Ministry of JUSTICE

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

IN RESPECT OF THE DECISION OF THE INFORMATION COMMISIONER DATED 18 FEBRUARY 2008 (REF: FS50165372)

AS UPHELD BY THE DECISION OF THE

INFORMATION TRIBUNAL OF 27 JANUARY 2009 (REF: EA/2008/0024 and EA/2008/0029)

STATEMENT OF REASONS

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 today signed a certificate substituting my decision for the decision notice of the Information Commissioner dated 19 February 2008, which was upheld by the Information Tribunal in its decision dated 27 January 2009 (case reference EA/2008/0024 and EA/2008/0029). That decision notice ordered disclosure, subject to some specified redactions (amended by the Information Tribunal), 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.

It is my opinion as the 'accountable person' in this case, as well as the collective opinion 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.

I believe this is an exceptional case warranting my use, as a Cabinet Minister, of the power in section 53(2) of the Act. Accordingly, I have today given the certificate required by section 53(2) to the Information Commissioner.

In accordance with section 53(3)(a) of the Act, I have also today laid a copy of that certificate before both Houses of Parliament.

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

ANALYSIS

FIRST, I am satisfied that at the time of the request in December 2006, the balance of the public interest in this case fell in favour of non-disclosure.

The Tribunal accepted that there was a strong public interest in maintaining the confidentiality of information relating to the formulation of government policy and Ministerial communications (which included maintaining the Cabinet collective responsibility convention). It considered that this was an exceptional case which brought together factors so important that in combination they created very powerful reasons why disclosure was in the public interest. Following on from this, the majority view of the Tribunal was that these reasons carried weight at least equal to that in favour of maintaining the exemption. Consequently, subject to certain redactions, the Tribunal's decision was that the minutes in question should be disclosed.

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. To my mind, however, this does not make it in the public interest to disclose the minutes of the relevant Cabinet meetings.

The Tribunal listed the public interest factors which it considered to be in favour of disclosure at paragraphs 79-80 of its Decision. At paragraph 79, the Tribunal referred to the momentous nature of the decision to commit the nation's armed forces to the invasion of another country, and stated that its seriousness had been increased by the criticisms made of the decision-making processes in Cabinet at the time. The Tribunal continued:

> *"…the questions and concerns that remain about the quite exceptional circumstances of the two relevant meetings create a very strong case in favour of the formal records being disclosed".* [80]

> it added that, the various factors, particularly in combination

> "…*have the effect of reducing any risk that this decision will set a precedent of such general application that Ministers would be justified in changing their future approach to the conduct or recording of Cabinet debate*." [81]

> and that

> …"*the value of disclosure lies in the opportunity it provides for the public to make up its own mind on the effectiveness of the decision-making process in context*." [82]

I do not accept that rationale, and in particular I do not accept the assumption underlying the Tribunal's decision that the momentous nature of the decision at issue increased the strength of the case for disclosure of the minutes concerned. 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.

The Tribunal thought that the deployment of troops was a hugely important step in the nation's recent history and that Cabinet should be accountable for it. I also believe that to be the case, but 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.

The risk of the prejudicial effects to Cabinet collective responsibility and the integrity of Cabinet decision-making that I have set out above is all the greater, when the information to be disclosed records recent Cabinet deliberations, and when those participating in such deliberations are still active in public life. At the time of the request in this case, the decisions were recent, a number of the Ministers who took part in the decision remained in Government, and the Prime Minister was still in office.

For the reasons set out above, I regard the potential dangers to collective responsibility and good government arising from disclosure in this case to be particularly pressing.

When assessing where the public interest lies in this case, 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 Government since 1997. 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 has released the Attorney General's legal advice and made a disclosure statement in relation to its development (25th 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. I am also satisfied that, while disclosure of these minutes would contribute to the general understanding of Government decision-making, any gain to be made is far outweighed by the potential damage to the operation of Cabinet government.

It is important that the public is connected to decision-making in both Government and indeed in Parliament. That does not, however, mean that there should necessarily be public interaction at every stage of the decision-making process. It is clear that Cabinet government relies – as outlined

above – on a limited private space in which to debate policy. The Government is committed to ensuring public participation in its decision-making: it exposes its thinking to Parliament and public via parliamentary debate, public consultation, and engagement with the media. It has opened itself to scrutiny in relation to the decision to use armed force in Iraq: it broke with precedent in putting that question before the House of Commons for debate and a vote. It has, I believe, met that public interest. While disclosure in this instance may provide a modest sense of increased proximity to Government decision-making, I believe in this case that the interest in disclosure is outweighed by the strong interest in protecting effective Cabinet government and encouraging high quality decision-making.

SECOND, I think this is an exceptional case where release would be damaging to the doctrine of collective responsibility and detrimental to the effective operation of Cabinet government.

I am not exercising the veto only because I disagree with the majority view of the Tribunal on the balance of the public interest. On questions of public interest balance, Government can, and does, appeal to the Information Tribunal and the Courts.

However, I am satisfied in this case that the veto should be exercised, because the public interest arguments in favour of non-disclosure are compelling – a view shared by the minority on the Tribunal. I consider that I (with the benefit of advice from former and current members of the Cabinet and correspondence with the Information Commissioner in July 2008 before the Information Tribunal issued its decision) am well-placed to make an assessment of their weight, and that the potential prejudice to the maintenance of effective Cabinet government and the doctrine of collective responsibility is serious. I think it is appropriate to note that such considerations are recognised beyond the boundaries of this administration.

The Government recognises that Parliament has not made section 35 an absolute exemption; it has released Cabinet documents other than minutes under Freedom of Information in the past. Every case must be assessed on its own merits, but I share the belief that there is a strong public interest in maintaining the efficacy of British constitutional arrangements.

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; and who remain on active duty.

3. That decision attracted exceptional media coverage lasting up to – and beyond – the time this request was made. It remains the focus of continued international interest.

4. The decision taken is manifestly not of purely historical interest and importance. The United Kingdom continues to deploy troops in Iraq. Iraq remains very much a live political issue in its own right, and links into many others of current import, including the change of administration in the United States, the perceived link between the terror threat to the UK and military action in Iraq, and overall security in the region.

5. The minutes record the contributions made by individual Cabinet members. Most of the meetings' attendees remain in Parliament, continue to sit in the Cabinet, or are otherwise active in public life.

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 request (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 furnished to the Information Commissioner and copies 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 executive override as it pertains to section 35(1) of the Act is annexed to the end of this document.

RT HON. JACK STRAW MP

LORD CHANCELLOR AND
SECRETARY OF STATE FOR JUSTICE

23 February 2009

ANNEX

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' (for instance, a Cabinet minister) 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 is that, in cases concerned with information falling within the scope of section 35(1), a Cabinet Minister 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.

When using the veto, the Cabinet Minister must provide a certificate to the Information Commissioner outlining the Minister's reasons for deciding to exercise the veto. That certificate must also then be laid before both Houses as soon as practicable.

The Government made clear 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]

Government has consistently said that use of the executive override will not be commonplace. It maintains that policy.

Since the Act came into force in 2005, the section 53 power has not been used. A total of 104,800 "non-routine" information requests were received by central government monitored bodies during the period January 2005 to December 2007. Of the 78,800 "resolvable" requests (those requests where it was possible to give a substantive decision on whether to release the information being sought), 50,100 (64%) were granted in full.

However, 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.

The Government has devised this policy in relation to the exercise of a Cabinet Minister's 'veto' only in respect of information that relates to the operation of the principle of collective responsibility. It does not apply to all information that passes to and from Ministers, for example. This policy statement – though limited in scope – does not preclude consideration of the veto in respect of other types of information. However, in accordance with our overarching commitment to use the power only in exceptional cases, such consideration would be preceded by a collective Cabinet view on whether it might be appropriate to exercise the veto in a given case. In making his or her decision, the Cabinet Minister (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.

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[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*).

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:

> *"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."*

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 – three and a half years. 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 Ministers have already 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 Scotland Office also released correspondence from the then Secretary of State for Scotland prior to bringing their current Adjacent Waters appeal before the Information Tribunal.

Therefore, the Government has developed criteria 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 (vi) 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.

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