

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

**IN RESPECT OF THE DECISION OF THE INFORMATION COMMISSIONER  
DATED 4 JULY 2012 (REF: FS50417514)**

**STATEMENT OF REASONS**

**I. INTRODUCTION**

Pursuant to section 53 of the Freedom of Information Act 2000 ('the Act'), and having considered the Government's policy on the use of the 'Ministerial Veto' in section 35(1) cases and the views of Cabinet on the use of the veto in this case, I have signed a certificate, dated 31 July 2012, substituting my decision for the decision notice of the Information Commissioner dated 4 July 2012.

That decision notice ordered disclosure of parts of the minutes of Cabinet from meetings on Thursday 13 March and Monday 17 March 2003 at which the Attorney General's legal advice concerning military action against Iraq was considered and discussed. This is the same information in respect of which the then Lord Chancellor and Secretary of State for Justice, the Rt Hon. Jack Straw MP, signed a section 53 certificate dated 23 February 2009. The effect of that certificate was to veto the Information Commissioner's decision dated 18 February 2008 (Ref: FS50165372) that the minutes of those two Cabinet meetings be disclosed, subject to specified redactions. That decision was upheld by the majority decision of the Information Tribunal dated 27 January 2009 (Ref: EA/2008/0024 and EA/2008/0029).

In coming to my decision, I have considered all relevant arguments afresh. Given the particular circumstances of this case, I have, as part of that exercise, also taken into account the statement of reasons for the certificate of 23 February 2009. In doing so, I have carefully re-examined the reasons given for issuing that certificate and have had regard to factors that have arisen since it was issued which are relevant to an assessment of where the public interest lies and whether or not this is an exceptional case.

A copy of the statement of reasons for the February 2009 certificate, as well as a copy of the Government's policy on the use of the veto in section 35(1) cases, is annexed to this document.

In accordance with the Government's policy on the use of the veto, I have taken into account the views of the Cabinet, the Information Commissioner, relevant former Ministers and the Leader of the Opposition.

It is my opinion as the 'accountable person' in this case, as well as the collective view of the Cabinet, that disclosure of this information would be: (1) contrary to the public interest; and (2) damaging to the doctrine of collective responsibility and detrimental to the effective operation of Cabinet government.

Having reached that conclusion, I have also concluded that this is an exceptional case warranting my use, as the Attorney General, of the power in section 53(2) of the Act.

Accordingly, I have given the certificate required by section 53(2) to the Information Commissioner on 31 July 2012. In accordance with section 53(3)(a) of the Act, I will lay a copy of that certificate before Parliament as soon as practicable.

No inference should be drawn from this statement as to the nature of the discussions recorded in the requested information.

## **II. ANALYSIS**

**FIRST**, I am satisfied that at the time of the request in March 2011 and by reference to the particular contents and context of the minutes of these Cabinet meetings, the balance of the public interest in this case fell in favour of maintaining the exemptions under sections 35(1)(a) and (b) of the Act, which the Information Commissioner agreed were engaged.

The Information Commissioner found that the public interest issues are finely balanced in this case (paragraph 79 of his decision notice). The Information Commissioner considered that there was no good reason for him to reach a different view in this case compared with that which he reached on 18 February 2008 (paragraph 82 of his decision notice).

I understand the strength of the public interest in the transparency and accountability of public authorities in general and in particular the public interest, as described in the decision

notice, in understanding the Government's deliberations and decisions concerning Iraq in 2003. Nonetheless, I consider that the Information Commissioner's assessment of the balance was wrong. As part of my assessment of the evidence and arguments applicable at the time of the request, I have considered whether I agree with the reasons relied on in support of the February 2009 section 53 certificate. I have also considered whether, given the passage of time and intervening developments, they still hold good. My opinion is that they do, for the reasons given below.

The Information Commissioner considered that the controversial nature of the decision to go to war in Iraq and the resultant loss of lives give rise to an exceptionally strong public interest in disclosure (paragraph 80 of his decision). He based his conclusion as to the balance of the public interest on the exceptional gravity and controversy of the matters discussed by Cabinet on 13 and 17 March 2003 (paragraph 83).

I accept that the decision to send UK armed forces into a conflict situation was one of the utmost gravity. Equally, I accept that the decision was extremely controversial. However, I do not accept that these factors caused the public interest in disclosure to equal or outweigh the public interest in maintaining the exemptions at the time of the request.

As to the public interest in maintaining the exemptions, I consider the following passages from the statement of reasons given on 23 February 2009 retain their relevance and force in the particular circumstances of this case:

*"Conventions on Cabinet confidentiality are of the greatest pertinence when the issues at hand are of the greatest sensitivity. Exceptional cases create an exceptional need for confidence in Cabinet confidentiality to be strong.*

*Serious and controversial decisions must be taken with free, frank – even blunt – deliberation between colleagues. Dialogue must be fearless. Ministers must have the confidence to challenge each other in private. They must ensure that decisions have been properly thought through, sounding out all possibilities before committing themselves to a course of action. They must not feel inhibited from advancing opinions that may be unpopular or controversial. They must not be deflected from expressing dissent by the fear that they may be held personally to account for views that are later cast aside.*

*Discussions of this nature will not however take place without a private space in which thoughts can be voiced without fear of reprisal, or publicity. Cabinet provides this space. If there cannot be frank discussion of the most important matters of Government policy at Cabinet, it may not occur at all. Cabinet decision-making could increasingly be driven into more informal channels, with attendant dangers of lack of rigour, lack of proper accountability, and lack of proper recording of decisions.*

*Disclosure of Cabinet minutes – particularly Cabinet minutes on a matter of such gravity and controversy – has the potential to create these dangers, to undermine frankness of deliberation, and to compromise the integrity of this thinking space where it is most needed. It therefore jeopardises a key principle of British government where it has its greatest utility.”*

I consider that the importance attaching to these public interest considerations is particularly great when the Cabinet is discussing matters of high controversy. Those are precisely the occasions where the benefits that stem from Cabinet confidentiality can be most valuable.

At paragraphs 50-54 of his decision notice, the Information Commissioner recognised the concerns referred to in the passages I have set out, and he also recognised the strength of the public interest factors in maintaining the exemption. My view, having consulted with my Cabinet colleagues and former Cabinet members under the previous administration, is that the Information Commissioner underestimated the weight to be given to those concerns in the circumstances of this case.

The Information Commissioner appears to have concluded that those concerns do not apply with full force in this case. In part, this is because of the nature of the information. The Information Commissioner observed that “there is nothing distinctive” about the information at issue here (paragraph 76). I do not accept that, given the acknowledged exceptional gravity of the subject matter being discussed at these meetings.

I do not believe that the passage of time has reduced the force of the above factors to any significant degree. Approximately three and a half years have passed since the disclosure of this information was vetoed; some 9 years have passed since the dates of the meetings themselves. In addition, in this period, there has been a change of government. However, I do not think that the passage of time has materially altered the weight to be given to the public interest in maintaining the confidentiality the minutes of these meetings. In this regard, as the Information Commissioner himself acknowledges, the issue of Iraq remains a ‘live’ one (paragraph 70 of his decision notice), and most of those involved in the Cabinet meetings of 13 and 17 March 2003 are still Members of Parliament or are otherwise active in public life.

Similarly I do not consider that the weight to be attached to the public interest in maintaining the exemptions in this case is diminished by the fact that by the date of the request in this case, UK forces were no longer engaged in combat in Iraq.

In assessing the weight to be attached to the public interest in disclosure of the minutes of these meetings I also take into account the very substantial amount of information that the public already has about the decision to use armed force in Iraq. That decision has been subject to arguably greater public scrutiny than any other decision of the previous administration. The then Government broke with precedent in putting the decision to use armed force in Iraq before the House of Commons for debate and a vote.

Thereafter, the Butler Report, the Hutton Inquiry, the Intelligence and Security Committee and repeated investigation by both the Defence and Foreign Affairs Select Committees of the House of Commons have all contributed to informing the public about the background to Cabinet's conclusions. The Government of the time released the Attorney General's legal advice and made a disclosure statement in relation to its development (25<sup>th</sup> May 2006). I believe that this information already in the public domain has greatly assisted the public in scrutinising the manner in which the decision to take military action was taken.

In this regard, I note that the Information Commissioner was mindful of the existence of the Iraq Inquiry, chaired by Sir John Chilcot (paragraphs 14, 35 and 72-74 of his Decision Notice). He noted that the purpose of that Inquiry is *"to examine the United Kingdom's involvement in Iraq, including the way decisions were made and actions taken, to establish as accurately and reliably as possible what happened, and to identify lessons that can be learned"*. He also noted that the Inquiry had access to, among other documents, the minutes of the meetings of Cabinet of 13 and 17 March 2003. The Information Commissioner concluded that the extent to which the Inquiry will meet the public interest in respect of this matter is presently uncertain as the Inquiry's report has not yet been published. I consider that the existence and proceedings of the Iraq Inquiry (which was underway at the time of the request in this case) will further contribute to the public scrutiny of and informed debate on these issues. However, I do not base my current decision on any speculation as to the outcome of that Inquiry.

With regard to the extent to which disclosure of this information would assist in holding Ministers to account, I consider that the following explanation given in the statement of reasons of 23 February 2009 continues to describe the position correctly:

*"... accountability for this decision – as for any other Cabinet decision – is properly with the Government as a whole, and not with individual Ministers. Section 1.2 of the Ministerial Code puts a Minister's duty to this convention as the first in the list of principles of ministerial conduct, and details the foundations of the doctrine clearly:*

*“Collective responsibility 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.”*

*If permitted to demonstrate their degree of attachment to any given policy, Ministers could absolve themselves from responsibility for decisions that they have nevertheless agreed to stand by. Conversely, maintenance of the doctrine multiplies the avenues through which the Government can be held to account. Thus every Minister in the 2003 Cabinet could legitimately be held to account for the decision to use armed force in Iraq. The resignations of Ministers at the time of this particular decision recognised and reinforced that principle. Disclosure of Cabinet minutes undermines the convention. If documents indicating which Ministers supported what particular policy were routinely to be disclosed, the muddled chain of accountability that would result might leave no channel for Parliament to hold the executive to account at all. Although Cabinet minutes do not generally attribute views to individual ministers, divergence of views can still be clear and speculation over who made various comments would be inevitable if they were to be released. Their disclosure would reduce the ability of Government to act as a coherent unit. It would promote factionalism, and encourage individual Ministers to put their interests above those of the Government as a whole. Such an outcome would be detrimental to the operation of our democracy, and contrary to the public interest.*

*The above-detailed prejudicial effects arising from disclosure occur even where Cabinet is in unanimous agreement. If only information revealing agreement between Ministers were released it would soon become apparent that where information had been withheld there must have been disagreement: the principle of collective responsibility would therefore again be undermined.”*

I have also had regard to the accounts of the Cabinet’s meetings of 13 and 17 March 2003 given in a number of memoirs published both prior to and since the Information Commissioner’s decision of 18 February 2008. In his present decision, the Information Commissioner has concluded that these memoirs and other public statements are qualitatively different from the official record of those meetings. I share his view that these memoirs do not attract substantial weight in the present case.

Finally, I acknowledge that disclosure of the minutes of these meetings could contribute to general understanding of Government decision-making, and may provide a modest sense of increased proximity to Government decision-making.

However, my view overall is that the public interest in disclosure is outweighed by the strong interest in protecting the conditions necessary for effective Cabinet government and thereby encouraging high quality decision-making at the highest level in Government.

For the above reasons and in all the circumstances of the case, my opinion is that the public interest favoured the maintenance of the exemptions under sections 35(1)(a) and (b).

**SECOND**, I think this is an exceptional case where disclosure would be damaging to the doctrine of collective responsibility and detrimental to the effective operation of Cabinet government. In my opinion, these concerns outweigh the public interest in the disclosure of the information at issue.

Like Mr Straw in his statement of reasons dated 23 February 2009, I am not exercising the veto only because I disagree with the Information Commissioner on the balance of the public interest. On questions of public interest balance, Government can, and does, appeal to the First-Tier Tribunal (Information Rights), the Upper Tribunal and, if needs be, the Courts. An example in the context of Ministerial documents and information concerning Cabinet discussions is the appeal by the Cabinet Office (Ref: EA/2011/0263) against the Information Commissioner's decision of 3 October 2011 (Ref: FS50362049).

Furthermore, I am not exercising the veto only because the section 35 exemption applies to this information: the Government recognises that Parliament has not made section 35 an absolute exemption. Nor am I exercising the veto only because the information at issue concerns meetings of Cabinet: the Government released the minutes of the Cabinet meeting on 9 January 1986 following its unsuccessful appeal to the Tribunal (Ref: EA/2010/ 0031) against the Information Commissioner's decision notice (Ref: FS50088735) issued on 22 December 2009. It has also released Cabinet documents other than minutes following requests under the Act in the past, and continues to do so where appropriate.

Having considered this particular case on its own merits I am satisfied that this is an exceptional case and that the use of the veto is appropriate. I consider that (with the benefit of advice from former and current members of the Cabinet) I am well-placed to make an assessment of the weight of the competing public interests such as those referred to above.

My view is that the public interest arguments in favour of non-disclosure are exceptionally weighty – a view that was shared by the minority on the Tribunal which considered this information in decisions EA/2008/0024 and EA/2008/0029 of 27 January 2009. In part, I refer to the public interest in maintaining the efficacy of British constitutional arrangements

and the serious potential prejudice to the maintenance of effective Cabinet government and the doctrine of collective responsibility.

Further to these broader considerations however, I believe that among the matters I have considered the following considerations are of particular relevance:

1. The information concerns the substance of a policy discussion, and not the mere process of a decision being taken.
2. The issue being discussed was exceptionally serious, being a decision to commit British service personnel to an armed conflict situation.
3. That decision attracted exceptional media coverage and remains the focus of both domestic and international interest. The Iraq Inquiry is one illustration of the ongoing domestic interest.
4. The decision taken is not of purely historical interest and importance. Iraq remains very much a live political issue in its own right, and links into many others of current importance, such as the overall security situation in the Middle East and the perceived link between the terror threat to the UK and military action in Iraq.
5. The minutes record the contributions made by some Cabinet members. Most of the meetings' attendees remain in Parliament, or are otherwise active in public life.

I have therefore concluded that the use of the Ministerial veto in this instance is in accordance with the Government's policy on the use of section 53 of the Act in relation to information falling within the scope of section 35(1) of the Act.

In all the circumstances, my opinion is that this is an exceptional case and that 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.

### **III. CONCLUSION**

Having therefore taken into account all the circumstances of the case, I am satisfied that the public interest, at the time of the request (and, indeed, at the present time as well), fell (and falls) in favour of maintaining the exemptions which the Information Commissioner has found



to be engaged. 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 furnished to the Information Commissioner and copies will be laid before both Houses of Parliament. I have also provided a copy of this statement of reasons to the Information Commissioner and will place copies in both Libraries of the Houses of Parliament. Copies will also be available in the Vote Office.