IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2010/ 0031

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's

Decision Notice No: FS50088735

Dated: 22nd. December, 2009

Appellant: **The Cabinet Office**

Respondent: **Information Commissioner**

Heard at: Care Standards Tribunal

Date of hearing: 2nd. August, 2010:

Date of decision: **13th. September, 2010**

Before

David Farrer Q.C.(Judge)

and

Roger Creedon

and

Paul Taylor

Attendances:

For the Appellant: Gerry Facenna

For the Respondent: Timothy Pitt – Payne Q.C.

Subject matter: **FOIA S.35(1)(b) Ministerial communications and the doctrine of Collective Responsibility**

Cases: ***The Cabinet Office v Information Commissioner (Lamb) EA/2008/0024***

Export Credit Guarantee Department [2008] EWHC 638 (Admin.)

BERR and O`Brien v Information Commissioner [2009] EWHC 164 (QB)

Home Office and MOJ v Information Commissioner [2009] EWHC 1611 (Admin.)

HM Treasury v Information Commissioner and Evan Owen [2009] EWHC 1811 (Admin.)

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2009/0031

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 22nd.December, 2009 and dismisses the appeal. The information which was the subject of the appeal shall be provided within 35 days of publication of this Decision

Dated this 31st.day of August 2010

Signed D.J.Farrer Q.C. Tribunal Judge

REASONS FOR DECISION

Introduction

1. In this Decision individuals will be referred to using the titles by which they were known in January,1986.

2. In 1984 it became apparent that Westland plc, the major UK manufacturer of civil and military helicopters was in financial difficulties. The Government was unwilling and perhaps unable to guarantee contracts to ensure its survival. A potential buyer withdrew in April, 1985 when ministers maintained the refusal to promise business.

3. By late 1985, it was clear that it must find a new industrial partner, capable of injecting significant funds into the business if it was to continue to trade. The Government`s position was that this was a private sector problem and that decisions as to Westland`s future were a matter for shareholders, not central government.

4. Negotiations proceeded with Sikorsky of America, a subsidiary of United Technologies which was collaborating for this purpose with Fiat. Discussions also took place with a group of European aviation companies. Proposals were floated by both suitors. In November, 1985, the national armaments directors ("the NAD") of France, Germany, Italy and the U.K. met at the request of their respective Defence ministers. They recommended that all four governments should in future meet their needs for helicopters from models designed and built in Europe. Mr. Michael Heseltine was then Secretary of State for Defence and Mr. Leon Brittan Secretary of State for Trade and Industry. The adoption of such a recommendation would, of course, have ruled out any bid from Sikorsky.

5. The recommendation was not well received by the majority of the Cabinet nor by the Chairman of Westland, Sir John Cuckney, who urged Mr.

Brittan to reject it. The Cabinet met to discuss the position on 5th. and 6th. December, 1985 and at a Cabinet Economic Sub Committee on 9th. December. The upshot was a rejection of the NAD recommendation, intended to allow Westland shareholders a free choice between whatever proposals were advanced. A decision was urgent since Westland needed to have a firm package of proposals in place before its accounts were published. The alternative was receivership.

6. On 19th. December, the Cabinet reaffirmed that it was for Westland alone to decide what was best for the company. Statements to that effect were made to the House of Commons by Mr. Brittan and by the Prime Minister, Mrs. Margaret Thatcher

7. The rival proposals were put to the shareholders soon after.

8. These developments reflected a very sharp division of opinion between Mr. Heseltine and the majority of his colleagues, particularly the Prime Minister and Mr. Brittan as to the recommendations of the NAD and the choice of partner for Westland. Further tension was created by the leaking of a letter from the Solicitor General which evidently contradicted statements made by Mr. Heseltine to a major bank. This led in due course to the resignation of Mr. Leon Brittan.

9. The Cabinet met again on 9th. January, 1986. Westland was an item on the agenda. Rival proposals had been put to Westland shareholders but their decision was not due for some days. In the course of discussions of the Westland issue Mr. Michael Heseltine resigned as Secretary of State

and left the meeting forthwith. It was probably the first time in the 20th. century that a minister resigned in the course of a Cabinet meeting.[1]

10. The issue over which he resigned was ostensibly a very narrow one, namely the degree of freedom that he should enjoy in responding to media questions as to his view of the affair pending the shareholders` decision. It was accepted that no further ministerial pronouncements should be made on either side. Mr.Michael Heseltine had, however, campaigned and commented in emphatic terms on the issue and considered that he now faced a problem, if asked whether silence indicated recantation. The Prime Minister made very clear that there should be no public divergence from the decision of Cabinet in any circumstances. He announced that he could not continue to serve.

11. Mr. Heseltine promptly announced his resignation to the press outside and made a detailed public statement that evening.

12. The Prime Minister made a statement to Parliament on 15th. January, 1986 in answering a debate on Westland called by the Opposition. It is a very clear, frank and detailed review of the history of the matter and includes unequivocal statements as to Cabinet discussions in December, 1985 and, central to this appeal, 9th. January, 1986. Considerable reliance was placed on that Statement by the Appellant and we shall return to it. In describing the Cabinet decisions on these occasions as “unanimous”, the Prime Minister was overriding the convention of collective responsibility, which we shall consider later in this Decision..

13. Mr. Heseltine responded in the House of Commons the same day.

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[1] It was suggested at the hearing that Joseph Chamberlain may have acted in a similar way over the Home Rule issue in 1883. Research indicates that this was not so. He resigned by letter to Gladstone.

14. No fewer than eight ministerial participants in the 9th. January meeting, namely the Prime Minister, Mr. Heseltine, Lord Young, Sir Geoffrey Howe and Messrs. Fowler, Baker, Lawson and Ridley produced memoirs featuring Westland and 9th. January, 1986. Of them, only Lord Young displayed any reticence as to what had been said, citing the dictates of collective responsibility, which lie at the heart of this appeal.

15. A further Cabinet meeting on 23rd. January, 1986, following acceptance by Westland of the Sikorsky offer, included reference to the issue.

16. On any view, the Cabinet meeting of 9th. January, 1986 was a momentous occasion, of enduring interest to political commentators, historians and ordinary observers of current affairs.

The request for information

17. On 28th. February, 2005, in the early days of this jurisdiction, Martin Rosenbaum, Executive producer of BBC Radio Political Programmes, made a request of the Appellant for the following information, specifying reliance on FOIA.

"a) The minutes of the Cabinet meeting held on 9 January, 1986

b) Any other records of this meeting, such as the hand – written notes made by the Cabinet Secretary or other officials during or shortly after the meeting

c) The minutes of any other Cabinet meetings or meetings of Cabinet sub – committees (between 1st. September, 1985 and 1st. March, 1986) at which the Westland helicopter company was discussed"

17a Only (a) is at issue in this appeal.

18. The subsequent treatment of this Request was deplorable. We make certain observations on the subject at the conclusion of this Decision.

19. The Appellant replied on 30th. March, 2005, confirming that it held the requested information but refusing to disclose it. Reliance was placed on the exemptions provided by s..35 (1)(a) and (b) of FOIA.. The Appellant set out the competing public interests, as it saw them, in disclosing and withholding the information and concluded that the latter outweighed the former. In essence, the interests identified were those canvassed in argument before us.

20. Mr. Rosenbaum asked immediately for an internal review, citing in support of his request the passage of time since the meetings (then about nineteen years) and the historical and political importance of the Westland controversy.

21. That request was refused by letter dated 28th. July, 2005 from the Managing Director of the Appellant, Colin Balmer. It repeated more briefly the arguments set out in the original refusal relating to ministerial communications. It did not explicitly abandon reliance on s.35(1)(a). If four months seems a long delay for such a straightforward response, it was trivial by comparison with what followed.

The complaint to the Information Commissioner

22 Mr. Rosenbaum complained to the ICO on 13th. September, 2005, as to the refusal and the delay over the internal review. He challenged the reasoning of the Appellant and referred to the publication of ministerial memoirs and the expectation of ministers that Cabinet minutes would be published after thirty years in any event.

23 The Decision Notice was issued on 22nd, December, 2009, more than four years after the complaint. By this time the Appellant had

narrowed the exemptions relied on to that relating to ministerial communications under s.35(1)(b). The Notice acknowledged, as was undeniable, that s.35(1)(b) was engaged in relation to all three elements of the request. It recited the arguments on both sides as to the disclosure of the minutes of 9th. January, 1986. Since they were advanced in written and oral argument on this appeal, we shall not repeat them here save to say that, at paragraph 26, it rightly identified, as the fundamental question whether disclosure would undermine the convention of the collective responsibility of ministers.

24 The ICO concluded that the public interest favoured disclosure of the minutes of 9th. January, 1986, so far as they related to the Westland affair and ordered disclosure within thirty – five days. That part of the Decision Notice gives rise to this appeal.

25 As to notebooks and other Cabinet minutes relating to this issue, he decided that the Appellant had correctly evaluated the balance of public interests. He confirmed the Appellant`s refusal. That part of the decision is not appealed and we say nothing further about it.

The appeal to the Tribunal

26 The Cabinet Office appealed on 18th. January, 2010. Put shortly, the grounds were as follows :

(1) The ICO erred in attaching insufficient weight to the inhibition of frank discussion which subsequent disclosure or the threat of disclosure would produce.

(2) There is a very strong public interest in maintaining the confidentiality of ministerial discussions where disclosure would reveal diverging views, inconsistent with the principle of collective responsibility. That principle was explicitly recognised by the Tribunal in the only previous

decision involving minutes of Cabinet meetings – *The Cabinet Office v Information Commissioner (Lamb) EA/2008/0024 at 52, 77 and 79.*

(3) That principle is not weakened by ministerial statements to Parliament or publication of ministerial memoirs disclosing Cabinet discussions. Indeed, such disclosure merely weakens the public interest in disclosure, since the information is already in the public domain.

(4) Uncertainties as to what transpired were laid to rest by the Prime Minister`s prompt statement to Parliament on 15th. January, 1986.

(5) Ministers must have a confidential space to debate and express possibly unpopular or unconventional options. The principle of collective responsibility is undermined by premature disclosure of discussions and disagreements.

(6) Despite numerous High Court dicta or indeed decisions[2] underlining the importance of general principles underlying qualified exemptions when balancing public interests, the ICO wrongly accorded less weight to what he regarded as "generalised arguments" such as the principle of collective responsibility.

(7) S.35(1)(b) conferred on ministerial communications a specific exemption analogous to that which s.35(1)(c) accorded to requests for and the provision of legal advice by the Law Officers ("The Law Officers` Convention"). Applying the approach of Blake J. in *HM*

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[2] *Export Credit Guarantee Department [2008] EWHC 638 (Admin.) at 35 – 38; BERR and O`Brien v Information Commissioner [2009] EWHC)164 (QB) at 51 – 53; Home Office and MOJ v Information Commissioner [2009] EWHC 1611 (Admin.) at 34; HM Treasury v Information Commissioner and Evan Owen [2009] EWHC 1811 (Admin.)51 and 54*

Treasury v Information Commissioner and Evan Owen [2009] EWHC 1811 (Admin.) 51 and 54 to that exemption:

"the statute assumes that the case for exemption is a substantial one."

and

"Parliament intended real weight should continue to be afforded to this aspect of (the exemption)"

(8) Only a clear and compelling interest could outweigh the need to .maintain the confidentiality associated with the principle of collective responsibility. None was demonstrated

27 These arguments were substantially repeated in written and oral submissions before the Tribunal.

Evidence

28 The Tribunal received written and oral evidence from Terence Robin Fellgett, the Director and Deputy Head of the Economic and Domestic Affairs Secretariat which supports collective decision – taking by the Government on domestic policy. He has clearly a profound knowledge and long experience at the highest level of the workings of Cabinet government. His evidence emphasised the critical importance of the principle of collective responsibility, which he described and illustrated. He acknowledged that the passage of time might be a material factor but insisted that the principle remained central even in the context of events many years ago. He spoke of the impact of disclosure, not just on those who took part in the meeting under scrutiny but, just as importantly, upon their successors today and their readiness to speak frankly. His experience of ministers was that they were deeply concerned at any risk

of disclosure of the expression of individual opinions at meetings of the Cabinet or Cabinet committees. To disclose records only of meetings blessed by general agreement would highlight the fact of division at those undisclosed.

29 Mr. Fellgett described how notes of the meeting were taken by the designated official, typed up and submitted for approval to the Cabinet Secretary or his deputy. They were issued to Cabinet members by the end of the day. Those members could seek amendment of factual errors but had no other influence upon their style or content. Contributions to discussions were normally attributed to the individual minister only where he or she was leading the debate or introduced a significant development to the argument.

30 The ICO relied essentially on the reasoning contained in the Decision Notice and refuted the claim that he had undervalued general arguments, particularly the significance of the doctrine of collective responsibility. He argued that the publication of memoirs and the Prime Minister`s statement to the House of Commons reduced the strength of the interest in protecting collective responsibility. So did the passage of nineteen years and the consequent retirement from front – line politics of almost all the ministers involved. There was, on the other hand, a strong public interest in disclosure of the authoritative record of a major political event, coupled with the general interests in transparency and the education of the public as to the workings of Cabinet government.

31 He further argued that disclosure of the minutes would resolve discrepancies in the accounts given by ministers in their memoirs.

Our Conclusions

32 The relevant legal and constitutional principles are few but highly

significant :

- Cabinet minutes are subject to a qualified, not an absolute exemption. Therefore, despite their sensitivity, Parliament contemplated that there would be circumstances in which their disclosure, within thirty years of the relevant meeting, might be in the public interest.

- In balancing the competing public interests in maintaining the exemption and disclosure, the Tribunal is required, by s.2(2)(b) of FOIA to have regard to *"all the circumstances of the case".* Those circumstances include the arguments for and against disclosure which apply generally to requests for information of this kind, as well as those specific to the present facts.

- Such general arguments, for example the importance of collective responsibility, are not to be treated as less significant than those specific to the case under review. They may be more weighty by virtue of their universal application. They will always require careful evaluation. Their impact will depend on the particular facts of the case.

- Cabinet minutes are likely to be among the most sensitive documents created by central government, not because of the label attached to them but because, by their nature, they will relate to discussions of the most critical national issues and will always bring into the reckoning the doctrine of collective responsibility.

33 The starting point for this decision is consideration of the doctrine or convention of collective responsibility, its purpose, its content and the interests which it is intended to protect.

34 It is a principle underlying cabinet government which has been recognised for at least one hundred and fifty years. Bagehot acknowledged its significance. Its importance grew as the Monarch`s control of and influence over his or her ministers weakened and they closed ranks against royal attempts to weaken them by promoting division[3].It gained recognition as a fundamental requirement of effective and cohesive government. A useful recent account of its development and significance is to be found in House of Commons Library Research paper 4/82, published on 15th. November, 2004.Its requirements are set out today in the Ministerial Code, which has been published with modifications since 1992. Paragraph 2.1 provides :

"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."

35 For present purposes, it has two related aspects :

- The requirement that all ministers of every rank publicly support collective decisions of the Cabinet and Cabinet committees, suppressing any private dissent, whether or not they were party to such decisions ("the primary aspect").

- The principle that the content of discussions, including the expression of divergent opinions, leading to such decisions will remain confidential. That imposes a duty of silence on ministers

[3] e.g., The use of the "closet" by George III to isolate his ministers, one from another..

and others with access to the content of such discussions, notably special advisers and civil servants ("the secondary duty")[4].

It is this latter aspect of the convention which is affected by s.1 of FOIA.

36 The object of the primary aspect of the convention is the preservation of a united front in Parliament and in the country without which effective government will not long survive. The requirement has been suspended by Prime Ministers on a very few occasions in relation to a specific issue – most recently by Harold Wilson at the time of the 1975 Referendum on membership of the EEC (as it then was).. However, such a dispensation merely underlines the enduring importance of the convention. Clare Short remained briefly in the Cabinet after public criticism of the government`s policy on Iraq but this was an isolated exception to the operation of the rule.

37 The secondary duty (confidentiality) is treated by the Code as a protection for the minister who must loyally support a policy against which he had argued in Cabinet. He should not be exposed to unjust contrasts in the media between the views he once expressed and those he now professes to support. If that were its sole justification, it could be argued that it lapsed at the end of the administration when the immediate demands for an appearance of unity were over and he or she would be free to explain his or her position. However, Mr. Fellgett asserted, there are further considerations. Disclosure of the opinions once expressed among themselves by former ministers, especially in Cabinet, is likely to inhibit candour in similar exchanges among their current and future successors, as mentioned above. Moreover – and this is perhaps another formulation of the same point – the duty of confidentiality is owed, not

[4] The terms primary and secondary are used simply as shorthand, not as indicating a view that the one is subordinate to the other.

simply to the individual colleague, the Prime Minister or even the administration as a whole but to the convention itself and the enduring strength and confidence that it provides to the working of Cabinet government. Any breach, by minister, adviser, civil servant or FOIA disclosure, weakens the principle.

38 It is important to remember that the exemption relied on, s.35(1)(b), covers not simply Cabinet Minutes but all "ministerial communications", hence correspondence, memoranda and reports circulated to colleagues with relevant responsibilities and unminuted oral discussions – the product of "sofa government". The point is that Cabinet minutes, given the subject matter of discussions recorded, are likely to raise the issue of collective responsibility in its most acute form.

39 When considering the public interest in disclosure of this class of document, different considerations arise from those relevant to information covered by s.35(1)(a), "the formulation or development of government policy". Whilst the inhibition of frank discussion, "the chilling effect", to use an already weary cliché, is a factor in decisions in both types of case, the passage of time does not necessarily weaken the case for maintaining the exemption under s.35(1)(b) where the convention is engaged, or may not do so as rapidly.

40 That conclusion derives from the possible impact of disclosure of past communications on current or future ministers, as discussed at paragraph 37. If the minister went into opposition in May, 2010 with hopes of a return to office within four or five years, it would be easy to understand his concern at the exposure of his independent stance in cabinet in the last days of the Brown Administration and to accept that he might not have adopted it, had he known it would be publicised within the next few years. However, it is legitimate to ask whether today`s minister would be similarly cowed by the thought of disclosure of his divergent opinion in twenty

years` time, when he may be an elder statesman in “another place”

41 If Mr. Fellgett`s analysis as to the nature of the secondary duty is correct, then the breach of that duty by one minister, even the Prime Minister, or indeed many, does not of itself, release another from his obligation to stay silent. Nor, therefore, does it automatically destroy the public interest in maintaining the exemption. Nevertheless, the evaluation of that public interest by this Tribunal cannot sensibly ignore the fact that considerable information as to the meeting of 9th. January, 1986 has already been divulged by ministers as indicated above. The Appellant neatly inverted the point, arguing that the very wealth of information given to the public, most notably by the Prime Ministerial statement of 15th.January, means that there is little, if any, public interest in disclosure.

42 That statement is an important piece of evidence. It was undoubtedly a factual and detailed description of the relevant history. The Prime Minister stated emphatically that the issue of principle raised by the Cabinet meeting of 9th. January, was the collective responsibility of Cabinet members, the very issue central to this appeal. It is also notable that she overrode the secondary duty of confidentiality, emphatically stating that the Cabinet decisions of 9th. January s and of 19th. December had been unanimous. Her brief account of the meeting of 9th. January included the stinging rebuke :

“He (Mr. Heseltine) was prepared to acknowledge the advantages of collective responsibility without being prepared to accept the disciplines that it requires. That the rest of the Cabinet could not accept. It would be a denial of the collective responsibility on which our system of constitutional government depends.”

Mr. Heseltine`s parliamentary statement in response dealt with the history of the affair and indicated the nature of the dispute at the Cabinet meeting of 9th. January. He made it clear that by then the die was cast

in favour of the Sikorsky bid, that he did not trust and had not trusted the government to give a fair run to the European consortium and thought his earlier statements would be misrepresented if all answers to Westland inquiries must henceforth be submitted to the Cabinet Office.

43 The difficulty with the Appellant`s argument as to the sufficiency of available accounts of the meeting is that it assumes precisely what the outsider most wishes to test, namely : that those accounts are full and accurate. Of course, the Prime Minister would not lie to the House nor would Mr. Heseltine`s resignation speech be designed to mislead. But that is not to say that either account must be supposed entirely objective or free from personal bias. The bitterness felt on both sides is plain from both speeches. We do not accept that memoirs or even Prime ministerial or personal statements to Parliament are truly a substitute for the original neutral record.

44 On the other side of the argument, as indicated already, multiple breaches of the convention by memoir or leak coupled with disclosures to the House of Commons, do not instantly absolve other ministers or officials from the duty to observe it nor fatally weaken the public interest in maintaining the exemption. They do, however, to a substantial degree undermine it. It becomes impossible to suggest that there survives an intrinsic interest in withholding the full account of this particular meeting, even though the argument as to the general principle remains intact. Indeed, the Appellant did not seek to argue the contrary. Its case rested on the importance of the general principle contrasted with the allegedly flimsy public interest in disclosure.

45 The thirty – year rule for disclosure of government papers (including Cabinet minutes) is now enshrined in ss.62 and 63 of FOIA. We do not consider it relevant in any way to the determination of this appeal. If information should be disclosed now, it is no answer to say that it will be available in ten years` time anyway and the converse applies in equal

measure.

46 Confronted by the Appellant`s assurance that it was not arguing, in effect, for a quasi – absolute exemption for ministerial communications, or, at least Cabinet minutes, we asked counsel to give us an example of circumstances in which the public interest in maintaining the exemption in relation to Cabinet minutes might not outweigh the interest in disclosure. Having taken instructions over the short adjournment, he was, in our view, still quite unable to answer the question. He referred to the case where the Prime Minister sets the convention aside (1975)[5] but that was beside the point. A political decision by the Prime Minister to permit public dissent among his ministers, generally taken in order to preserve party or coalition, is a wholly different thing from the decision of a Tribunal that the public interest favours disclosure of ministers` opinions in Cabinet.

47 We inferred that the Appellant did not, in reality, contemplate that a case could arise in which disclosure would be justified. It was impliedly asserting that whilst collective responsibility did not confer an absolute exemption on disclosure of cabinet minutes, its importance as a principle was, without more, so overwhelming that it would not be outweighed by any combination of interests favouring disclosure. That is, of course, a distinction without a difference.

48 Our conclusions of principle are these :

- By reason of the convention of collective responsibility, Cabinet minutes are always information of great sensitivity, which will usually outlive the particular administration, often by many years.

[5] And, perhaps 2011, if there is a referendum on The Alternative Vote at parliamentary elections

- The general interest in maintaining the exemption in respect of them is therefore always substantial. Disclosure within thirty years will very rarely be ordered and then only in circumstances where it involves no apparent threat to the cohesive working of Cabinet government, whether now or in the future.

- Such circumstances may include the passage of time, whereby the ministers involved have left the public stage and they and their present and future successors know that such disclosure will not embarrass them during the critical phase of an active political career.

- Publication of memoirs and ministerial statements describing the meeting(s) concerned may weaken the case for withholding the information, especially where versions conflict, either factually (which is not the case here) or in their interpretation of what took place.

- The fact that the issues discussed in Cabinet have no continuing significance may weaken to a slight degree the interest in maintaining the exemption but the importance of the convention is not dependent upon the nature of the issue which provoked debate.

- There is always a significant public interest in reading the impartial record of what was transacted in Cabinet, no matter what other accounts of it have reached the public domain. Where the usual interest in maintaining confidentiality has been significantly weakened, that interest may justify disclosure.

- The public interest in disclosure will be strengthened where the Cabinet meeting had a particular political or historical

significance, for example the discussion of the invasion of Iraq at the meeting under consideration in *Cabinet Office v Information Commissioner (Lamb))*

49 We apply such principles to the particular facts of this appeal.

50 There is here, as always, a principled case, which we respect, for maintaining the exemption, deriving from the fundamental role of the doctrine of collective responsibility.

51 However, nineteen years had passed when this request was made. Only one member of the Cabinet of 9th. January, 1986 is still a front – line politician, indeed a member of the Cabinet, namely Mr. Kenneth Clarke.

52 We do not believe that any member of that Cabinet could justifiably feel traduced by the publication of those minutes in 2005. Furthermore, we do not think that any reasonably robust member of the present or a future Cabinet would be deterred from arguing his or her corner by the thought that the opinion expressed might see the light of day twenty years from now. By far the greater and more imminent threat would seem to come from the prompt publication of a colleague`s memoirs.

53 The Prime Minister`s decision to abandon the convention in her brief account of the Cabinet meeting in the statement of 15th. January, 1986 weakens to some degree the interest in withholding the information..

54 So does the appearance of the various memoirs, which, with one exception, breached the convention and exposed the discussion to the public gaze.

55 We think that there is a particular public interest in studying these particular minutes, relating as they do, to a highly significant meeting,

which marked, on one view, a fundamental split between the pro – American eurosceptic stance of the Prime Minister and her closest supporters on the one hand and the “pro – European” approach espoused by Mr. Heseltine and his allies, on the other.

56 We are further persuaded that there is a legitimate interest in seeing the authoritative unvarnished contemporary account of the meeting which only the minutes can provide. This is especially the case where the meeting involved a very sharp division of opinion between the two main protagonists.

57 We add two further short points in favour of disclosure in the Closed Annex.

58 Balancing the interests for and against disclosure we have no doubt that this is one of the few cases in which the maintenance of the exemption is not shown to outweigh the public interest in disclosure, mainly due to the weakening of the requirement of confidentiality on the particular facts of this case but also to the specific positive factors favouring disclosure that we have noted.

59 We repeat, however, that this Decision does not mean that the public interest will commonly require the disclosure of Cabinet minutes. We foresee that disclosure will be a rare event and that the interest in maintaining the exemption will be particularly strong where the meeting was held in the recent past.

60 We therefore dismiss the appeal.

61 Our decision is unanimous.

Delay

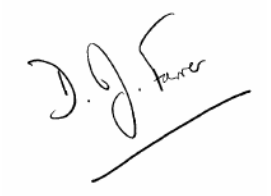
62 We expressed earlier in this Decision our alarm at the inordinate delay, especially by the ICO in processing this complaint. It exceeds anything that we have previously seen. It is particularly reprehensible since the investigation was not factually complex, even though the issues raised were of great importance.

63 We were told that time was lost through staff changes and, presumably, a consequent failure to track investigations. Whatever the reason, this lack of progress makes a mockery of the right to information. We do not know what use Mr. Rosenbaum proposed to make of these minutes, if his request succeeded. Whatever it was, it was thwarted utterly by inexcusable maladministration. If we value serious investigative journalism, it is imperative that information, if it should be disclosed, be made available, whilst of some practical value.

64 We appreciate that these failures occurred under a previous regime and gladly acknowledge the success of current efforts to improve performance.

65 Nevertheless, we could not allow this appeal to pass by without an expression of deep concern at the way it has been handled.

Signed



David Farrer Q.C.

Tribunal Judge Date 13 September 2010