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 reference FS50347714) 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 and 1998 ("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 to the 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 a previous request under the Act in 2005, and was the subject of a section 53 certificate issued by the previous Secretary of State for Justice on 10

December 2009. In taking my decision to make a certificate under section 53 of 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 53 of 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 June 2010, 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 2011 and 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.

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 proposals; and held referendums on 11 September 1997 in Scotland and 18 September 1997 in 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 ongoing 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 extent 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 by the passage of time.

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 of the views of the former Ministers who were involved in the Committee's discussions in 1997 and 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 ongoing 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