maintain and preserve their dignity and privacy. Its approach to the disclosure of service records must be in accordance with its work in this area. It drew attention to successive governments' commitment to rebuild the unwritten Military Covenant:⁶

"[the] Government has explicitly committed to honouring and supporting the whole of the Armed Forces community through its work to 'Rebuild the Military Covenant'. The Government has recognised the need to do more to ensure our Armed Forces, veterans and their families have the support they need and are treated with the dignity they deserve. It is important that in managing the disclosure of information in ROS [Records of Service] that MOD does so in a way that is fully consistent with the aims of the Military Covenant."

60. It also explained that disclosure of information about periods of service reveal information about the subject's family life. It described a scenario whereby disclosure as to a period of service and the location of that service may contradict what is understood within the family. The Commissioner believes that the public

⁶ <http://www.parliament.uk/briefing-papers/SN05979>

authority is referring to issues of paternity whereby a serviceman is assumed to be the father of one of his dependents but it comes to light, following public disclosure under the Act, that he was separated from his partner at the relevant period when posted abroad on active duty.

61. It explained that in accordance with its duty of care to a service person's family following the death of that service person, it was in the public interest for it to seek to protect the dignity of that family. In essence, it could not predict in each case whether there was an issue of paternity or similar matter and therefore it was correct to adopt a cautious generic approach.
62. As noted above, it also eventually submitted copies of comments provided by various veterans' agencies in support of its position. The consensus among these agencies was that 25 years was "*about right*". One agency recognised how frustrating this might be for researchers. Another argued that 25 years might not be long enough, particularly where the individual in question had served, for example, in Northern Ireland.
63. Another agency mentioned its irritation at being approached by those who wanted to pass themselves off as veterans:

"we see individuals turning up at memorial events ... displaying an array of medals which, as is often the case, turns out to belong to someone who has recently past [sic] away".
64. Another commented: "*most families of those KIA [killed in action] in Afghanistan would not see this [25 years] as long enough – particularly with blue on blue incidents ... The problem is not that there is interest, but that having suffered enough they then have to go through it all again and again. Most want to forget and this kind of recall is damaging.*"
65. The Commissioner notes that the phrase "blue on blue" usually refers to incidents where a service person dies as a consequence of the military actions of their own or allied forces. It normally relates to actions which occur during NATO operations because the colour blue is normally worn by forces operating under NATO command.

66. Another commented following a straw poll of its most badly affected clients (widows, bereaved parents, siblings, dependents (now adults) and disabled ex-service persons):

"We have seen evidence of this [trauma recalling past military events] in applications for War Disablement Pensions where older folk find it much more difficult to discuss their past or accept counselling, whereas younger applicants will accept help and can rationalise the situation better."

67. Many of the agencies also expressed the importance of a simple and uniform approach such as the 25 year period because it provided clarity to the subjects and their families as to what they could expect.

Balance of the public interest arguments

68. The Commissioner agrees that the public authority is entitled to be protective of personal information (including medal entitlement information) relating to service personnel who have died in recent theatres of war such as Iraq and Afghanistan. Feelings as to loss will still be very raw for their surviving family members and, in the Commissioner's view, there is a compelling public interest in allowing the public authority to shield those surviving members from further intrusion into their grief. Such intrusion would inevitably arise if information about recent service history (including medal entitlement) were to be routinely made available under the Act.
69. The question arises in this case as to whether the public interest in protecting medal entitlement information about people who served in the Second World War (and particularly medal entitlement information relating to the serviceman named in the complainant's request) outweighs the public interest in disclosure.
70. The Commissioner would add that just because he has approved the publication scheme via which this information will become generally available in due course, it does not follow that the public interest favours maintaining the exemption at section 22 to prevent earlier disclosure
71. The requested information in this case appears innocuous from its description in the request and clearly relates to military service given approximately 70 years ago.

72. Prompted by the complainant, the Commissioner notes that there is a considerable discrepancy between what is available at The National Archives from this era and what is (or will be) available via the public authority's publication scheme. For example, the Registrar General of Shipping and Seaman has transferred to The National Archives information about medals claimed by and issued to merchant seaman who served during the Second World War and this is available for a small fee⁷.
73. The Office of the Judge Advocate General (part of HM Courts and Tribunals and not part of the public authority) has transferred information of far greater sensitivity to The National Archives, namely, court martial records from the prisoner of war camp in Changi⁸.
74. The Commissioner recognises that access to service records for this era can be frustratingly inconsistent for those with an interest in this subject. However, he does not believe it is the responsibility of the public authority to standardise levels of access across all relevant public authorities and other bodies. It must only consider its own records.
75. The complainant asserts that the public authority has in the past been inconsistent with regards to access to its own records. However, the Commissioner does not agree that past inconsistency on the part of the public authority undermines any consistent approach it seeks to take now.
76. The Commissioner agrees that there is a strong public interest in allowing the public authority to carry out its duty of care for service personnel and their families even after the death of the service person in question. The public authority has come to the view that in order to maintain its duty of care to veterans' families 25 years is an appropriate period of time to allow following the date of a service person's death before allowing access to information about their medal entitlements.
77. The Commissioner has previously accepted this generic approach by approving the public authority's publication scheme. However,

⁷ <http://www.nationalarchives.gov.uk/documentsonline/seamens-medals.asp>

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<http://www.nationalarchives.gov.uk/catalogue/displaycataloguedetails.asp?CATLN=6&CATID=1553650&SearchInit=4&SearchType=6&CATREF=WO+93%2F46>

he must consider here whether the public interest is best served in the circumstances of this case by ordering a deviation from the access arrangement which is set out in the publication scheme.

78. The Commissioner has found the comments provided by veteran agencies and associations to be particularly compelling in this regard. He notes that all but one of the agencies felt that the 25 year arrangement best served those that they represented. One agency felt that, in some cases, for example, where a person has served in Northern Ireland, a 25 year gap was not long enough. Reference was made in a number of the comments to unwelcome approaches being made to bereaved families for medal information or for medals themselves.
79. There is no suggestion that the requester in this case has anything other than honourable intentions with regard to this information, that is, he is conducting historical research. However, it is generally accepted that the Act is "applicant blind" (apart from exceptional circumstances which do not apply here). The complainant's intentions are therefore irrelevant in this case.
80. Where there is evidence that unwelcome approaches are being made to bereaved families for medal information (or for medals themselves where medal entitlement information becomes available), the Commissioner accepts that there is a public interest in avoiding this regardless of the age of that information. Where the public authority seeks to avoid unwelcome approaches of this kind being made to service families it is acting upon its duty of care to those families as part of the Military Covenant.
81. In the paper to which the Commissioner has already provided a link (see note 6) the Military Covenant is described as follows:

"[It] has existed as an unwritten social and moral commitment between the State and the Armed Forces that has developed through long standing convention and customs. Historically it has been largely associated with the Army, although its principles are applied across all three Services. Although it currently has no legal basis, it implies that in return for the sacrifices that Service personnel make, the State has an obligation to recognise that contribution and retains a long term duty of care toward Service personnel and their families."

82. While the evidence eventually supplied by the public authority is not primary evidence, it is not speculative commentary. It is, instead, compelling secondary evidence from relevant sources that represent individuals with direct experience. There was a consensus that a gap of 25 years provided reassurance to service families of all generations that there would be a significant gap between the death of their loved one and the routine public disclosure of any information about them. The Commissioner therefore gives weight to the public authority's assertion that disclosure of this information would adversely impact on today's generation of service families.
83. The Commissioner also notes the observation made by one of the agencies regarding its experience of helping the older generation of servicemen and their families come to terms with traumatic experiences of military service. The Commissioner believes this point is relevant when considering whether information of the age requested in this case should be disclosed under the Act.
84. Finally, the Commissioner notes that the complainant is not being denied access to this information. Access is, instead, delayed. If he were able to obtain consent from the subject's next of kin, he would be able to access the information immediately via the publication scheme.
85. The Commissioner does not agree that public interest is ill-served by delay in this case. There are no exceptional circumstances which appear to tip the balance in favour of disclosure in advance of the established timetable. The complainant has provided no evidence to show, for example, how this information would provide immediate and revelatory insight for the public into a particular event in the Second World War. The events of the Second World War remain significant to the life of the nation and new facts which increase the public's understanding of those events regularly emerge thanks to the work of a number of dedicated individuals accessing archived information from primary sources that becomes available over time.
86. While there is a public interest in allowing historians to advance their researches, the Commissioner does not believe that this public interest factor outweighs the public interest in allowing the public authority to maintain its duty of care to service families.
87. Therefore the Commissioner is of the view that the public interest is currently best served by allowing the public authority to keep to

its present timetable for publication of the information requested in this case.

Section 22 – Balance of public interests: Conclusion

88. For the reasons outlined above, the Commissioner has concluded that the public interest in maintaining the exemption at section 22 outweighs the public interest in disclosure. In reaching his view, he has given particular weight to the public authority's duty of care to service families as part of the Military Covenant and the testimony provided by the public authority from representatives of those families.
89. The public authority is therefore entitled to rely on section 22(1) as a basis for withholding the requested information.
90. The Commissioner has not gone on to consider the application of section 44 in this case because he is already satisfied that the requested information is exempt under section 22(1) of the Act.

Procedural Requirements

91. In failing to notify the complainant that it was relying on section 22(1) as a basis for withholding the requested information within 20 working days, the public authority contravened the requirements of section 1(1)(a), section 10(1) and section 17 of the Act. It also contravened the requirements of section 10 by failing to provide any response in a timely manner. These provisions are set out in full in a Legal Annex to this Notice.

The Decision

92. 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:
 - It was entitled to rely on section 22(1) as a basis for withholding the requested information.
93. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- It failed to provide the complainant with a response within 20 working days and, specifically, it failed to advise the complainant within 20 working days that it was seeking to rely on section 22(1). In failing to do so, it contravened the requirements of section 1(1)(a), section 10(1) and section 17 of the Act.

Steps Required

94. The Commissioner requires no steps to be taken.

Right of Appeal

95. 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: 0300 1234504

Fax: 0116 249 4253

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

Website: www.informationtribunal.gov.uk

96. 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.
97. 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 12th day of July 2011

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 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

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.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“If, and to the extent that –

(g) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(h) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

...

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 17(2) states –

"Where–

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim–

1. that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
2. that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, 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 authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

...

Prohibitions on disclosure.

Section 44(1) provides that –

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”

Section 44(2) provides that –

“The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).”