

Freedom of Information Act 2000

Ministerial veto on disclosure of the Department of Health's Transition Risk Register

Information Commissioner's Report to Parliament

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**Presented to Parliament pursuant to Section 49(2) of the Freedom
of Information Act 2000**

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1. Introduction

- 1.1 Section 49(2) of the Freedom of Information Act 2000 ("FOIA") provides that the Information Commissioner ("the Commissioner") may from time to time lay before each House of Parliament such reports with respect to his functions under FOIA as he thinks fit.
- 1.2 On 1 and 2 November 2011 the Commissioner issued two Decision Notices under section 50 FOIA (references FS50392064 and FS50390786). The Decision Notices ordered the Department of Health ("the Department") to disclose copies of its Strategic Risk Register and the Transition Risk Register relating to the coalition government's proposals for modernising the NHS under the Health and Social Care Bill.
- 1.3 The Department appealed against both Decision Notices to the First-tier Tribunal (Information Rights) ("the Tribunal"). The Tribunal's decision was issued on 9 March 2012 with written reasons following on 5 April 2012. The Tribunal allowed the Department's appeal in respect of the Strategic Risk Register but upheld the Commissioner's decision that the Transition Risk Register should be disclosed.
- 1.4 On 8 May 2012 the Rt Hon Andrew Lansley MP, Secretary of State for Health, issued a certificate under section 53(2) FOIA overruling the Commissioner's Decision Notice and vetoing disclosure of the Transition Risk Register. This report sets out the background that led to the issue of that certificate.

2. Statutory Framework

- 2.1 Under section 1(1) FOIA any person who has made a request to a public authority for information is entitled to be informed in writing

whether the information requested is held¹ and if so to have that information provided to him².

2.2 This general right of access to information held by public authorities is not unlimited³. Exemptions from the duty to provide information requested fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, the duty to disclose does not apply only if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information⁴.

2.3 Any person (known as a “complainant”) may apply to the Commissioner for a decision whether their request for information made to a public authority has been dealt with in accordance with the requirements of FOIA⁵. With certain exceptions⁶, the Commissioner is under a duty to issue a Decision Notice following such an application.

2.4 Either the complainant or the public authority may appeal to the Tribunal against the Commissioner’s Decision Notice⁷. The Tribunal consists of a legally qualified Judge and two lay members.

2.5 If the Tribunal considers that the Decision Notice under appeal is not in accordance with the law, or involved an incorrect exercise of the Commissioner’s discretion, then the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner⁸. The Tribunal may also review any finding of fact on

¹ Section 1(1)(a)

² Section 1(1)(b)

³ Section 2

⁴ Section 2(2)(b)

⁵ Section 50(1)

⁶ Section 50(2)

⁷ Section 57(1)

⁸ Section 58(1)

which the Decision Notice was based⁹. In applying the public interest test, the Tribunal is therefore entitled to reach its own conclusion as to where the balance of the public interest lies, and it may substitute that conclusion for the conclusion reached by the Commissioner.

2.6 A decision of the Tribunal may be appealed to the Upper Tribunal (Administrative Appeals Chamber) on a point of law¹⁰.

2.7 Where a Decision Notice has been served on a government department and relates to a failure to comply with the duty to provide information on request, a certificate may be issued, the effect of which is that the Decision Notice no longer has effect¹¹. A certificate can only be issued where the "accountable person" (in this instance a Cabinet Minister) has, on reasonable grounds, formed the opinion that there was no failure in respect of complying with the general duty to provide information on request in a particular case¹². This certificate is the so-called "veto". In such cases the accountable person can substitute his or her view for that of the Commissioner or Tribunal as to where the balance of the public interest lies in a particular case.

2.8 Such a certificate must be served within twenty working days of the date on which the Decision Notice was given to the public authority or, where an appeal to the Tribunal is brought, within twenty working days of the day on which any such appeal is determined or withdrawn.

⁹ Section 58(2)

¹⁰ Section 59

¹¹ Section 53

¹² Section 53(2)

3. The requests for information and their context

- 3.1 On 12 July 2010 the Government published its White Paper entitled "Equity and Excellence: Liberating the NHS" in which it set out its long-term vision for the NHS. A period of public consultation on the White Paper closed on 11 October 2010. A further period of public consultation on the Government's proposed reforms to the NHS commenced on 18 October 2010.
- 3.2 On 29 November 2010 the Rt Hon John Healey MP made a request for information to the Department which was properly interpreted as being for disclosure of the Transition Risk Register.
- 3.3 On 15 December 2010 the Government published "Liberating the NHS: Legislative Framework and next steps". This contained a more detailed description of how the reforms would be put into practice and the steps that had already been taken to implement the proposals.
- 3.4 On 20 December 2010 the Department refused Mr Healey's request.
- 3.5 The Government introduced the Health and Social Care Bill in Parliament on 19 January 2011.
- 3.6 On 28 February 2011 Mr Nicholas Cecil, a journalist with the Evening Standard, made a request to the Department seeking disclosure of its Strategic Risk Register.
- 3.7 On 28 March 2011 the Department refused Mr Cecil's request.
- 3.8 On 6 April 2011 the Bill's progress was halted by the Government's announcement that it would engage in a listening exercise intended

to address the concerns that had been raised regarding the scale and pace of the proposed reforms to the NHS.

- 3.9 Mr Healey and Mr Cecil subsequently complained to the Information Commissioner's Office about the Department's refusal to disclose the risk registers.

4. The Information Commissioner's decision notices

- 4.1 The Commissioner issued a Decision Notice on 1 November 2011 (reference FS50392064) in relation to Mr Cecil's request for the Strategic Risk Register. The Commissioner issued a further Decision Notice on 2 November 2011 (reference FS50390786) in relation to Mr Healey's request for the Transition Risk Register.

- 4.2 The Department had refused to disclose both risk registers relying on the exemption provided by section 35(1)(a) FOIA, which states:

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...

- 4.3 The Commissioner agreed with the Department that the information contained within both risk registers related to the formulation or development of government policy and that therefore the exemption under section 35(1)(a) FOIA was engaged.

- 4.4 However, whilst accepting that there were significant public interest arguments in favour of maintaining the exemption, and that the issues were finely balanced, the Commissioner concluded that the public interest favoured the disclosure of the information contained in both risk registers.

5. The appeals to the First-tier Tribunal (Information Rights)

- 5.1 On 2 December 2011 the Department appealed against the two Decision Notices to the Tribunal. The issue before the Tribunal was whether the Commissioner was correct to find that the public interest favoured disclosure of the risk registers.
- 5.2 The appeal was heard at an oral hearing on 5 and 6 March 2012. The Tribunal heard evidence on behalf of the Department from Lord O'Donnell, the former Cabinet Secretary and Head of the Home Civil Service, and Una O'Brien, Permanent Secretary at the Department. Both Lord O'Donnell and Ms O'Brien were cross examined during the hearing and answered questions from the Tribunal.
- 5.3 Mr Healey, who had been joined as a party to the appeal, gave evidence in support of the case for disclosure of the risk registers and of his experience as a former Minister responsible for the formulation and development of government policy. Mr Healey was also cross examined and answered questions from the Tribunal.
- 5.4 The Tribunal also received written evidence on behalf of the Commissioner from Professor Chris Ham of the King's Fund, a charity that seeks to understand how the healthcare system in England can be improved. Professor Ham's evidence concerned the King's Fund's views about the scope and significance of the government's healthcare reforms.
- 5.5 The Tribunal's decision was issued on 9 March 2012 with written reasons following on 5 April 2012. After the announcement of the Tribunal's decision, but prior to the Tribunal's written reasons being issued, the Health and Social Care Bill received Royal Assent on 27 March 2012.

5.6 The Tribunal allowed the Department's appeal in respect of the Strategic Risk Register but upheld the Commissioner's decision that the Transition Risk Register should be disclosed.

5.7 The Tribunal noted that this was a difficult case where factors both for and against disclosure were particularly strong. However, it concluded that at the time that the Transition Risk Register had been requested by Mr Healey, the public interest favoured disclosure. The Tribunal considered that disclosure "would have informed the public debate at a time of considerable public concern. It would have helped the public understand whether the government had understood the risks involved and what measures it was considering for dealing with them. Disclosure could have gone a long way to alleviating these concerns and reassuring the public that it was doable or it may have demonstrated the justification for the concerns so that public debate at a crucial time could have been better informed"¹³.

5.8 The Tribunal's decision was unanimous

6. The veto

6.1 The Department did not appeal the Tribunal's decision in relation to the Transition Risk Register to the Upper Tribunal under section 59 FOIA. Neither did the Commissioner seek to appeal the Tribunal's decision relating to the Strategic Risk Register.

6.2 On 1 May 2012 the Rt Hon Andrew Lansley MP, Secretary of State for Health, wrote to the Commissioner advising him that he was minded to issue a certificate under section 53(2) FOIA in respect of his Decision Notice requiring disclosure of the Transition Risk Register.

¹³ Department of Health v Information Commissioner & Healey & Cecil EA/2011/0286 & 0287, §89.

The Secretary of State sought the Commissioner's views before reaching a final decision, requesting a response by 3 May 2012.

6.3 The Commissioner responded to the Secretary of State within that deadline. In that letter the Commissioner noted as follows:

- No indication had been given as to why the Secretary of State was considering exercising the veto in this case.
- An assurance had been given to Parliament, during passage of the Freedom of Information Bill, that the veto would only be used in exceptional circumstances.
- No exceptional circumstances had been identified in the Secretary of State's letter.
- The Commissioner's view remained that there were specific aspects of the circumstances of this case that swayed the balance of public interests towards disclosure.
- The fact that the Transition Risk Register related to a major piece of legislation with far reaching consequences for the entire nation was a very significant public interest in favour of disclosure.
- That this public interest in disclosure could not be met by other sources of information in the public domain.

6.4 Nevertheless, on 8 May 2012 the Secretary of State issued a certificate under section 53(2) FOIA overruling the Commissioner's Decision Notice of 2 November 2011 and vetoing disclosure of the Transition Risk Register.

6.5 The certificate confirmed that the Secretary of State took the view that the public interest favoured the continued non-disclosure of the Transition Risk Register and therefore that there was no failure by the Department to comply with its duty to disclose information on request. The practical effect of the certificate is that the Transition Risk Register is not required to be disclosed.

7. The Information Commissioner's response

7.1 The reasons for deciding to exercise the veto in this case are set out in a separate Statement of Reasons issued at the same time as the certificate. This has since been supplemented by an oral statement to the House of Commons, made on 10 May 2012.

7.2 In the Statement of Reasons the Secretary of State recognised that there was a public interest in disclosure of the Transition Risk Register, accepting that it related to a very major reform of the UK public health care system with wide effect; that the reforms were introduced with some speed; that there is a public interest in the public and, specifically, Parliament being able to assess and evaluate the risks of the NHS reforms; that opposition to the reforms had largely focussed on the inherent risks and the extent to which the Government has properly assessed those risks; that disclosure would assist the public to understand the way the Government assesses and manages risk; and that there was a general public interest in openness in public affairs.

7.3 However, the Secretary of State concluded that in his view the public interest favoured the withholding of the Transition Risk Register.

7.4 The Secretary of State noted that there was a powerful public interest in providing a safe space so as to preserve and protect the ability of civil servants to prepare risk registers. The importance of

such a “safe space” to debate policy and make decisions was something that the Commissioner expressly acknowledged in his Decision Notice¹⁴. Indeed the Commissioner concluded that in this particular case “there was a significant public interest in maintaining this space”. This was also recognised by the Tribunal, which concluded that “there is a very strong public interest for the Government and the DOH in this case having a safe space to formulate and develop policies for the extensive reform of the NHS”¹⁵.

7.5 The Secretary of State also said that if risk registers were routinely or regularly disclosed, or there was a concern that they could be, then it was likely that the form and content of such registers would be changed to the detriment of good government. This is an argument that is commonly referred to as the “chilling effect”.

7.6 In his Decision Notice the Commissioner did not accept that disclosure of the Transition Risk Register would affect the frankness and candour of future risk registers¹⁶. Whilst the Tribunal noted Lord O’Donnell’s own views of the likely chilling effect, it found that there was no actual evidence of such an effect¹⁷. The Tribunal noted that independent research carried out by the Constitution Unit at the University College London had concluded that there was little evidence of disclosure under FOIA leading to a chilling effect. It also noted that there was no evidence of a chilling effect arising from a previous decision of the Commissioner requiring the Office of Government Commerce to disclose Gateway Reviews relating to the introduction of identity cards¹⁸.

7.7 Further, the Commissioner does not accept that his Decision Notice, or the Tribunal’s decision, set any sort of precedent for the disclosure

¹⁴ Decision Notice FS50390786, §§34-37

¹⁵ Department of Health v Information Commissioner & Healey & Cecil EA/2011/0286 & 0287, §72

¹⁶ Decision Notice FS50390786, §38

¹⁷ Department of Health v Information Commissioner & Healey & Cecil EA/2011/0286 & 0287, §66

¹⁸ Ibid, §67

of risk registers generally. He recognises the importance of considering each request for information on a case by case basis. He accepts that there will be cases in which it is entirely proper to refuse to disclose a risk register under FOIA. He also notes that other risk registers, including for example the risk register relating to the proposed expansion of Heathrow Airport, and those prepared by the National Institute for Health and the Clinical Excellence and the Care Quality Commission, have been disclosed in the past without any evidence that disclosure has caused the sort of damage to good government identified by the Secretary of State¹⁹.

7.8 As to any evidence that disclosure could increase the likelihood of the risks identified in the register materialising and would distract policy makers from their task or harm public debate, the Tribunal found that the evidence given by the Department amounted merely to "conjecture of what might happen if there was routine disclosure of risk registers"²⁰.

7.9 The Secretary of State considered that disclosure of the Transition Risk Register would give rise to sensationalised reporting and debate in light of its form and content. However, the Tribunal did not accept the Department's evidence to this effect noting that the Transition Risk Register simply "identified the sort of risks one would expect to see in such a register from a competent Department"²¹.

7.10 The Secretary of State explained that in reaching his decision to use the veto, he had taken into account the "Statement of HM Government Policy on use of the Executive Override under the Freedom of Information Act 2000 as it relates to information falling within the scope of section 35(1)" ("the Statement of Policy").

¹⁹ Department of Health v Information Commissioner & Healey & Cecil EA/2011/0286 & 0287, §68

²⁰ Ibid, §71

²¹ Ibid, §64

7.11 The Statement of Policy sets out the guiding principles on the use of the veto. These state that the Government sees the use of the veto as the exception rather than the rule and will not routinely agree the use of the executive override simply because it considers the public interest in withholding the information outweighs the public interest in disclosure.

7.12 The Statement of Policy goes on to set out criteria for determining what constitutes those “exceptional cases” in which the Government would be minded to use the veto. These are where, in the judgement of the Cabinet:

(a) Release of the information would damage Cabinet Government; and/or

(b) It would damage the constitutional doctrine of collective responsibility; and

(c) The public interest in release, taking account as appropriate of information in the public domain, is outweighed by the public interest in good Cabinet Government and/or the maintenance of collective responsibility.

7.13 The Secretary of State states that this was an exceptional case because disclosure of the Transition Risk Register would have created exceptional difficulties and risks; that the controversies surrounding the issues were particularly acute; that the timing of the request came at a particularly sensitive time; and that the damage that would have been likely to be caused is exceptionally serious.

7.14 On the three previous occasions on which the veto has been exercised, the Commissioner has made clear his view that it is vital

that a ministerial certificate should only be issued under section 53 FOIA in exceptional cases.

7.15 The Commissioner notes that none of the criteria for "exceptional cases" in the Statement of Policy are met in the present case.

7.16 Furthermore, the Commissioner does not consider that sufficient reasons have been given as to why this case is considered to be exceptional, particularly in light of the Tribunal's decision dismissing the Department's appeal. The Commissioner notes that much of the argument advanced as to why the case is considered to be exceptional merely repeats the arguments previously made to Commissioner and the Tribunal and which were in part dismissed by the Tribunal.

8. Conclusion

8.1 In light of previous commitments he has made, and the interest shown by past Select Committees in the use of the ministerial veto, the Commissioner intends to lay a report before Parliament under section 49(2) FOIA on each occasion that the veto is exercised. This document fulfils that commitment.

8.2 Laying this report is an indication of the Commissioner's concern to ensure that the exercise of the veto does not go unnoticed by Parliament and, it is hoped, will serve to underline the Commissioner's view that the exercise of the ministerial veto in any future case should be genuinely exceptional.

8.3 The previous three occasions on which the veto has been exercised related to the disclosure of Cabinet material under FOIA. The Commissioner would wish to record his concern that the exercise of the veto in this case extends its use into other areas of the policy

process. It represents a departure from the position adopted in the Statement of Policy and therefore marks a significant step in the Government's approach to freedom of information.

8.4 The Commissioner's Decision Notice and the Tribunal's judgment addressed the provisions of the Act as they are, and not as they might be. The arguments employed by the Department at the Tribunal and by the Secretary of State in explanation of the subsequent veto, both in the Statement of Reasons and in exchanges in the House of Commons around the Ministerial Statement, certainly use the language of 'exceptional circumstances' and 'matter of principle'. But the arguments are deployed in support of what is in fact the direct opposite of the exceptional – a generally less qualified, and therefore more predictable, 'safe space'. As such, the Government's approach in this matter appears to have most to do with how the law might be changed to apply differently in future. This question falls naturally to consideration by the Justice Committee who have been undertaking post-legislative scrutiny of the Act.

Christopher Graham
Information Commissioner

Dated: 15 May 2012

ANNEX

Ministerial certificate

Secretary of State's statement of reasons

**Secretary of State's written statement to the House of
Commons**

**Statement of HMG policy on the use of the executive
override**

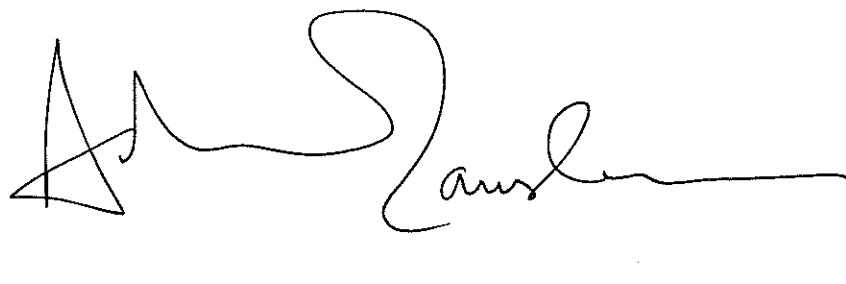
8 May 2012

**CERTIFICATE OF THE SECRETARY OF STATE FOR HEALTH, MADE IN
ACCORDANCE WITH SECTION 53(2) OF THE FREEDOM OF
INFORMATION ACT 2000**

In a decision notice dated 2 November 2011 (Reference: FS50390786), the Information Commissioner ordered the disclosure of the Department of Health's Transition Risk Register from November 2010.

As the accountable person within the definition of section 53(8) of the Freedom of Information Act 2000 ("the Act"), I have, on reasonable grounds, formed the opinion, in respect of the request concerned, that the public interest favours the continued non-disclosure of the information that the Department of Health was ordered to disclose and that there is no failure falling within section 53(1)(b) of the Act.

Therefore I am of the opinion that there was no failure falling within section 1(1)(b) of the Act, and I make this certificate accordingly.

A handwritten signature in black ink, appearing to read 'Andrew Lansley', written in a cursive style.

THE RT HON ANDREW LANSLEY CBE MP

SECRETARY OF STATE FOR HEALTH

**EXERCISE OF THE EXECUTIVE OVERRIDE UNDER SECTION 53 OF THE
FREEDOM OF INFORMATION ACT 2000**

**IN RESPECT OF THE DECISION OF THE INFORMATION COMMISSIONER
DATED 2 November 2011 (REF: FS50390786)**

**STATEMENT OF REASONS
(under section 53(6) of the Freedom of Information Act)**

INTRODUCTION

Pursuant to section 53 of the Freedom of Information Act 2000 (the 'Act'), and having considered the views of both Cabinet and the Information Commissioner on use of the veto in this case, as well as all the relevant documents and information pertinent to this decision, I have today signed a certificate substituting my decision for the Decision Notice of the Information Commissioner dated 2 November 2011 (case reference FS50390786). That Decision Notice ordered disclosure of the Department of Health's Transition Risk Register from November 2010 (the TRR).

It is my opinion, as the 'accountable person' in this case, that the decision taken by the Department of Health not to disclose this information in response to the request under the Freedom of Information Act was in accordance with the provisions of that Act. Disclosure of this information is not required having regard to the balance of the public interests in favour of disclosure and those against. I believe this is an exceptional case warranting my use, as a Cabinet Minister, of the power in section 53(2) of the Act. Accordingly, I have today given the certificate required by section 53(2) to the Information Commissioner.

In accordance with section 53(3)(a) of the Act, I shall lay a copy of that certificate before both Houses of Parliament at the first available opportunity, which will be Wednesday 9 May. I shall also lay a copy of this statement of reasons with the certificate.

ANALYSIS

I. The public interest balance at the relevant time

I am satisfied that at the time of the Department of Health's first response to the request in December 2010, the balance of the public interest in this case fell in favour of maintaining the confidentiality of the requested information. In coming to this conclusion I have taken into account in particular the following matters.

(1) *The public interests in not disclosing and maintaining the exemption*

Risk registers are used across all departments. They are a vital part of risk management and thereby good government. I consider that they do form an important part in the formulation and development of Government policies. That is my experience and is in line with the clear evidence of the very senior officials who gave evidence to the Tribunal: Lord O'Donnell, the former Cabinet Secretary and Head of the Civil Service, and Una O'Brien, the Permanent Secretary at the Department of Health. It is strongly in the public interest that such risk registers be as effective as possible.

The effectiveness of risk registers is intimately linked to their form and the manner in which they are expressed.

- They are designed to identify all the main risks (however serious and however unlikely) associated with the policy being considered.
- They should be expressed in clear, and if necessary trenchant language. The red/amber/green (RAG) system of rating the risks is blunt but serves useful purposes.
- They are developing documents, subject to regular review and updating - so, for example, at any point in time the mitigation measures for any risk may be more or less developed. So, they might well contain a number of very serious

risks which, particularly at an early stage, have not yet had mitigation developed (even though effective mitigation is highly likely) and thus have a red or red/amber rating.

There is thus a clear and powerful public interest in providing a safe space so as to preserve and protect the ability of civil servants to prepare such risk registers in the frank way in which they have hitherto been expressed. The need to protect this safe space will be particularly acute (and the public interest in doing so will be particularly strong) where the need for free and frank advice on risk is paramount. An example of such a circumstance will be where the advice is required at highly sensitive times on highly sensitive issues.

If risk registers are routinely or regularly disclosed at highly sensitive times in relation to highly sensitive issues, or there is legitimate concern that they could be, it is highly likely that the form and content will change: to make the content more anodyne; to strip out controversial issues or downplay them; to include argument as to why risks might be worth taking; to water down the RAG system. They would be drafted as public facing documents designed to manage the public perception of risk; not as frank internal working tools. These consequences (many of them insidious) would be to the detriment of good government. I do not consider that the risk of these consequences occurring can be dismissed as minimal, exaggerated, still less non-existent. I have in this respect had particular regard to the evidence of Lord O'Donnell and Una O'Brien. It seems to me that they have the expertise and experience to be almost uniquely well placed to make the judgements about how officials are likely to react to this sort of disclosure.

The above factors, if present in a particular case, may well carry significant weight in assessing where the public interest lies. However, I recognise of course that each case needs to be considered on its particular facts. I have therefore considered with particular care whether and if so to what extent these matters applied to the disclosure of the TRR.

Here, I have concluded that timing and the sensitivity of the issues are critical to striking the public interest balance and to properly assessing the weight to be accorded to the interests on the non-disclosure side of the balance.

- The request for the TRR came shortly after the first version of it had been compiled and approved; and at a time of acute political sensitivity in relation to the proposals for change to the NHS, just in advance of legislation being introduced into Parliament.
- The TRR analysed risks in a frank way and in a way which was not designed for publication. It did so on the basis that it represented the first version of that risk analysis. That is consistent with its purpose and use as an important tool in assisting with the formulation and development of policy.
- I do not consider that the content of the TRR can properly be characterised as simply anodyne or that it would have been viewed in that way.
- On the contrary, I consider that the form and the frankness of the content of TRR would have been liable to create sensationalised reporting and debate. The content would also have been inherently highly open to misinterpretation by both the press seeking a headline and/or for political reasons. The likelihood of this occurring is particularly acute where the subject matter is, as with the Transition programme, controversial and the proposals at a highly sensitive stage.
- Disclosure of the TRR at the relevant time would thus, I consider, have been likely to lead to the effects dealt with above – to the consequent potentially serious detriment of good government.

I also consider that there is no good reason for treating the public interest in protecting the effectiveness of the TRR as being diminished on the basis that the policies had been ‘fixed’ and were simply being implemented. I do not consider that that was in fact the position. In my view, which accords with the evidence of Una O’Brien, policies were still being formulated and developed at this time across a wide range of areas of the transition programme. Some parts of the programme were

unsurprisingly more advanced than others. But very large tracts were at an early stage of formulation and development. The need for protection of the safe space around the TRR remained acute. I also do not consider that the fact that the TRR considered implementation issues either reduced that need or can properly be taken as indicating that policy was merely being implemented at this time. The consideration of implementation issues simply reflected the fact that, in the process of formulating and developing policy, risks associated with future implementation were being considered.

In all these circumstances, release of the TRR at the relevant time would, I believe, have been likely to have had serious effects of the kind identified above.

Finally on this side of the public interest balance, there were two further risks impacting on the public interest in not disclosing the TRR.

First, I consider that disclosure of the TRR would potentially also have created a risk of serious distraction from progressing the proposals, formulating and developing policy. The distraction would have been caused by the need to respond to and deal with the reaction to the disclosure of the TRR (and its content) at this time.

Secondly, I consider that disclosure of the TRR carried the very real possibility of increasing the likelihood of some of the risks identified in that document happening. When some risks are made public, those potentially affected are likely to act in a way that could increase the likelihood of the risk occurring. The purpose of a risk register is to secure mitigation of those risks, not precipitate them.

(2) *The public interest in disclosure*

I recognise, and have taken into account, that there is a public interest in disclosure of the TRR. I have considered all the points made in this respect by the Tribunal in their decision. In particular, I have taken into account the following:

- The risk register relates to a very major reform of the UK public health care system. The reforms will therefore have a wide effect. Moreover, the reforms were introduced at least in part with some speed.
- There is a public interest in the public and, specifically, Parliament being as well placed as possible to assess and evaluate the risks of the programme of reform for the NHS. The Government's own assessment of the nature, extent and management/mitigation of those risks is a part of that.
- Much of the opposition to the Government's proposed NHS reforms is focussed on the risks inherent in those reforms and the extent to which the Government has properly assessed those risks.
- Disclosure of this information would assist the public to understand the way the Government assesses and manages risk more generally.
- There is a general public interest in openness in public affairs.

In considering the weight of this side of the public interest balance, I note that there is already a considerable amount of material in the public domain on the risks involved in the reform programme. The risks involved in the proposed changes were capable of identification and indeed have been subject of detailed (and public) analysis by academics. Moreover, the nature of the Government's analysis of the risks has been set out extensively in the Impact Assessment and numerous other public documents. I have also taken into account the fact that there was a significant risk (flowing from the form and content of the TRR) that, far from assisting public debate and understanding, disclosure of the TRR at this time would in fact have distorted such debate and understanding.

Conclusion

I believe that the factors in favour of non-disclosure are very powerful when judged having regard to the sensitivities at the relevant time and the content and form of this TRR. There are some important public interest factors the other way – notably the importance of the proposed reforms. But there are factors serving to lessen the weight of those factors.

Weighing those public interests against one another, I have concluded that the public interest balance clearly favours maintaining the exemption and not disclosing the TRR.

II. Is the case exceptional?

I have concluded that this is an exceptional case for the following reasons.

1. The disclosure of this TRR at this time would have created exceptional difficulties and risks.
2. The controversies surrounding the issues were particularly acute. The register relates to reforms that were highly controversial. The need for the safe space for officials was exceptionally high.
3. The timing of the request came at particularly sensitive time, just ahead of the Health and Social Care Bill being introduced to Parliament. There were particular and exceptional risks associated with disclosure of this TRR at the time of the request.
4. The damage that I consider would have been likely to be caused by disclosure is exceptionally serious. It cannot properly be justified by the various public interests in disclosure.

I have taken into account *HMG statement of policy on use of the executive override (veto) in respect of information relating to the operation of collective responsibility under s35(1) FOIA*. In setting out the criteria for determining what constitutes exceptional circumstances in cases of collective responsibility, the policy provides a number of relevant matters to be considered. Although that policy is not directly applicable to this case, it is nonetheless informative and it has assisted me in concluding that this is an exceptional case. I should make it clear in this respect, in response to a point made by the Information Commissioner, that that statement of policy was not intended to, and in my view does not, suggest (implicitly or otherwise) that the exercise of the power of veto would be limited to cases touching on collective Cabinet responsibility.

I make clear that I have concluded that this case is exceptional. I have not concluded, and do not consider that I need to conclude, that it is unique. I recognise that there may be other cases in which disclosure of Risk Registers is sought in particularly controversial circumstances. However, each case will need to be considered on its own merits balancing the particular public interests in play in the context and at the time.

CONCLUSION

I have in these circumstances concluded that it is appropriate to exercise the Ministerial veto in this case.

At the same time as I took the decision to exercise the Ministerial Veto, I also approved a document which sets out key information relating to the risks associated with the transition programme as they were in November 2010 in a single document. It includes the actions that have subsequently been taken to mitigate those risks and the outcomes of those actions. I consider it appropriate to release this information in this form now following the passage of the Health and Social Care Bill through Parliament. I continue to consider that disclosure of the TRR in its original form would not be in the public interest for all those reasons dealt with above.

The certificate I have signed has been provided to the Information Commissioner and copies will be laid before both Houses of Parliament at the earliest opportunity. I have also provided a copy of this statement of reasons to the Information Commissioner and both Libraries of the Houses of Parliament and copies are available in the Vote Office.

THE RT HON. ANDREW LANSLEY CBE MP
SECRETARY OF STATE FOR HEALTH
8 MAY 2012



Ministry of
JUSTICE

STATEMENT OF HMG POLICY

**Use of the executive override under the
Freedom of Information Act 2000 as it relates to
information falling within the scope of
Section 35(1)**

**STATEMENT OF HMG POLICY
USE OF THE EXECUTIVE OVERRIDE UNDER THE FREEDOM
OF INFORMATION ACT 2000 AS IT RELATES TO
INFORMATION FALLING WITHIN THE SCOPE OF
SECTION 35(1)**

BACKGROUND

The Freedom of Information Act 2000 (“the Act”) contains a provision in section 53 for an ‘accountable person’ to issue a certificate overriding a decision of the Information Commissioner or the Information Tribunal ordering the disclosure of information (the “veto”). The effect of the certificate under this policy is that, in cases concerned with information falling within the scope of section 35(1), the accountable person can substitute his or her view for that of the Commissioner or the Tribunal as to where the balance of the public interest in disclosure lies in a particular case.

For the purpose of issuing a certificate in line with this policy the accountable person will, where possible, be the Cabinet Minister with responsibility for the policy area to which the information relates. In cases involving papers of a previous administration, the Attorney General will act as the accountable person.

When using the veto, the accountable person is required by the Act to provide a certificate to the Information Commissioner outlining their reasons for deciding to exercise the veto. That certificate must also then be laid before both Houses as soon as practicable.

The Government considers that the veto should only be used in exceptional circumstances and only following a collective decision of the Cabinet. This policy is in line with the commitment made by the previous administration during the passage of the Freedom of Information Bill that the veto power would only be used in exceptional circumstances, and only then following collective Cabinet agreement:

“I do not believe that there will be many occasions when a Cabinet Minister – with or without the backing of his colleagues – will have to explain to the House or publicly, as necessary, why he decided to require

information to be held back which the commissioner said should be made available.”¹

In agreeing that the provision should stand as part of the Act, Parliament clearly envisaged certain circumstances in which a senior member of the Executive would be the final arbiter of whether information should be disclosed, subject to judicial review by the courts.

Section 35(1)(b) of the Act exempts information from disclosure when it relates to ‘Ministerial Communications’. Section 35 is a qualified exemption, that is to say, its operation is subject to a public interest test.

This policy statement relates only to the exercise of the veto in respect of information that relates to the operation of the principle of collective responsibility. It does not apply to all information that passes to and from Ministers, for example.

This policy statement – though limited in scope – does not preclude consideration of the veto in respect of other types of information. However, in accordance with our overarching commitment to use the power only in exceptional cases, such consideration would be preceded by a collective Cabinet view on whether it might be appropriate to exercise the veto in a given case. In making his or her decision, the Cabinet Minister or Attorney General (acting as the accountable person) would be entitled to place great weight on the collective assessment of Cabinet in deciding whether or not to actually exercise the veto.

In cases where the information being considered relates to papers of a previous administration the Attorney General will consult former Ministers and the opposition in line with the process set out in this policy. In accordance with the convention on papers of a previous administration only the Attorney General will have access to the information being considered.

REASONING

The Cabinet is the supreme decision-making body of Government. Cabinet Government is designed to reconcile Ministers’ individual

¹ **Rt Hon Jack Straw MP**, then Secretary of State for the Home Department (*Hansard*, 4 April 2000, columns 918-23). Cf. **The Rt Hon the Lord Falconer of Thoroton**, (*Hansard*, 25th October 2000, columns 441-43).

interests with their collective responsibilities. The fact that any Minister requires the collective consent of other Ministers to speak on behalf of Government is an essential safeguard of the legitimacy of Government decisions. This constitutional convention serves very strong public interests connected with the effective governance of the country.

Our constitutional arrangements help to ensure that the differing views from Ministers – which may arise as a result of departmental priorities, their own personal opinions, or other factors – are reconciled in a coherent set of Government decisions which all Ministers have a duty to support in Parliament and beyond.

Cabinet Committee business, sub-Committee business, and Ministerial correspondence are all subject to the same principles of collective responsibility. These points are reflected in paragraph 2.1 of the Ministerial Code:

“The principle of collective responsibility, save where it is explicitly set aside, requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial committees, including in correspondence, should be maintained.”

The risk from premature disclosure of this type of information is that it could ultimately destroy the principle and practice whereby Ministers are free to dissent, put their competing views, and reach a collective decision. It is therefore a risk to effective Government and good decision-making regardless of the political colour of an administration.

The Government recognises that the public interest against the disclosure of much material covered by collective responsibility will often be strong, but that the scheme of the Act does not make protection absolute. Accordingly, the drafting of the section 35 exemption reflects Parliament’s intention that in some circumstances, the public interest in relation to information covered by it may fall in favour of release. So in particular cases the public interest in favour of the disclosure of material covered by collective responsibility may prevail.

The Act has been in force since 1 January 2005. During that period, a significant number of requests for information relating to ministerial communications have been received and the information released without dispute. In other cases, where an initial request has been refused, a subsequent decision of the Information Commissioner or Information Tribunal to release has been accepted without further contest.

The importance of this practice is that by these actions it is acknowledged that each section 35 case must be considered on its individual merits. Cabinet committee correspondence from the mid-1980s was released in 2006 when the Department for Children, Schools and Families withdrew an appeal to the Tribunal in relation to information relating to corporal punishment. The Cabinet Office also released Cabinet minutes from 1986 relating to the Westland Affair following a decision by the Information Tribunal in 2010.

Therefore, the Government has agreed that the following criteria will be used to govern the exercise of the veto in collective responsibility cases. The Government will apply the criteria on a case-by-case basis, by reference to all the relevant circumstances of each case.

CRITERIA

The exercise of the veto would involve two analytical steps. It must first be considered whether the public interest in withholding information outweighs the public interest in disclosure. Only if this test is satisfied can it then be considered whether the instant case warrants exercise of the veto. The Government will not routinely agree the use of the executive override simply because it considers the public interest in withholding the information outweighs the public interest in disclosure.

The criteria below apply only when the first step has been satisfied. The three headline paragraphs – (a) to (c) below – articulate the policy by setting out the situation in which the Government will consider the use of the veto. In this respect, point (c) is particularly important, as it is only by giving full regard to the arguments for and against disclosure that a sustainable view of the public interest balance can be arrived at.

In addition to the set criteria we are also proposing a list of potentially relevant considerations – listed (i) to (vii) below – that

will in all cases be considered in arriving at a final decision. Not all will carry weight in every case. Some may carry none. But consideration of each one in each case can inform the key decision reached in respect of the headline criteria.

Guiding principles

The focus of this policy is section 35(1) of the Act;

- The government has no fixed view on when the use of the veto power would be appropriate, but sees its use as the exception rather than the rule in dealing with requests for government information;
- Use of the power would be considered in all the circumstances of each/any case and may develop over time in the light of experience;
- The government has committed to consider any decision on the exercise of the veto collectively in Cabinet; and
- It will not routinely use the power under section 53 simply because it considers the public interest in withholding the information outweighs that in disclosure.

Criteria for determining what constitutes an exceptional case

At present, the Government is minded to consider the use of section 53 if, in the judgement of the Cabinet:

- a) release of the information would damage Cabinet Government; and/or
- b) it would damage the constitutional doctrine of collective responsibility; and
- c) The public interest in release, taking account as appropriate of information in the public domain, is outweighed by the public interest in good Cabinet Government and/or the maintenance of collective responsibility.

In deciding whether the veto should be exercised the Cabinet will have:

- Reviewed the information in question (or the key documents and/or a representative sample of the information if voluminous); (In the case of papers of a previous administration the Attorney General will review the documents and brief the Cabinet accordingly), and;
- Taken account of relevant matters including, in particular, the following:
 - i) whether the information reveals the substance of policy discussion within Government or merely refers to the process for such discussion;
 - ii) whether the issue was at the time a significant matter, as evidenced by for example the nature of the engagement of Ministers in its resolution or any significant public comment the decision attracted;
 - iii) whether the issue remains significant (or would become so if the documents were released) or has been overtaken by time or events;
 - iv) the extent to which views of different Ministers are identifiable;
 - v) whether the Ministers engaged at the time remain active in public life;
 - vi) the views of the Ministers engaged at the time, especially the views of former Ministers (or the Opposition) if the documents are papers of a previous administration and thus covered by the commitment to consult the Opposition;
 - vii) whether any other exemptions apply to the information being considered that may affect the balance of the public interest.

A decision on whether to exercise the veto will then be made according to all the circumstances of the case.

END



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