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 2 November 2011 (REF: FS50390786)

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 views of both Cabinet and the Information Commissioner on use of the veto in this case, as well as all the relevant documents and information pertinent to this decision, I have today signed a certificate substituting my decision for the Decision Notice of the Information Commissioner dated 2 November 2011 (case reference FS50390786). That Decision Notice ordered disclosure of the Department of Health's Transition Risk Register from November 2010 (the TRR).

It is my opinion, as the 'accountable person' in this case, that the decision taken by the Department of Health not to disclose this information in response to the request under the Freedom of Information Act was in accordance with the provisions of that Act. Disclosure of this information is not required having regard to the balance of the public interests in favour of disclosure and those against. 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 shall lay a copy of that certificate before both Houses of Parliament at the first available opportunity, which will be Wednesday 9 May. I shall also lay a copy of this statement of reasons with the certificate.

ANALYSIS

I. The public interest balance at the relevant time

I am satisfied that at the time of the Department of Health's first response to the request in December 2010, the balance of the public interest in this case fell in favour of maintaining the confidentiality of the requested information. In coming to this conclusion I have taken into account in particular the following matters.

(1) The public interests in not disclosing and maintaining the exemption

Risk registers are used across all departments. They are a vital part of risk management and thereby good government. I consider that they do form an important part in the formulation and development of Government policies. That is my experience and is in line with the clear evidence of the very senior officials who gave evidence to the Tribunal: Lord O'Donnell, the former Cabinet Secretary and Head of the Civil Service, and Una O'Brien, the Permanent Secretary at the Department of Health. It is strongly in the public interest that such risk registers be as effective as possible.

The effectiveness of risk registers is intimately linked to their form and the manner in which they are expressed.

- They are designed to identify all the main risks (however serious and however unlikely) associated with the policy being considered.
- They should be expressed in clear, and if necessary trenchant language. The red/amber/green (RAG) system of rating the risks is blunt but serves useful purposes.
- They are developing documents, subject to regular review and updating - so, for example, at any point in time the mitigation measures for any risk may be more or less developed. So, they might well contain a number of very serious

risks which, particularly at an early stage, have not yet had mitigation developed (even though effective mitigation is highly likely) and thus have a red or red/amber rating.

There is thus a clear and powerful public interest in providing a safe space so as to preserve and protect the ability of civil servants to prepare such risk registers in the frank way in which they have hitherto been expressed. The need to protect this safe space will be particularly acute (and the public interest in doing so will be particularly strong) where the need for free and frank advice on risk is paramount. An example of such a circumstance will be where the advice is required at highly sensitive times on highly sensitive issues.

If risk registers are routinely or regularly disclosed at highly sensitive times in relation to highly sensitive issues, or there is legitimate concern that they could be, it is highly likely that the form and content will change: to make the content more anodyne; to strip out controversial issues or downplay them; to include argument as to why risks might be worth taking; to water down the RAG system. They would be drafted as public facing documents designed to manage the public perception of risk; not as frank internal working tools. These consequences (many of them insidious) would be to the detriment of good government. I do not consider that the risk of these consequences occurring can be dismissed as minimal, exaggerated, still less non-existent. I have in this respect had particular regard to the evidence of Lord O'Donnell and Una O'Brien. It seems to me that they have the expertise and experience to be almost uniquely well placed to make the judgements about how officials are likely to react to this sort of disclosure.

The above factors, if present in a particular case, may well carry significant weight in assessing where the public interest lies. However, I recognise of course that each case needs to be considered on its particular facts. I have therefore considered with particular care whether and if so to what extent these matters applied to the disclosure of the TRR.

Here, I have concluded that timing and the sensitivity of the issues are critical to striking the public interest balance and to properly assessing the weight to be accorded to the interests on the non-disclosure side of the balance.

- The request for the TRR came shortly after the first version of it had been compiled and approved; and at a time of acute political sensitivity in relation to the proposals for change to the NHS, just in advance of legislation being introduced into Parliament.
- The TRR analysed risks in a frank way and in a way which was not designed for publication. It did so on the basis that it represented the first version of that risk analysis. That is consistent with its purpose and use as an important tool in assisting with the formulation and development of policy.
- I do not consider that the content of the TRR can properly be characterised as simply anodyne or that it would have been viewed in that way.
- On the contrary, I consider that the form and the frankness of the content of TRR would have been liable to create sensationalised reporting and debate. The content would also have been inherently highly open to misinterpretation by both the press seeking a headline and/or for political reasons. The likelihood of this occurring is particularly acute where the subject matter is, as with the Transition programme, controversial and the proposals at a highly sensitive stage.
- Disclosure of the TRR at the relevant time would thus, I consider, have been likely to lead to the effects dealt with above – to the consequent potentially serious detriment of good government.

I also consider that there is no good reason for treating the public interest in protecting the effectiveness of the TRR as being diminished on the basis that the policies had been 'fixed' and were simply being implemented. I do not consider that that was in fact the position. In my view, which accords with the evidence of Una O'Brien, policies were still being formulated and developed at this time across a wide range of areas of the transition programme. Some parts of the programme were

unsurprisingly more advanced than others. But very large tracts were at an early stage of formulation and development. The need for protection of the safe space around the TRR remained acute. I also do not consider that the fact that the TRR considered implementation issues either reduced that need or can properly be taken as indicating that policy was merely being implemented at this time. The consideration of implementation issues simply reflected the fact that, in the process of formulating and developing policy, risks associated with future implementation were being considered.

In all these circumstances, release of the TRR at the relevant time would, I believe, have been likely to have had serious effects of the kind identified above.

Finally on this side of the public interest balance, there were two further risks impacting on the public interest in not disclosing the TRR.

First, I consider that disclosure of the TRR would potentially also have created a risk of serious distraction from progressing the proposals, formulating and developing policy. The distraction would have been caused by the need to respond to and deal with the reaction to the disclosure of the TRR (and its content) at this time.

Secondly, I consider that disclosure of the TRR carried the very real possibility of increasing the likelihood of some of the risks identified in that document happening. When some risks are made public, those potentially affected are likely to act in a way that could increase the likelihood of the risk occurring. The purpose of a risk register is to secure mitigation of those risks, not precipitate them.

(2) The public interest in disclosure

I recognise, and have taken into account, that there is a public interest in disclosure of the TRR. I have considered all the points made in this respect by the Tribunal in their decision. In particular, I have taken into account the following:

- The risk register relates to a very major reform of the UK public health care system. The reforms will therefore have a wide effect. Moreover, the reforms were introduced at least in part with some speed.
- There is a public interest in the public and, specifically, Parliament being as well placed as possible to assess and evaluate the risks of the programme of reform for the NHS. The Government's own assessment of the nature, extent and management/mitigation of those risks is a part of that.
- Much of the opposition to the Government's proposed NHS reforms is focussed on the risks inherent in those reforms and the extent to which the Government has properly assessed those risks.
- Disclosure of this information would assist the public to understand the way the Government assesses and manages risk more generally.
- There is a general public interest in openness in public affairs.

In considering the weight of this side of the public interest balance, I note that there is already a considerable amount of material in the public domain on the risks involved in the reform programme. The risks involved in the proposed changes were capable of identification and indeed have been subject of detailed (and public) analysis by academics. Moreover, the nature of the Government's analysis of the risks has been set out extensively in the Impact Assessment and numerous other public documents. I have also taken into account the fact that there was a significant risk (flowing from the form and content of the TRR) that, far from assisting public debate and understanding, disclosure of the TRR at this time would in fact have distorted such debate and understanding.

Conclusion

I believe that the factors in favour of non-disclosure are very powerful when judged having regard to the sensitivities at the relevant time and the content and form of this TRR. There are some important public interest factors the other way – notably the importance of the proposed reforms. But there are factors serving to lessen the weight of those factors.

Weighing those public interests against one another, I have concluded that the public interest balance clearly favours maintaining the exemption and not disclosing the TRR.

II. Is the case exceptional?

I have concluded that this is an exceptional case for the following reasons.

1. The disclosure of this TRR at this time would have created exceptional difficulties and risks.
2. The controversies surrounding the issues were particularly acute. The register relates to reforms that were highly controversial. The need for the safe space for officials was exceptionally high.
3. The timing of the request came at particularly sensitive time, just ahead of the Health and Social Care Bill being introduced to Parliament. There were particular and exceptional risks associated with disclosure of this TRR at the time of the request.
4. The damage that I consider would have been likely to be caused by disclosure is exceptionally serious. It cannot properly be justified by the various public interests in disclosure.

I have taken into account *HMG statement of policy on use of the executive override (veto) in respect of information relating to the operation of collective responsibility under s35(1) FOIA.* In setting out the criteria for determining what constitutes exceptional circumstances in cases of collective responsibility, the policy provides a number of relevant matters to be considered. Although that policy is not directly applicable to this case, it is nonetheless informative and it has assisted me in concluding that this is an exceptional case. I should make it clear in this respect, in response to a point made by the Information Commissioner, that that statement of policy was not intended to, and in my view does not, suggest (implicitly or otherwise) that the exercise of the power of veto would be limited to cases touching on collective Cabinet responsibility.

I make clear that I have concluded that this case is exceptional. I have not concluded, and do not consider that I need to conclude, that it is unique. I recognise that there may be other cases in which disclosure of Risk Registers is sought in particularly controversial circumstances. However, each case will need to be considered on its own merits balancing the particular public interests in play in the context and at the time.

CONCLUSION

I have in these circumstances concluded that it is appropriate to exercise the Ministerial veto in this case.

At the same time as I took the decision to exercise the Ministerial Veto, I also approved a document which sets out key information relating to the risks associated with the transition programme as they were in November 2010 in a single document. It includes the actions that have subsequently been taken to mitigate those risks and the outcomes of those actions. I consider it appropriate to release this information in this form now following the passage of the Health and Social Care Bill through Parliament. I continue to consider that disclosure of the TRR in its original form would not be in the public interest for all those reasons dealt with above.

The certificate I have signed has been provided to the Information Commissioner and copies will be laid before both Houses of Parliament at the earliest opportunity. 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.

THE RT HON. ANDREW LANSLEY CBE MP
SECRETARY OF STATE FOR HEALTH
8 MAY 2012