Freedom of Information Act 2000

The Attorney General's veto on disclosure of the minutes of the Cabinet Sub-Committee on Devolution for Scotland, Wales and the Regions

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

Ordered by the House of Commons to be printed on 29th February 2012

HC 1860 London: The Stationery Office Price: £16.00

Any enquiries regarding this publication should be sent to us at websitefeedback@ico.gsi.gov.uk

This publication is available for download at www.official-documents.gov.uk and from our website at www.ico.gov.uk

ISBN: 9780102976106

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office

ID 2479971 02/12 19009 19585

Printed on paper containing 75% recycled fibre content minimum.

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1. Introduction

1.1 Section 49(2) of the Freedom of Information Act 2000 ("the Act") 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 the Act as he thinks fit.

1.2 On 12 and 13 September 2011 the Commissioner issued two Decision Notices (reference numbers FS50347714 and FS50362603 respectively – the "Decision Notices") under section 50 of the Act. The Decision Notices ordered the Cabinet Office to disclose copies of the minutes of the meetings of the Cabinet Sub Committee on Devolution to Scotland and Wales and the English Regions, dating from 1997 and 1998 (the "DSWR Minutes").

1.3 On 8 February 2012 the Attorney General, the Rt Hon Dominic Grieve QC MP issued a certificate under section 53(2) of the Act overruling the Commissioner's two Decision Notices and vetoing disclosure of the DSWR Minutes. This report sets out the background that led to the issue of that certificate.

2. Background

2.1 Under section 1(1) of the Act any person who has made a request to a public authority for information is, subject to certain exemptions, entitled to be informed in writing whether the information requested is held[1] and if so to have that information provided to him[2].

2.2 This general right of access to information held by public authorities is not unlimited[3]. Exemptions from the duty to provide information requested fall into two classes: absolute exemptions and qualified

[1] Section 1(1)(a)
[2] Section 1(1)(b)
[3] Section 2

exemptions. Where the information is subject to a qualified exemption, the duty to disclose does not apply if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information[4].

2.3 Any person (known as a "complainant") may apply to the Commissioner for a decision whether a request for information made to a public authority has been dealt with in accordance with the requirements of the Act[5]. With certain exceptions[6], 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 First Tier Tribunal General Regulatory Chamber (Information Rights) ("the Tribunal") against the Commissioner's Decision Notice[7]. 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 Commissioner[8]. The Tribunal may also review any finding of fact on which the Decision Notice was based[9]. In applying the public interest test, the Tribunal is therefore entitled to reach its own conclusion as to where the balance of public interest lies, and it may substitute that conclusion for the conclusion reached by the Commissioner.

[4] Section 2(2)(b)
[5] Section 50(1)
[6] Section 50(2)
[7] Section 57(1)
[8] Section 58(1)
[9] Section 58(2)

2.6 A decision of the First Tier Tribunal may be appealed to the Upper Tribunal (Administrative Appeals Chamber) on a point of law[10].

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 effect[11]. A certificate can only be issued where the "accountable person" (in this instance the Attorney General) 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 case[12]. 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.

3. The requests for information

The first request (Decision Notice reference FS50347714)

3.1 On 24 May 2010 a request was made to the Cabinet Office for copies of *"the minutes of the Cabinet meeting on devolution"*.

3.2 Elsewhere in his correspondence of 24 May 2010, the requester made it clear that the information that he was requesting was the

[10] Section 59
[11] Section 53
[12] Section 53(2)

information which had been the subject of a previous decision notice issued by the Commissioner under reference FS50100665. That decision notice had itself been the subject of a ministerial certificate under section 53 of the Act. Disclosure of the requested information had been vetoed on 10 December 2009 by the then Lord Chancellor and Secretary of State for Justice, the Rt Hon Jack Straw MP.

3.3 The Cabinet Office responded to the request on 18 June 2010, noting that it considered the scope of the request to cover the information which had been subject to the Ministerial veto in 2009. It confirmed that it held the requested information but it refused to disclose copies of the minutes, relying on the exemptions at sections 28, 35(1)(a) and 35(1)(b) of the Act.

3.4 Section 28(1) of the Act states that –

> *"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration."*

3.5 Section 35(1) of the Act states that –

> *"Information held by a government department ... is exempt information if it relates to –*
> *(a) the formulation or development of government policy,*
> *(b) Ministerial communications …"*

3.6 Sections 28 and 35 of the Act are exemptions which are qualified by the application of a public interest balancing test. The Cabinet Office took the view that the balance of the public interest was in favour of maintaining the exemptions.

3.7 On 27 August 2011 the requester complained to the Commissioner's Office about the Cabinet Office's refusal to provide him with the information he had asked for. When doing so he informed the Commissioner that his complaint related to the entirety of the information which had been the subject of the Ministerial veto on 10 December 2009. During the course of the Tribunal appeal which ultimately concluded with the 10 December 2009 veto, the Cabinet Office identified that it held Cabinet sub-committee minutes from meetings which took place in 1998. Those minutes were held to be within the scope of that request and, in the Commissioner's view, were therefore subject to that veto[13].

The second request (Decision Notice reference FS50362603)

3.8 On 7 June 2010 a request was made to the Cabinet Office which, in so far as was relevant to the Commissioner's Decision Notice in that case, was for copies of *"…the minutes of the Cabinet Sub-Committee on Devolution for Scotland, Wales and the Regions".*

3.9 The Cabinet Office responded to this request on 5 July 2010. It again confirmed that it held the requested information and refused to disclose it, citing the exemptions provided by sections 28, 35(1)(a) 35(1)(b) of the Act. The Cabinet Office did not, at that point, refer to the previous exercise of the veto in relation to the requested information but did do so when it provided the requester with the conclusions of its internal review on 24 November 2010.

[13] The Attorney General's analysis, and the case advanced by the Cabinet Office on appeal is different to this; it is argued that because the original request to which the 10 December 2009 veto related only concerned the 1997 DSWR Minutes, the veto only related to those minutes and, consequently, the first requestor's request only related to the 1997 DSWR Minutes. The Commissioner considers this a technicality; the existence of the 1998 DSWR minutes only came to light during the appeal process and consequently fell within scope.

3.10 On 29 November 2010, following the Cabinet Office's internal review of its refusal, the requester complained to the Commissioner, indicating that he was dissatisfied with the reasons given by the Cabinet Office for refusing his request.

3.11 On receiving the complaint, the Commissioner took the view that on an objective reading of the request it was for all of the DSWR Minutes that were held by the Cabinet Office. The Commissioner's subsequent Decision Notice therefore related to all the DSWR Minutes dated from 1997 and 1998.

4. The Information Commissioner's decision notices

4.1 Although the two complaints were received by the Commissioner separately and at different times, due to their subject matter they were allocated to the same senior case officer and they were dealt with together.

4.2 At the Commissioner's request, the Cabinet Office provided him with copies of the 1997 and 1998 DSWR Minutes.

4.3 During the course of the Commissioner's investigation, the Cabinet Office also raised and sought to rely on the exemption at section 42 of the Act in relation to a limited and specified element of the minutes. This was in addition to the exemptions it had initially cited to both complainants.

4.4 Section 42(1) of the Act states that –

> *"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."*

4.5 As with Sections 28 and 35, section 42 of the Act is an exemption which is qualified by the application of a public interest balancing test. The Cabinet Office argued that the balance of the public interest was in favour of maintaining the exemption.

4.6 On 12 September 2010 the Commissioner issued a Decision Notice (reference number FS50347714) in respect of the first complaint[14] and on 13 September 2010 the Commissioner issued a Decision Notice (reference FS50362603) in respect of the second complaint[15]. Both Decision Notices reached essentially identical conclusions.

4.7 In both Decision Notices, the Commissioner accepted that the DSWR contained information relating to the formulation or development of government policy and recorded Ministerial discussions. Consequently they fell within the scope of the exemptions at section 35(1)(a) and (b) of the Act. Therefore, the DSWR Minutes were only to be disclosed if the public interest in disclosure was equal to, or greater than, the public interest in maintaining the exemption.

4.8 The Commissioner identified a number of public interest factors in favour of disclosure and acknowledged that the Cabinet Office's main argument for maintaining the exemption at section 35 of the Act was that disclosure could undermine the convention of collective Cabinet responsibility.

4.9 Collective Cabinet responsibility is the constitutional convention that members of the Cabinet must publicly support all Government decisions made in Cabinet, even if they do not privately agree with them. The Cabinet Office sought to rely on the convention in arguing against disclosure of the DSWR Minutes.

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[14] *http://www.ico.gov.uk/~/media/documents/decisionnotices/2011/fs_50347714.ashx*
[15] *http://www.ico.gov.uk/~/media/documents/decisionnotices/2011/fs_50362603.ashx*

4.10 The Commissioner recognised the validity and weight of the argument against disclosure on the grounds of preserving the convention of collective Cabinet responsibility. His conclusion was that this factor tipped the balance of the public interest in favour of maintaining the exemptions in relation to that specific content which either identified individual Ministers or which could be fairly characterised as dealing with the more sensitive areas of policy discussed in the DSWR Minutes.

4.11 In relation to these two specified categories of information, the Commissioner's view was that the principle of collective Cabinet responsibility carried significant weight and he therefore concluded that the public interest favoured withholding this information. In his decision Notices the Commissioner stressed that his conclusion meant that only the content specifically identifying any Minister should be redacted and he provided a confidential annex to the Cabinet Office specifying the information which he considered should be withheld.

4.12 In relation to the remainder of the content of the DSWR Minutes, the Commissioner considered that its disclosure would not be likely to result in harm to the convention of collective Cabinet responsibility, particularly given the passage of time. The Commissioner further considered that there was a specific public interest in disclosure in order to inform current and future debate about devolution, together with the general public interest in the transparency and openness in decision-making. The Commissioner therefore concluded that, in relation to this remaining information, the public interest in the maintenance of the exemptions at sections 35(1)(a) and (b) of the Act did not outweigh the public interest in disclosure.

4.13 The Cabinet Office had also cited the exemption at section 28 of the Act, both to the original complainants to the Commissioner during his investigation. However, the Commissioner's conclusion in relation to this exemption was that the likelihood of the prejudice which is relevant to section 28(1) of the Act was not real and significant and, accordingly, the exemption itself was not engaged.

4.14 With regard to the exemption at section 42 of the Act (legal professional privilege) which was raised by the Cabinet Office for the first time during the Commissioner's investigation, the Commissioner accepted that the exemption applied to the specified elements of the DSWR Minutes identified by the Cabinet Office, and was therefore engaged. Bearing in mind the established case law, the Commissioner accorded significant weight to the maintenance of the legal professional privilege exemption at section 42(1) of the Act, especially in relation to important policy issues. He therefore considered that the public interest in maintaining this exemption outweighed the public interest he identified in favour of disclosure.

4.15 In all the circumstances of the case the Commissioner decided that, other than in respect of the information that he directed should be withheld, the public interest in maintaining the exemptions cited by the Cabinet Office did not outweigh the public interest in disclosure. The remaining information contained in the DSWR Minutes should therefore be disclosed.

5. The appeals to the Information Tribunal

5.1 On 10 October 2010 the Cabinet Office lodged two appeals with the Tribunal against the Commissioner's Decision Notices. The Tribunal allocated case number EA/2011/0231 to the appeal against the Decision Notice arising from request (FS50347714) and case number

EA/2011/0232 to the appeal against the Decision Notice arising from the second request (FS50362603).

5.2 The Cabinet Office served its grounds of appeal in a single document in respect of both appeals. Those grounds of appeal rehearsed the history of the original veto in relation to the DSWR Minutes and argued that, whilst the Commissioner was correct to conclude that section 35(1)(a) and (b) of the Act was engaged in relation to the DSWR Minutes, he was incorrect to conclude that the public interest in favour of withholding all of the DSWR Minutes did not outweigh the public interest in disclosing specified elements of them.

5.3 In its grounds, the Cabinet Office also disputed that the Commissioner was correct to find that section 28(1) of the Act was not engaged in relation to the DSWR Minutes. The Cabinet Office argued both that the exemption available under that section was engaged and that, further, the public interest favoured maintaining the exemption.

5.4 The Cabinet Office also disputed that the Commissioner was correct to conclude that both the 1997 and 1998 DSWR Minutes fell within the scope of the first request; it argued that only the 1997 minutes were within the scope of that request.

5.5 On the 7 November 2011 the Commissioner served his response to the appeal, defending the conclusions reached in his original Decision Notices.

5.6 On 10 November 2011, the Tribunal judge issued initial directions which ordered that the two appeals be consolidated and heard as one. Those initial directions also ordered that, following his representations made to the Tribunal by letter dated 3 November

2012, the first requester was joined to the proceedings as second respondent.

5.7 Following discussions, a set of directions were agreed between the Commissioner and the Cabinet Office for the future conduct of the Appeal. On 29 November 2011 The Tribunal also ordered that, following further representations to the Tribunal in a letter dated 15 November 2011, the first requester be allowed to withdraw as a party to the appeal.

5.8 The second requester did not apply to the Tribunal to be joined to the proceedings.

5.9 The Tribunal's Directions of 29 November 2011 provided that the appeal be listed for a two day oral hearing, on a date to be fixed, between 8 March and 22 March 2012. The Tribunal's directions also provided for the service of witness statements by the parties on 25 January 2012 and the service of skeleton arguments in advance of the hearing, on 22 February 2012.

5.10 Subsequently, by email dated 16 December 2011, the Tribunal confirmed the appeal was listed a final hearing oral hearing on 13 and 14 March 2012.

6. The veto

6.1 On 16 November 2011 Sir Gus O'Donnell CGB, Secretary of the Cabinet and Head of the Civil Service, wrote to the Commissioner on behalf of the Attorney General, the Minister responsible in cases relating to the papers of a previous administration.

6.2 The Secretary of the Cabinet advised the Commissioner that the Attorney General had been invited by the Minister for the Cabinet

Office to consider whether it was appropriate to exercise the Ministerial veto available to him under section 53(2) of the Act, overruling the Commissioner's Decision Notices.

6.3 The Secretary of the Cabinet stated that the Government noted the Commissioner's previously expressed concern that the section 53(2) veto power should not come to be seen as a routine matter and it strongly agreed that the exercise of the veto would only be appropriate in exceptional circumstances as was recognised in the published Statement of HMG policy.[16]

6.4 However, the Secretary of the Cabinet indicated that the Government regarded the confidentiality of Cabinet and Cabinet Committee proceedings to be of the utmost importance. It took the view that disclosure of the DSWR Minutes would undermine the convention of collective Cabinet responsibility and the ability of Minsters to express their views freely and frankly. Accordingly, the Government considered that it was appropriate for the Attorney General, if he considered the public interest in withholding the disputed information outweighed the public interest in disclosure, to consider excising the veto in relation to the DSWR Minutes. The Secretary of the Cabinet therefore sought to canvas the Commissioner's views on the matter and requested a response by 21 November 2012.

6.5 The Commissioner responded to the Secretary of the Cabinet by letter on 21 November 2011. In that letter he acknowledged the divergence of the respective positions that he and the Government held and he set out his view that, given that appeal proceedings had been lodged and the appeal was shortly due to be heard, it was appropriate for the Tribunal process to be allowed to proceed.

[16] *http://www.justice.gov.uk/downloads/publications/policy/moj/foi-veto-policy.pdf*

6.6 In responding, the Commissioner felt it helpful to set out in some detail the reasoning underlying his view that the exercise of the veto was not appropriate in this case. In brief, the Commissioner's position was summarised as follows:

- The case at hand was an appropriate one to proceed to the Tribunal for a full merits review;
- By failing to allow the matter to the be determined by a Tribunal, the Attorney General could be seen as effectively usurping the role of the Tribunal;
- The disclosure of the DSWR Minutes would not, in the Commissioner's analysis, significantly undermine the important principle of collective Cabinet responsibility in this case; and
- The exercise of the Ministerial veto appeared at odds with the Government's drive for greater openness and transparency.

6.7 The Commissioner noted that, as he had set out in his Decision Notices, he had taken full account of the reasons for the exercise of the Ministerial veto in relation to the same material on 10 December 2009. Having done so, he felt it appropriate for the matter to be considered by way of full merits review before the independent and expert Tribunal, as was normally the case when Government wished to challenge one the Commissioner's Decision Notices.

6.8 The Commissioner further considered that it would be beneficial to allow the Tribunal the opportunity to give some clear indication to the Commissioner, the Government and others with an interest in the matter, as to its views about public access to Cabinet material under the Act; this was something which the Commissioner felt could be of informative value in future cases.

6.9 The Commissioner recognised the powers granted by Parliament to a Minister in relation to the veto. However, bearing in mind the

availability of a full merits review by an independent and expert Tribunal Panel, the Commissioner observed that, in his view, the fact that the papers related to a previous administration served only to reinforce the view that the due legal process through the judicial route was the most appropriate course of conduct in the present case; there was an obvious, available and constitutionally sound route for talking the matter forward without what may be perceived as a Ministerial conflict of interest. That route was to allow the appeal procedure already instituted by the Government to run its course.

6.10 The Commissioner noted with concern and disappointment that the exercise of the veto was being considered at a time when considerable progress had been made by the Government towards greater openness and transparency. He expressed the view that the exercise of the veto would run counter to the Government's rhetoric in this regard.

6.11 The Commissioner concluded that he had previously been at a loss to identify any 'exceptional circumstances' – as opposed to any general objection to the disclosure of Cabinet materials - when the veto had been exercised in relation to the DSWR Minutes on 10 December 2009. No new maters were advanced in this regard by the Attorney General in the Secretary to the Cabinet's letter.

6.12 The Commissioner's conclusion was that the section 53 veto should not be exercised in this particular case.

6.13 Nevertheless, on 8 February 2012, the Attorney General issued a Ministerial certificate under section 53 of the Act, overruling the Commissioner's Decision Notices of 12 and 13 September 2011[17].

[17] *A copy of this document is provided in the annexed documents. It does not appear to have been published on line.*

6.14 The certificate confirmed that the Attorney General took the view that the public interest favoured the continued non-disclosure of the DSWR Minutes and therefore that there was no failure by the Cabinet Office to comply with its duty to disclose the information on request.

6.15 The practical effect of that certificate is that neither the 1997 nor 1998 DSWR Minutes are required to be disclosed.

6.16 The reasons for deciding to exercise the veto in this case were set out by the Attorney General in a separate statement of reasons[18]. In that document the Attorney General stated that his reasoning drew upon the reasons referred to in the 10 December 2009 certificate and that, in his view, those reasons remained relevant in the present case. However, he wished to make it clear that he had addressed the matters before him on their own merits and he indicated that he had taken into account the further passage of time since the original request for disclosure of the DSWR Minutes in 2005.

6.17 In his analysis, the Attorney General recognised that there was a public interest in disclosure of information which would improve the public's understanding of the Government's decision making and that, in relation to the DSWR Minutes, there was a particular public interest in improving the public's understanding of the policy discussions which led to significant constitutional changes in the way UK citizens were governed.

6.18 However, the Attorney General did not consider that it followed that the public interest favoured disclosure of the DSWR Minutes. He considered the potential dangers to collective responsibility and good government that would arise from disclosure of the DSWR Minutes to be particularly pressing and more so where, in his view, there was

[18] *https://update.cabinetoffice.gov.uk/resource-library/dswr120208-statement-reasons*

already a substantial amount of information in the public domain. This was the case in the debate surrounding devolution for Scotland, Wales and the Regions, which had been amongst the most significant constitutional changes made under the previous administration.

6.19 In the view of the Attorney General, the public interest in transparency was sufficiently served by the lengthy debate and scrutiny, both inside Parliament and in general public discussions on devolution at the time and that, where relevant, those debates are a matter of public record. Furthermore, and in addition to the extensive reporting, the public were presented with opportunities to participate 'directly and determinatively' in the policy making process. He therefore concluded that the public interest in the effective operation of Cabinet government weighed heavily against the disclosure of the DSWR Minutes.

6.20 The Attorney General stated that he believed that this was an exceptional case where, in his opinion, disclosure would be damaging to the doctrine of collective Cabinet responsibility.

6.21 A copy of the government's policy on the use of the veto in cases where the information in question is said to be exempt under section 35(1) of the Act was annexed to the Attorney General's statement of reasons[19]. Specifically, the policy relates to the use of the veto in respect of information that engages the operation of the principle of collective Cabinet responsibility. In that policy the government reiterates the assurances given by the previous administration during the passage of the Freedom of Information Bill through Parliament that Government would only seek to exercise the use of the veto in exceptional circumstances and then only following collective Cabinet agreement.

[19] *http://www.justice.gov.uk/downloads/publications/policy/moj/foi-veto-policy.pdf*

6.22 The policy notes that whilst the Government considers that the public interest against disclosure of information covered by collective Cabinet responsibility will often be strong, the exemption is not absolute and that it was clearly Parliament's intention that in some circumstances the public interest might favour disclosure.

6.23 The policy sets out the criteria to be used by the Government in deciding whether or not to exercise the veto. In particular, the Government will not consider the use of the veto unless, in the view of the Cabinet as a whole, the release of the information would damage Cabinet government and / or the constitutional doctrine of collective responsibility and the public interest in disclosure is outweighed by the public interest in good Cabinet government and / or the maintenance of collective responsibility.

6.24 In a statement issued on 8 February 2012 the Attorney General said:

> *"I have today given the Information Commissioner a certificate under section 53 of the Freedom of Information Act 2000('the Act'). The certificate relates to the Decision Notices dated 12 September 2011(ref. FS50347714) and 13 September 2011 (ref. FS50363603). It is my view, as an accountable person under the Act, that there was no failure by the Cabinet Office to comply with section 1(1)(b) of the Act in these cases by withholding copies of the minutes of the Cabinet Ministerial Committee on Devolution to Scotland and Wales and the English Regions (DSWR) from 1997 and 1998.*
>
> *The consequence of my giving the Information Commissioner this certificate is that the Commissioner's Decision Notices, which ordered disclosure of most of the DSWR minutes, cease to have effect.*

A copy of the certificate has been laid before each House of Parliament. I have additionally placed a copy of the certificate and a detailed statement of the reasons for my decision in the Libraries of both Houses, the Vote Office and the Printed Paper Office.

This is only the third time the power under section 53 (otherwise known as the 'veto') has been exercised since the Act came into force in 2005. In that time, central government has released an enormous amount of information in response to FOI requests – including in October 2010 the minutes of the Cabinet discussion of the Westland affair.

My decision to exercise the veto in this case was not taken lightly, but in accordance with the Statement of Government Policy on the use of the executive override as it relates to information falling within the scope of section 35(1) of the Act. I have placed a copy of that policy in the Libraries of both Houses.

In line with that policy, I have both assessed the balance of the public interest in disclosure and non-disclosure of these minutes, and considered whether this case meets the criteria set out in the Statement of Government Policy for use of the veto.

I consider that the public interest falls in favour of non-disclosure and that disclosure would be damaging to the doctrine of collective responsibility and detrimental to the effective operation of Cabinet government. I have concluded, in light of the criteria set out in the Government's policy, that this constitutes an exceptional case and that the exercise of the veto is warranted. A detailed explanation of the basis on which

I arrived at the conclusion that the veto should be used is set out in my statement of reasons."

6.25 The certificate, statement of reasons, the Attorney General's statement to the House of Commons and the HMG policy for the exercise of the veto are included in the annex to this report.

7. The Information Commissioner's response

7.1 The Commissioner issued a press statement on 8 February 2012. In that statement the Commissioner noted his regret that the Tribunal had, for the second time, been denied an opportunity to consider the issues in relation to the DSWR Minutes as provided by the Act. The Commissioner stated he would study the Attorney-General's statement of reasons to understand what 'exceptional circumstances' there might be to justify the use of the veto in this case and the Commissioner would then make his report to Parliament. This is that report.

7.2 The Commissioner notes that the Cabinet Office had appealed the Commissioner's Decision Notices to the Tribunal and that a full two day hearing of that appeal was due to commence on 13 March 2012, only some five weeks after the veto was exercised. The Commissioner regrets that the Tribunal's role was disregarded at such a stage in proceedings. He also notes that there is no reference in either the Attorney General's statement of reasons or his written statement to the House of Commons to the role of the Tribunal or to the pending appeal hearing.

7.3 The Commissioner believes that the Attorney General's statement, whether written or oral, should have addressed the reasons, presumably also exceptional, for imposing a veto ahead of the Tribunal hearing.

7.4 The Commissioner particularly regrets that the exercise of the veto prior to the full hearing of the appeal before the Tribunal meant that the issues in dispute were not put to the Tribunal for a consideration which would, in part, have been conducted in closed session so as not to disclose publicly the withheld information.

7.5 The Commissioner notes that, notwithstanding the date set for the service of witness evidence, the Cabinet Office did not advance any such evidence in the present case. Although the need to preserve the doctrine of collective Cabinet responsibility has been advanced, the Commissioner therefore remains unclear as to what are said to be the specific or 'exceptional' factors in this particular case which the Attorney General considers dictate that the Commissioner's decision on where the public interest lies should be overridden by the exercise of the Ministerial veto.

7.6 Had the appeal to the Tribunal proceeded to the arranged full hearing, the arguments both for and against disclosure would have been rehearsed fully (albeit in closed session) before an impartial Tribunal comprising of a legally qualified Judge and two experienced lay members. As already noted, that panel might have concluded that, to a greater or lesser extent, Commissioner's findings were flawed and might have substituted the Decision Notice. In the Commissioner's view, that is precisely the function of the Tribunal.

7.7 However, in the present case, the statement of reasons set out by the Attorney General essentially rehearse the Cabinet Office's pleadings and do not put forward additional arguments over and above those which would have been presented before the Tribunal in any event. The Commissioner previously noted this to be the case in respect of the exercise of the veto on 10 December 2009.

7.8 The Commissioner therefore remains concerned by the "blanket" nature of the exercise of the veto in the present case. Whilst acknowledging the importance of the constitutional convention which the Attorney General seeks to protect, it seems to the Commissioner that a considered review of the DSWR Minutes as part of the appeal process might have resulted in the disclosure of some, or portions of some of the DSWR Minutes in redacted form. The Commissioner considers that the convention of collective Cabinet Responsibility could only justify such a blanket refusal if all Cabinet papers were absolutely exempt from disclosure under the Act. However, that is not how the Act is drafted.

7.9 The Commissioner is cognisant of the current post legislative review of the Act being undertaken by the Justice Committee of the House of Commons. In his written evidence he has referred to the previously expressed concerns regarding the disclosure of Cabinet material under the Freedom of Information Act and to the two previous occasions on which the Ministerial veto has been exercised. The Commissioner has suggested that the Committee might consider whether the disclosure of Cabinet and Cabinet committee minutes is an unintended consequence of the Freedom of Information Act. If it is, the Committee has the opportunity to recommend to the Government amendments to the Act that would afford greater protection from disclosure to Cabinet and Cabinet committee minutes. The Commissioner remains clear that until such time as any such proposal is enacted each case must continue to be considered on its own merits under the current legislation which, in any event, cannot be retrospective in its application.

7.10 It was the previous Commissioner's expressed view at the time that the veto was exercised for the first time in February 2009 that it was vital that a ministerial certificate should only be issued under section 53 of the Act in exceptional cases. At that point he was concerned

that any greater use of such certificates would threaten to undermine much of the progress made towards greater openness and transparency in government since the Act came into force. At the time that the veto was exercised on the second occasion in December 2009, the current Commissioner agreed strongly with that view and, notwithstanding the outcome of the post legislative review, he continues to be of the opinion that he would be very concerned to see the exceptional become the routine.

7.11 This is the third occasion on which the veto has been exercised. On the first occasion the Commissioner considered it appropriate to obtain, and publish, legal advice on the prospects of successfully challenging the Secretary of State for Justice's certificate by way of an application for judicial review or otherwise. The advice was that, on that occasion, such an application for judicial review would be unlikely to succeed. On the second occasion, the Commissioner considered that the circumstances of the case were sufficiently different for him to have considered taking further legal advice. However, he concluded that the appropriate course of action was to wait and see whether the exceptional did indeed become a matter of routine.

7.12 Accordingly, the Commissioner did not seek a further opinion at that time. Nevertheless, he did state that, in the event of a similar veto in relation to Cabinet materials being imposed in the future in advance of a Tribunal hearing, he would not hesitate to seek Counsel's advice with a view to challenging the decision.

7.13 However, the Commissioner is mindful that, on this occasion, the veto has been exercised against the backdrop of the current post legislative review of the Act. Whilst he remains troubled by the matters set out at paragraphs 6.5 – 6.11 above, he does not consider in these circumstances that it would be either constructive

or appropriate to take further formal steps at public expense in relation to the exercise of the veto on this occasion by the Attorney General.

7.14 The Commissioner therefore considers that this report is now the end of his formal involvement with this case.

8. Conclusion

8.1 In light of previous commitments made by the Commissioner's predecessor, 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) of the Act 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.

Christopher Graham
Information Commissioner

Dated: 24th February 2012

ANNEX

Attorney General's certificate

Attorney General's statement of reasons

Attorney General's written statement to the House of Commons

Statement of HMG policy on the use of the executive override

8 February 2012

CERTIFICATE OF THE ATTORNEY GENERAL, MADE IN ACCORDANCE WITH SECTION 53(2) OF THE FREEDOM OF INFORMATION ACT 2000

In Decision Notices dated 12 September 2011 (ref. FS50347714) and 13 September 2011 (ref. FS50362603) the Information Commissioner ordered the disclosure of information contained in minutes of the meetings of the Cabinet Ministerial Committee on Devolution to Scotland and Wales and the English Regions, that took place in 1997 and 1998.

As an accountable person within the definition of section 53(8) of the Freedom of Information Act 2000 ("the Act"), I have taken the view that the public interest favours the continued non-disclosure of all the information that the Cabinet Office was ordered to disclose.

Therefore I am of the opinion that there was no failure falling within section 53(1)(b) of the Act, and I make this certificate accordingly.

{SIGNED}

RT HON DOMINIC GRIEVE QC MP
ATTORNEY GENERAL

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

IN RESPECT OF THE DECISIONS OF THE INFORMATION

COMMISSIONER DATED 12 SEPTEMBER 2011 (REF: FS50347714)
AND

13 SEPTEMBER 2011 (REF: FS50362603)

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 Government's policy on use of the "Ministerial Veto" in section 35(1) cases and the views of Cabinet, former Ministers and the Information Commissioner on use of the veto in this case, I have today signed a certificate substituting my decision for the Decision Notices of the Information Commissioner dated 12 September 2011 (case referenceFS50347714) and 13 September 2011 (case reference FS50362603). Those Decision Notices ordered disclosure of information contained in the minutes of the meetings of the Cabinet Ministerial Committee on Devolution to Scotland and Wales and the English Regions (DSWR) that took place in 1997 and1998 ("the DSWR minutes").

It is my opinion as the accountable person in this case, that the decisions taken by the Cabinet Office not to disclose the DSWR minutes in response tithe requests was in accordance with the provisions of the Freedom of Information Act. I am fully aware that the same information was the subject of previous request under the Act in 2005, and was the subject of a section 53certificate issued by the previous Secretary of State for Justice on 10 December 2009. In taking my decision to make a certificate under section 53of the Act on this occasion, I have, among other things, both carefully considered the statement of reasons made by the Secretary of State on that occasion, and paid close regard to the reasons stated by the Commissioner in the two September 2011 Decisions Notices.

I set out below the reasons for my decision to make the section 53 certificate in these cases. My reasoning draws on the reasons referred to in the December 2009 certificate. In my view all the reasons set out in that statement remain relevant today and, indeed, are relevant to the information contained in minutes of DSWR meetings in 1998 which were not within the scope of the request addressed by the certificate made in December 2009.

However, I want to make it clear that I have addressed the matters before me on their own merits, and I have also taken into account the further passage of time since the original request for disclosure of the DSWR minutes.

My conclusion is that disclosure of the DSWR minutes:

1) Is not required having regard to the balance of the public interests in favour of disclosure and those against, and
2) Would be damaging to the doctrine of collective responsibility and detrimental to the effective operation of Cabinet government.

I believe this is an exceptional case warranting my use, as the accountable person for cases involving papers of a previous administration, 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 have also today laid a copy of that certificate before both Houses of Parliament.

This statement sets out my reasons for making a certificate under section 53of the Act in this case. No inference should be drawn from this statement as to the nature of the information recorded in the DSWR minutes.

ANALYSIS

The Commissioner accepted that the information sought by the requests fell within the scope of the exemption at section 35(1)(b) of the Act, applicable to information relating to Ministerial communication.

1. **FIRST,** and taking the application of section 35(1)(b) of the Act as the starting point, I am satisfied that at the time of the requests in May and June2010, the balance of the public interest in this case fell in favour of maintaining the confidentiality of the requested information.

2. The DSWR Committee was a Cabinet Committee established following the 1997 general election. It was tasked with considering the Government's policy on devolution to Scotland, Wales and the English Regions. Following its deliberations and decisions Parliament passed the Scotland Act 1998 and the Government of Wales Act 1998.

3. The decisions of the DSWR Committee had and continue to have a significant impact on people throughout the UK, but particularly those in Scotland and Wales. The Committee considered policies which led to changes in how they were governed and democratically represented. These decisions also led to changes in public administration in the UK, with policy divergence leading to different services and outcomes for citizens in England, Wales, Scotland and Northern Ireland. Devolution was among the most significant constitutional changes made under the previous Government and continues to have a profound impact today.

4. I recognise that there is a general public interest in transparency and openness, improving public understanding of the Government's decision making, and encouraging debate and discussion on policy development.

5. In relation to the DSWR minutes, I also recognise that there is a particular interest in improving the public's understanding of the policy discussions which led to significant constitutional changes which have affected the way that UK citizens are governed. I agree that release of this information would improve the ability of the public to assess the Government's analysis of, and approach to, devolution in Scotland and Wales in particular and would inform current and future debate on this subject as noted in paragraph 26 of the Commissioner's Decision Notice of 12 September 2011and paragraph 25 of the Decision Notice of 13 September 2011.

6. However, there is already a considerable amount of material in the public domain on devolution for Scotland, Wales and the English Regions. Decisions taken by the Committee were presented by the Government Ministers of the day and were the subject of lengthy debate and scrutiny both inside Parliament and in general public discussions on devolution at that time. The legislation proposed by Government as a result of the work of the DSWR Committee was debated and considered in detail by Parliament, including in Select Committees, and those debates were recorded in Hansard in the parliamentary debates on the Referendums Bill, the Scotland Bill and the Government of Wales Bill.

†[1]

8. These proposals were also the subject of extensive reporting analysis and comment in the media. Moreover, the Government provided a number of opportunities whereby the public could participate directly and determinatively in the policy-making process. It issued two White Papers in July 1997, *Scotland's Parliament* and *A Voice for Wales* that explained its

[1] Numbered paragraph 7 is missing in the original.

proposals; and held referendums on 11 September 1997 in Scotland and 18 September 1997in Wales.

9. I consider that the public interest in the effective operation of Cabinet government weighs heavily against the disclosure of the DSWR minutes. Effective Cabinet government depends in large part on the convention of collective Cabinet responsibility; and in turn, collective Cabinet responsibility places a high premium on maintaining the confidentiality of Ministerial communications on Cabinet business, because all Ministers are responsible to Parliament and the public for all Government policies, even if in private they oppose these policies. This is a point explicitly recognised in the Ministerial Code.

10. Collective Cabinet responsibility is a long standing constitutional principle and essential to the good governance of the UK, in which the public clearly has a strong interest. Disclosure of individual and divergent Ministerial views would compromise the Government's ability convincingly to maintain a collective position for which all Ministers are accountable.

11. Maintaining the confidentiality of Ministerial communications permits Ministers freely and frankly to debate policies in private before coming to a collective view which they are required to support in public. Robust debate and candid discussion ensure that all policies are fully considered and all alternative options and viewpoints fully explored, and ultimately produces better policy for the good of the public. However, this cannot be achieved unless a high level of confidentiality is generally maintained in such discussions. A lack of confidentiality would result in watered-down discussions and consequentially impaired decision making, which would not be in the public interest.

12. Moreover, Ministers debate controversial issues in Cabinet Committees in the expectation that their deliberations will be kept confidential for an appropriate period of time. Were this expectation to change through the premature publication of Cabinet Committee minutes, there is a very significant risk that Ministers would be unwilling to put

forward openly and candidly dissenting views. Rather than fully debating the merits of a policy, they would be likely to express themselves with a view to future publication of their position and the need to defend this in public. Ministers would seek to maintain the appearance of unanimity for fear of being held personally accountable for views which were unpopular or incorrect in the light of subsequent events. This would undermine the quality of policy making in future, to the detriment of the general public. There is also a risk that Ministers could seek to bypass formal channels for Government decision making to limit the potential for disclosure. This would lead to poorer documentation of decisions and a less formal, and therefore potentially less rigorous, consideration of policy options.

13. For these reasons, it is my view that preservation of the practices of collective government is an important factor in considering the balance of the public interest required under the Act. That factor must necessarily carry significant weight in relation to this particular information, given what I say below about the on-going debate surrounding matters which are discussed in the minutes.

14. The Commissioner has explicitly recognised this at paragraph 28 of his Decision Notice of 12 September 2011 and paragraph 27 of his Decision Notice of 13 September 2011. He accepts at least in relation to some of the information in question, that, "the factor relating to collective Cabinet responsibility continues to carry significant weight", and concludes that the public interest falls in favour of withholding those parts of the information.

15. As to the rest of the information in the DSWR minutes, although I agree with the Commissioner that the public interest in maintaining the conditions necessary for the operation of collective Cabinet responsibility is not the only relevant factor public interest consideration, I believe that this public interest must carry significant weight in this case. I disagree with the Commissioner's suggestion that this strong public interest in favour of confidentiality does not extend beyond the parts of the DSWR minutes

directly attributed to individual Ministers, and "the more sensitive areas of policy".

16. At paragraph 25 of his Decision Notice of 12 September 2011 and paragraph 24 of his Decision Notice of 13 September 2011 the Commissioner concludes that the passage of time has significantly reduced any risk to collective Cabinet responsibility posed by the release of this information. I do not agree.

17. Although the DSWR minutes record discussions in 1997 and 1998, devolution was in 2010 and today an issue of debate and discussion due to its constitutional significance and continually evolving nature. Many of the issues discussed and debated by the Committee were again being debated in May and June 2010. In June 2009 the Calman Commission published its report on Scottish devolution and made wide-ranging recommendations for how this could be strengthened. The Holtham Commission also published its first report on devolution funding in Wales in July 2009 and was due to publish its final report when the requests were received. By 2010 the coalition Government in Westminster had committed itself to implementing the Calman Commission's recommendations and had also committed to holding a referendum on further devolution in Wales and establishing a Commission to examine the Welsh devolution settlement.

18. The Commissioner states that release of this information would inform current and future debates. As I have already said, I recognise this as a factor in favour of disclosure. Nevertheless I believe that it is a consideration that in this case is diluted by the wealth of information that is already available relating to the decisions taken. I also believe that in this case, that public interest in disclosure is outweighed by the public interest in good governance through the means of collective Cabinet responsibility. Disclosure of this information puts this at risk. It is not in the public interest for Ministers' ability rigorously and candidly to assess matters of public importance and controversy to be impaired. As I have explained

above, the present situation is not one in which the risks arising from disclosure have been diminished byte passage of time.

ǂ[2]

20. Therefore, I believe in this case that any public interest in disclosure is outweighed by the strong public interest in protecting effective Cabinet government and encouraging high-quality decision-making both at the time of the request and in future.

21. So that the position is clear, I recognise that the Act does not create an absolute exemption from disclosure for information relating to Ministerial communications. It is not the case that any form of "blanket approach" has been taken in respect of this category of information. To the extent that the Commissioner suggests otherwise, he is wrong. Yet the minutes of Cabinet meetings and the meetings of Cabinet committees do call for particular consideration. The public interests concerned must, on each occasion, be carefully identified and considered. This is the approach that I took before deciding to make the section 53 certificate in this case.

22. **SECOND**, having considered the Government's policy on use of the section 53 power in section 35(1) cases, I think this is an exceptional case as defined by that policy, and therefore merits the exercise of the power to make a certificate.

23. I believe release of this information would seriously prejudice the practice of collective responsibility, and that this outweighs any public interest in release of the DSWR minutes.

24. But I am not making this certificate veto simply because I disagree with the Commissioner's assessment of the balance of the public interest. As the Government's published policy makes clear, this is not a sufficient justification to use the section 53 power. Rather, I believe that this case also meets the criteria for determining an exceptional case as set out in that policy. I have reached this conclusion having taken particular account

[2] Numbered paragraph 19 is missing in the original.

of the views of the former Ministers who were involved in the Committee's discussions in 1997and 1998. I have also considered the opinion of the Information Commissioner. I also briefed the current Cabinet and considered their view in accordance with the statement of policy.

25. I have considered this case in the light of the Government's published policy on use of the veto, taking particular account of the following factors which I believe to be relevant:

- The information in this case records considerable discussions on the substance of the Government's policy on devolution. It is not merely concerned with the process of decisions being taken.

- Devolution was a significant policy at the time, and indeed remains so. It was a central element of the then Government's election manifesto in 1997, and one of its key policy priorities on taking Government. This is evidenced by the fact that the Committee first met within a week of the General election and the Government's intention to hold referendums on devolution was in the Queen's speech of 14 May 1997. The DSWR Committee represented the apex of Government decision-making on devolution issues, and these minutes cover the issues most central to this fundamental constitutional change. Devolution was also a matter of significant media and public interest, and the Committee's decisions attracted substantial public comment.

- The decisions taken by the Committee were significant at the time and remained so in 2010 (and indeed continue to remain so to the present day). The decisions taken by the Committee continue to have a substantial effect on the operation of Government across the United Kingdom. In addition, these issues continue to be of public debate – for example many of them were considered by the Calman

and Holtham Commissions, and continue to be debated in the context of the current Scotland Bill, the on-going debate on Scotland's constitutional future and the Silk Commission in Wales. The matters discussed at DSWR are manifestly not matters of purely historical interest and importance. Disclosure of the DSWR minutes also give rise to a real and significant risk that debates and discussions between the administrations would be prejudiced.

- A number of individuals have comments attributed to them in the minutes, including where they are not in agreement on certain policy issues. Although the Commissioner decided that content identifying individual ministers should be withheld, I do not consider that such an approach significantly alters the public interest considerations in relation to the remainder of the information.

- Of the large number of Ministers who took part in at least one of the DSWR meetings a significant majority remain active in public life: 12 are currently members of the House of Commons and a further 19 are members of the House of Lords;

- Of those former Ministers engaged in the Committee the majority favoured withholding this information. I consider this a particularly relevant consideration given that the information constitutes papers of a previous administration with the consequence that I, as the accountable person, am the only current Minister able to view the documents.

26. In light of these considerations, the exercise of the Ministerial veto is the most appropriate means to ensure that the public interest in effective Cabinet government is properly and fully protected.

CONCLUSION

Having therefore taken into account all the circumstances of the case, I am satisfied that the public interest, at the time of the requests (and, indeed, at the present time as well), fell (and falls) in favour of non-disclosure. I am also satisfied that this is an exceptional case meriting use of the Ministerial veto to prevent disclosure and to safeguard the public interest.

The certificate I have signed has been provided to the Information Commissioner and copies have been laid before both Houses of Parliament. 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. A copy of the Government's policy in relation to use of the power under section 53 of the Act as it relates to section 35(1) of the Act is annexed to this document.

RT HON DOMINIC GRIEVE QC MP

ATTORNEY GENERAL

8 February 2012

ATTORNEY GENERAL'S OFFICE

WRITTEN MINISTERIAL STATEMENT

FREEDOM OF INFORMATION

Attorney General (Dominic Grieve): I have today given the Information Commissioner a certificate under section 53 of the Freedom of Information Act 2000 ('the Act'). The certificate relates to the Decision Notices dated 12 September 2011(ref. FS50347714) and 13 September 2011 (ref. FS50363603). It is my view, as an accountable person under the Act, that there was no failure by the Cabinet Office to comply with section 1(1)(b) of the Act in these cases by withholding copies of the minutes of the Cabinet Ministerial Committee on Devolution to Scotland and Wales and the English Regions (DSWR) from 1997 and 1998.

The consequence of my giving the Information Commissioner this certificate is that the Commissioner's Decision Notices, which ordered disclosure of most of the DSWR minutes, cease to have effect.

A copy of the certificate has been laid before each House of Parliament. I have additionally placed a copy of the certificate and a detailed statement of the reasons for my decision in the Libraries of both Houses, the Vote Office and the Printed Paper Office.

This is only the third time the power under section 53 (otherwise known as the 'veto') has been exercised since the Act came into force in 2005. In that time, central government has released an enormous amount of information in response to FOI requests – including in October 2010 the minutes of the Cabinet discussion of the Westland affair.

My decision to exercise the veto in this case was not taken lightly, but in accordance with the Statement of Government Policy on the use of the executive override as it relates to information falling within the scope of section 35(1) of the Act. I have placed a copy of that policy in the Libraries of both Houses.

In line with that policy, I have both assessed the balance of the public interest in disclosure and non-disclosure of these minutes, and considered whether this case meets the criteria set out in the Statement of Government Policy for use of the veto.

I consider that the public interest falls in favour of non-disclosure and that disclosure would be damaging to the doctrine of collective responsibility and detrimental to the effective operation of Cabinet government. I have concluded, in light of the criteria set out in the Government's policy, that this constitutes an exceptional case and that the exercise of the veto is warranted. A detailed explanation of the basis on which I arrived at the conclusion that the veto should be used is set out in my statement of reasons.

The Attorney General's Office
8th February 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

[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*).

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 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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ISBN 978-0-10-297610-6