Freedom of Information Act 2000

Ministerial veto on disclosure of parts of the minutes of Cabinet meetings in March 2003

Information Commissioner's Report to Parliament

HC 547

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1. Introduction

1.1 Section 49(2) of the Freedom of Information Act 2000 ("FOIA") provides that the Information Commissioner ("the Commissioner") may from time to time lay before each House of Parliament such reports with respect to his functions under FOIA as he thinks fit.

1.2 On 4 July 2012 the Commissioner issued a Decision Notice under section 50 FOIA (reference FS50417514). The Decision Notice ordered the Cabinet Office to disclose parts of the minutes of the Cabinet meetings held on 13 and 17 March 2003 at which military action against Iraq was discussed.

1.3 On 31 July 2012 the Attorney General, Rt Hon Dominic Grieve QC MP, issued a certificate under section 53(2) FOIA overruling the Commissioner's Decision Notice and vetoing once again the disclosure of the minutes.

1.4 This report sets out the background that led to the issue of that certificate.

2. Statutory Framework

2.1 Under section 1(1) FOIA any person who has made a request for information to a public authority is entitled to be informed in writing whether the information requested is held[1] and if so to have that information provided to him[2].

2.2 This general right of access to information held by public authorities is not unlimited[3]. Exemptions from the duty to provide information

[1] Section 1(1)(a)
[2] Section 1(1)(b)
[3] Section 2

requested fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, the duty to disclose does not apply only if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information[4].

2.3 Any person (known as a "complainant") may apply to the Commissioner for a decision whether their request for information made to a public authority has been dealt with in accordance with the requirements of FOIA[5]. With certain exceptions[6], the Commissioner is under a duty to issue a Decision Notice following such an application.

2.4 Either the complainant or the public authority may appeal to the Tribunal against the Commissioner's Decision Notice[7]. No appeal was lodged in the current case and thus there is no need to describe the Tribunal process.

2.5 Where a Decision Notice has been served on a government department and relates to a failure to comply with the duty to provide information on request, a certificate may be issued, the effect of which is that the Decision Notice no longer has effect[8]. A certificate can only be issued where the "accountable person" (in this instance, the Attorney General) has, on reasonable grounds, formed the opinion that there was no failure in respect of complying with the general duty to provide information on request in a particular case[9]. This certificate is the so-called "veto". In such cases the accountable

[4] Section 2(2)(b)
[5] Section 50(1)
[6] Section 50(2)
[7] Section 57(1)
[8] Section 53
[9] Section 53(2)

person can substitute his or her view for that of the Commissioner or Tribunal as to where the balance of the public interest lies.

2.6 Such a certificate must be served within twenty working days of the date on which the Decision Notice was given to the public authority or, where an appeal to the Tribunal is brought, within twenty working days of the day on which any such appeal is determined or withdrawn.

2.7 In the current case, the relevant 'accountable person' was the Attorney General since the matter in hand concerned the papers of a previous administration.

3. The request for information and its context

3.1 A request for the minutes of Cabinet meetings held on 13 and 17 March concerning the military action in Iraq was first made in December 2006. Following refusal by the Cabinet Office, the Commissioner issued a decision notice on 19 February 2008, ordering disclosure of the majority of the relevant information. That decision notice was appealed by the Cabinet Office (and the requester). On 27 January 2009 the Information Tribunal largely upheld the Commissioner's decision by a 2:1 majority but ordered the further redaction of a small amount of information (Ref EA/2008/0024 and EA 2008/2009).

3.2 On 23 February 2009, the then Secretary of State for Justice issued a certificate vetoing the disclosure. The circumstances leading up to the exercise of the earlier veto were set out in a report to Parliament by the previous Commissioner, Richard Thomas[10].

[10] HC 622 10 June 2009

3.3 On 19 March 2011 Dr Chris Lamb, the requester in the original case, renewed his request to the Cabinet Office. On this occasion, he was seeking the information as ordered to be published by the Information Tribunal.

3.4 On 28 July 2011 the Cabinet Office refused Dr Lamb's request, confirming its decision on 21 December 2011 following an internal review.

3.5 Dr Lamb complained to the Information Commissioner's Office about the Cabinet Office's refusal to disclose the information.

4. The Information Commissioner's decision notice

4.1 The Commissioner issued a Decision Notice on 4 July 2012 (reference FS50417514) in relation to Dr Lamb's request for the Cabinet minutes.

4.2 The Cabinet Office had refused to disclose the minutes, relying on the exemptions provided by sections 35(1)(a) and 35(1)(b) FOIA, which state:

> *(1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-*
>
> *(a) the formulation or development of government policy..*
> *(b) Ministerial communications.*

4.3 The Commissioner agreed with the Department that the information contained within the minutes related to both the formulation or

development of government policy and Ministerial communications and that therefore both exemptions relied upon were engaged.

4.4 Applying the public interest test, the Commissioner recognised that there were significant public interest arguments both in favour of maintaining the exemption and in favour of disclosure and that the issues were finely balanced. He considered whether circumstances had changed since his earlier decision. In particular he took account of the passage of time, the work of the Iraq Inquiry under the chairmanship of Sir John Chilcott, the publication of various memoirs and other public statements regarding the events leading up to military intervention in Iraq, the change of government, and the reasons given by the former Justice Secretary for the exercise of the veto in 2009. Taking all the circumstances into account, the Commissioner concluded that the public interest favoured the disclosure of the information as previously ordered by the Tribunal.

5. The veto

5.1 On 23 July 2012 the Cabinet Secretary wrote to the Commissioner advising him that the Attorney General was considering whether to issue a certificate under section 53(2) FOIA in respect of his Decision Notice. The Cabinet Secretary sought the Commissioner's views before a final decision was taken, requesting a response by 26 July 2012.

5.2 The Commissioner responded to the Cabinet Secretary on 25 July 2012. In that letter the Commissioner noted as follows:

- This was a reprise of a case when the veto was first exercised, following consideration of an appeal by the Tribunal

- The Commissioner's decision notice explicitly took account of this and the extent to which circumstances had changed since then
- In those circumstances the Commissioner had no further comments.

5.3 On 31 July 2012 the Attorney General issued a certificate under section 53(2) FOIA overruling the Commissioner's Decision Notice of 4 July 2012 and vetoing disclosure of the requested information.

5.4 The certificate confirmed that the Attorney General took the view that the public interest favoured the continued non-disclosure of the Cabinet minutes and therefore that there was no failure by the Cabinet Office to comply with its duty to disclose information on request. The practical effect of the certificate is that the Cabinet minutes are not required to be disclosed.

5.5 The Attorney General concluded that the balance of the public interest favoured the maintenance of the exemptions rather than the disclosure of the information. He considered that the Commissioner's assessment of the balance was wrong. The Attorney General further concluded, in accordance with the Government Statement of Policy on the use of the veto, that this was an 'exceptional case' requiring the use of the veto because disclosure would be damaging to the doctrine of collective responsibility and detrimental to the effective operation of Cabinet government.

6. The Information Commissioner's response

6.1 It is clear from the Attorney General's statement of reasons that the public interest factors he took into account were much the same as those considered by the Commissioner. The difference lies not just in the weight attached to them but in whether they are regarded as

favouring disclosure or not. For example, the Attorney General states that he considers that the importance attaching to the public interest in protecting the safe space for frank deliberation is particularly great when the Cabinet is discussing maters of high controversy. He says, "These are precisely the occasions where the benefits that stem from Cabinet confidentiality can be most valuable."

6.2 The Commissioner understands that, but considers that these are also the occasions where the public interest in disclosure of the official record of what took place, after an appropriate period of time, is particularly great. Likewise, the passage of time since the relevant meetings were held and the continuing public interest in Iraq as a "live" issue can be used to support both the case disclosure and the case for withholding the information.

6.3 The Attorney General explained that in reaching his decision to use the veto, he had taken into account the "Statement of HM Government Policy on 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)" ("the Statement of Policy").

6.4 The Statement of Policy sets out the guiding principles on the use of the veto. These state that the Government considers that the veto should only be used in exceptional circumstances and it 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.

6.5 The Statement of Policy goes on to set out criteria for determining what constitutes those "exceptional cases" in which the Government would be minded to use the veto. These are where, 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.

6.6 The Statement of Policy further describes how, in deciding whether the veto should be exercised, the Cabinet (or the Attorney General where, as in this case, the information is held within the papers of a previous administration) will have reviewed the withheld information; and taken into account relevant matters, including in particular:

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;

vii) whether any other exemptions apply to the information being considered that may affect the balance of the public interest.

6.7 These factors are among those consistently taken into account by the Commissioner when considering the balance of the public interest in disclosing or withholding information relating to Government policy-making at the highest level. The Commissioner doubts whether these criteria alone, which will necessarily already have been taken into account by the Commissioner and, where there has been an appeal, by the Tribunal as well, are indicative of the exceptional as opposed to the routine.

6.8 It is important to note that the term 'exceptional case' in the Statement of Policy bears a different meaning from its plain English sense. For the Statement of Policy, 'exceptional' does not mean rare or unusual. Rather, it means a case where an exception should be made and disclosure blocked. In that sense, the 'exceptional' could occur very frequently.

6.9 Nevertheless, the Attorney General's statement of reasons shows how, in his view, the current case fulfils a number of the criteria for 'exceptional cases' under the policy, justifying the executive override.

6.10 The Attorney General says that the exemption is not absolute, but qualified, and points to examples of Cabinet material having been disclosed in other circumstances.

6.11 The Attorney General refers to the 'exceptional gravity' of the issues at stake at the meetings and the 'exceptionally weighty' factors that should have swung the public interest balance.

6.12 The Attorney General quotes extensively and approvingly from the earlier statement of reasons given by Rt Hon Jack Straw (2009).

7. Conclusion

7.1 In light of previous commitments he has made, and the interest shown by past Select Committees in the use of the ministerial veto, the Commissioner intends to lay a report before Parliament under section 49(2) FOIA on each occasion that the veto is exercised. This document fulfils that commitment.

7.2 Laying this report is an indication of the Commissioner's concern to ensure that the exercise of the veto does not go unnoticed by Parliament and, it is hoped, will serve to underline the Commissioner's view that the exercise of the ministerial veto in any future case should be genuinely exceptional.

7.3 On the four previous occasions on which the veto has been exercised, the Commissioner has made clear his view that it is vital that a ministerial certificate should only be issued under section 53 FOIA in truly exceptional circumstances.

7.4 Yet if the veto continues to be exercised in response to the majority of orders for the disclosure of Cabinet or Cabinet committee minutes, it is hard to imagine how the most significant proceedings of the Cabinet will ever be made known before the elapse of 30 years (to be reduced over time to 20 years under the Constitutional Reform and Governance Act 2010.)

7.5 It seems that disclosures of information around the most significant Cabinet decisions will, by definition, always be the ones to attract the veto as an 'exceptional case'.

7.6 The Commissioner accepts that section 53 of the Act provides for the use of a ministerial veto and is mindful of the Report of the Justice Committee following post-legislative scrutiny of the FOIA[11], in particular, the sections dealing with the safe space, exemptions and the ministerial veto.

7.7 The situation that now obtains, however, is most unsatisfactory and far from the impression given during the passage of the Act, as set out as Background in the Statement of Policy itself:

> The Government considers that the veto should only be used in exceptional circumstances and only following a collective decision of the Cabinet. This policy is in line with the commitment made by the previous administration 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."*[12]

7.8 The Commissioner and the Tribunal are required by the Act to weigh the public interest. But a Cabinet Minister can set the decision of the Commissioner and the Tribunal aside on the basis of criteria that are not part of the legislation.

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[11] HC96-1 Post-legislative scrutiny of the Freedom of Information Act 2000, July 2012

[12] **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*).

7.9 The Attorney General declares himself, his colleagues, and their predecessors in Cabinet to be well placed to judge the issues. By implication, the Commissioner and the Tribunal are not.

7.10 The Commissioner has noted the Committee's observation, in the summary to their report:

> *We have considered the evidence of witnesses, particularly former senior civil servants and ministers, suggesting that policy discussions at senior levels and the recording of such discussions may have been inhibited by the Freedom of Information Act. Evidence of such an effect is difficult to find by its very nature, but there is clearly a perception in some quarters that there is no longer a sufficiently 'safe space' for policy discussions. Parliament clearly intended that there should be a safe space for policy formation and Cabinet discussion, and we remind everyone involved that section 35 was intended to protect high-level policy discussions. We recognise that the ministerial veto may need to be used from time to time to maintain that safe space. We believe that civil servants and others in public authorities should be aware of the significance of these provisions and the protection they afford.*

7.11 Nevertheless, the Commissioner must continue to perform the function Parliament has given him to exercise his judgement as to where the greater public interest lies, carefully and conscientiously in every case.

7.12 In his written submission in response to the Committee's call for evidence, the Commissioner invited the Committee to consider the case for an absolute exemption for Cabinet minutes if the view was taken that this was a class of information that should never be disclosed under FOIA. In other words, if orders for the disclosure of Cabinet minutes were an unintended consequence of the powers given to the Commissioner the honest (and more cost-effective) approach was to amend FOIA to stop that possibility. However, the Committee appear not to have reached that conclusion and have made no such recommendation.

7.13 In the case of the 2009 veto, the previous Commissioner sought counsel's opinion as to the prospects for a successful application for judicial review. Importantly, this was the first occasion on which the veto had been exercised. The opinion obtained clearly indicated that there were no strong grounds for mounting a case that exercise of the veto on that occasion was susceptible to judicial review. The opinion was annexed to the Commissioner's report to Parliament.

7.14 The Commissioner has considered whether there is a case for a legal challenge in this case. He has taken full account of the advice previously obtained and of all the circumstances of the present case. Even if the current veto were held not to have conformed to the Statement of Policy on the use of the executive override that would not *ipso facto* indicate any breach of the law.

7.15 Accordingly, the Commissioner has not sought Counsel's Opinion on this occasion. He does, however, reserve the right to seek legal advice in any future situation where the imposition of the veto appears to him to be manifestly unreasonable.

7.16 The veto has now been exercised on five occasions since the Act came into effect. While the Commissioner's present intention is always to make a report to Parliament whenever the veto is imposed, the process of making a request for information and the role of the Commissioner and of the Tribunal are now well enough understood to obviate the necessity of setting out at length the general background and the relevant law as opposed to the particulars of the matter in hand. Accordingly, the Commissioner believes that any future reports in event of the exercise of the veto are likely to be more briefly expressed.

Christopher Graham

Information Commissioner

Dated: 3 September 2012

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Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **4 July 2012**

Public Authority: **The Cabinet Office**
Address: **70 Whitehall**
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested information relating to the minutes of two Cabinet Meetings in 2003 concerning the military invasion of Iraq.

2. The Commissioner's decision is that the exemption under section 35 applied. However, he finds that the public interest favours disclosing the requested information.

3. The Commissioner requires the public authority to disclose the withheld information to the complainant.

4. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The complainant wrote to the Cabinet Office on 19 March 2011 and requested information in the following terms:

> *"I wish to place a new Freedom of Information request relating to the Cabinet minutes for the Cabinet meetings of 13 and 17 March 2003, which discussed the military invasion of Iraq.*

Under the terms of the Freedom of Information Act 2000, I request disclosure of these Cabinet minutes as contained in the ruling of the Information Tribunal (re: the 'Cabinet minutes' case)."

6. The Cabinet Office responded on 28 July 2011. It confirmed that it held information relevant to the request, but refused to disclose it, citing sections 27 (international relations) and 35 (formulation of government policy) of FOIA.

7. The Cabinet Office carried out an internal review of that decision, finally providing its response on 21 December 2011. That review concluded that the Cabinet Office had correctly applied the exemption at section 35(1)(a) and (b). No reference was made to section 27.

Scope of the case

8. The complainant contacted the Information Commissioner (the Commissioner) to complain about the way his request for information had been handled, specifically with respect to the withholding of the requested information on the basis of the public interest test. He also complained about the timeliness with which the Cabinet Office handled his request for information and subsequent internal review.

9. The requested information in this case relates to the minutes of Cabinet Meetings at which the military action against Iraq was considered and discussed (the Iraq War Cabinet Minutes). As the wording of the request implies, both the Cabinet Office and the Commissioner have considered a similar request for information on a previous occasion. Clearly, the Cabinet Office dealt with the request in this case as a valid new request and not a repeated request.

10. With regard to the original request, the Commissioner found the section 35 exemption engaged but required disclosure of the minutes on public interest grounds. That decision (FS50165372) was upheld by a majority ruling of the Information Tribunal – subject to a minor amendment - but was overruled by the then Secretary of State for Justice when he issued a veto certificate in accordance with section 53(2) of FOIA on 23 February 2009.

11. The Commissioner notes that, in correspondence with the Cabinet Office about the handling of his request in this case, the complainant asked why disclosure was still being refused despite the (majority) ruling of the First-tier Information Tribunal backing disclosure in January 2009 (EA/2008/0024 and EA/2008/0029).

12. Whilst acknowledging the existence of that Tribunal decision and the subsequent exercise of the Ministerial veto, the Commissioner's duty is to decide, on a case-by-case basis, whether a request for information has been dealt with in accordance with FOIA.

13. In this case, neither the complainant nor the Cabinet Office disputes that section 35 is engaged. The Commissioner therefore considers the scope of his investigation to be with respect to the balance of the public interest in relation to section 35.

14. In reaching a decision in this case, the Commissioner is mindful of the existence of the Iraq Inquiry. That Inquiry, chaired by Sir John Chilcot, was announced by the then Prime Minister, Gordon Brown, on 15 June 2009. The purpose of the Inquiry is to identify lessons that can be learned from the Iraq conflict. According to the Inquiry's website:

> *"We will therefore be considering the UK's involvement in Iraq, including the way decisions were made and actions taken, to establish, as accurately as possible, what happened and to identify the lessons that can be learned."*

15. At the time of writing, the Commissioner is not aware that the Inquiry has set a date for reporting its findings.

Reasons for decision

16. The Cabinet Office is relying on sections 35(1)(a) and (b) for refusing to disclose the requested information. In other words, it is claiming that the information is held by a government department and relates to the formulation or development of government policy and ministerial communications.

17. Ministerial communications are defined at section 35(5) as including proceedings of the Cabinet, or of any committee of the Cabinet. Having viewed the withheld information, the Commissioner is satisfied that it falls within both subsection 35(1)(a) (the formulation or development of government policy) and (b) (Ministerial communications). In the Commissioner's view, subsection (b) is the more relevant: however, he acknowledges that the withheld information also relates to the formulation or development of government policy at the time by virtue of its subject matter, namely the UK's policy regarding military action in Iraq.

18. Accordingly, he finds the exemption engaged in relation to both sub-sections being claimed and therefore he has gone on to consider the public interest arguments.

The public interest test

19. Section 2(2)(b) provides that a public authority is not under a duty to disclose information if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it. This means that if the public interest is equally balanced, the information must be disclosed.

20. The Commissioner must consider whether, at the time of the request, the public interest in disclosing the two sets of Cabinet minutes equals or outweighs the public interest in withholding the information. In doing so, he has considered whether, and to what extent, the balance of the public interest has changed since the matter was last considered.

Public interest arguments in favour of disclosing the requested information

21. In correspondence with the Commissioner, the complainant brought to his attention examples of declassified documents from the Iraq Inquiry which he considers relevant to the issues in this case.

22. Arguing in favour of disclosure, the complainant also told the Commissioner that he considered that:

> *"disclosure of the minutes is still highly relevant and in the public interest".*

23. The Cabinet Office acknowledges there is a general public interest in disclosure of information, recognising that:

> *"openness in government may increase public trust in and engagement with the Government….."*

and

> *"the decisions Ministers make may have a significant impact on the lives of citizens, and there is a public interest in their deliberations being transparent".*

24. In correspondence with the Commissioner, the Cabinet Office acknowledged that, in this case, there is a strong public interest in how the government reached a decision to commit British forces to military action. Similarly, it told the complainant that it took into account the public interest in:

> *"understanding the UK's relations with Iraq and the circumstances in which the UK committed forces to Iraq".*

25. The Cabinet Office acknowledges that there have been changes of administration since the minutes were produced and that this could be seen as a factor in favour of disclosure.

26. Notwithstanding its recognition of the above arguments in favour of disclosure, the Cabinet Office advised the Commissioner that it considers that the public interest factors in favour of disclosure have in fact diminished with the passage of time, particularly given the current work of the Iraq Inquiry (discussed further below).

Public interest arguments in favour of maintaining the exemption

27. The Cabinet Office identified a number of arguments in favour of maintaining the exemption:

- the public interest in protecting the constitutional convention of the policy making process;
- the public interest in protecting the constitutional convention of Cabinet collective responsibility;
- the Iraq Inquiry chaired by Sir John Chilcot; and
- the change of administration.

28. Stressing the importance of the two conventions to the effective functioning of a central element of the nation's system of government, the Cabinet Office told the Commissioner:

> *"Essentially the Cabinet Office maintains that two important public interests favour withholding all of this information. They are the public interest in preserving the confidentially of the policy making process and the public interest in protecting the constitutional convention of Cabinet collective responsibility".*

29. Arguing strongly against disclosure, the Cabinet Office told the complainant:

> *"Ministers must be able to discuss policy freely and frankly, exchange views on available options and understand their possible implications…. If discussions were routinely made public there is a risk that Ministers may feel inhibited from being frank and candid with one another. The convention of Cabinet collective responsibility depends on free discussion for the full consideration of policies and actions as each Cabinet member knows that they are individually responsible for the decision reached in Cabinet. If the quality of underlying collective decision making decline, this could undermine decision making".*

30. Under the convention, members of the Cabinet must publicly support all Government decisions made in Cabinet, even if they do not privately agree with them and may have argued in Cabinet against their adoption. They must also preserve the confidentiality of the Cabinet debate that led to the decision.

31. The complainant told the Commissioner:

> *"Frankly, it is impossible not to conclude that lies have been told about the applicability of Cabinet collective responsibility around the Iraq invasion. Different witness evidence to the Chilcot Inquiry is blatantly contradictory on this".*

32. With respect to the Iraq Inquiry (also known as the Chilcot Inquiry) the Cabinet Office argued that the public interest in favour of releasing the Cabinet minutes is diminished by the work of the Inquiry. It argued that:

> *"the Inquiry's forthcoming report will address the public interest in understanding more about the way in which the decisions to deploy British forces in Iraq were taken".*

33. Furthermore, in the Cabinet Office's view, there is a very strong public interest in the Inquiry continuing its work to produce its report and a risk that premature disclosure under FOIA could undermine its work.

34. With respect to the Inquiry itself, and the eventual outcome of the Inquiry, the Cabinet Office argued that the very existence of the Inquiry weakens the public interest in disclosure.

35. It confirmed to the complainant that the Inquiry had had access to the information within the scope of the request in this case.

36. The Cabinet Office acknowledges that there have been changes of administration since the minutes were written. However, it argued that despite those changes, many of the participants at the Cabinet meetings in scope of this request remain politically active. In its view, this is a factor which diminishes the impact of the passage of time and adds weight to the public interest in favour of maintaining the exemption.

Balance of the public interest arguments

37. As the Cabinet Office is citing multiple limbs of the exemption, the Commissioner must consider separately, in the case of each limb of the exemption, whether the public interest in disclosing the information under consideration equals or outweighs the public interest in maintaining the exemption.

38. As he considers section 35(1)(b) to be the more relevant, the Commissioner has first considered the public interest in respect of that limb of the exemption. In doing so, he notes that, in this case, the public interest arguments put forward by the Cabinet Office in relation to section 35(1)(a) are broadly similar to those cited in relation to section 35(1)(b).

39. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.

40. The Commissioner recognises that the content and context of the requested information will invariably be important factors when balancing the opposing public interests. For example, he recognises that factors in particular cases, such as the importance of the issue or project and the extent of public expenditure, may be more significant (in public interest terms) than the alleged virtues of safeguarding candour and frankness.

41. In considering the opposing public interest factors in this case, the Commissioner has found the following to be particularly relevant.

General transparency and accountability

42. The Commissioner considers that there is clearly a public interest in transparency and the accountability of public authorities. He also recognises that there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest. He therefore gives weight to the argument that disclosure in cases such as this enhances the public's ability to scrutinise the way in which important decisions are taken, for example the decision to go to war.

The gravity of the issue under discussion – the decision to send UK armed forces into a conflict situation

43. The Commissioner recognises that the decision was controversial and that ministers resigned over the matter. He also acknowledges that the decision impacted on the lives of a significant number of people and impacted significantly on the lives of a number of people.

Preserving the confidentiality of the policy making process and the convention of collective responsibility

44. The Cabinet Office argued that there is a need to balance the requirements of openness and transparency against the proper and effective functioning of government.

45. In considering this matter, the Commissioner has been mindful of the public interest in a public authority having effective processes which allow it to openly debate issues of significant public interest without undue inhibition.

46. With respect to section 35(1)(a) he recognises the public interest in the need for a "safe space" for government Ministers and civil servants to formulate policy and debate issues openly away from public scrutiny.

47. He gives weight to the generic argument that there is a risk that full consideration of the options, discussions and decision making could be compromised if ministers believed their views would be made public. He accepts that that would not be in the public interest. However, he is not satisfied that he has been presented with evidence that disclosure in this case would have this effect.

48. The Commissioner has also considered the extent to which an earlier decision continues to impact on current policy. In doing so, he notes that, at the time of this request, the UK's involvement in military action in Iraq had ceased.

49. Turning next to the matter of the convention of collective Cabinet responsibility, the Commissioner considers that that convention is designed to protect both the integrity of the policy formulation and development process protected under s35(1)(a), and the Ministerial decision making process protected under s35(1)(b).

50. He recognises that preserving the convention of Cabinet collective responsibility allows the Government to be able to engage in free and frank debate in order to reach a collective position. He recognises the public interest in allowing free and frank debate in order to agree a collective position, to the extent that it serves to improve the quality of the final decision.

51. He considers that preserving the convention also allows Government better to present a united front after a decision has been made. In the Commissioner's view, there is a public interest in the Government being able to present a united front, as this prevents valuable government time from being spent publicly debating and defending views that have only ever been individual views rather than Government positions, and in commenting on the meaning and implications of a divided Cabinet.

52. He accepts that, necessarily given the nature of the information discussed at Cabinet Meetings, there will be circumstances when Ministers need to be confident that they are able to speak candidly, and if necessary argue over different approaches, without the fear that such discussions will be prematurely disclosed. If Ministers feel inhibited in their discussions, this might adversely affect the decision making process on critical issues. In the Commissioner's view, such an adverse consequence would clearly not be in the public interest.

53. The Commissioner also acknowledges the potential for the convention to be undermined by the routine early disclosure of minutes of Cabinet meetings.

54. He therefore accepts that Cabinet confidentiality is a strong factor favouring the maintenance of the exemption. He acknowledges, however, that how much weight the public interest in maintaining the convention of Cabinet collective responsibility will carry in any individual case, will vary depending on all the specific circumstances of the case and the public interest in disclosure of the particular information at issue.

55. When determining how much weight the public interest in maintaining the convention will carry in this case he considers it appropriate to take account of the extent to which damage to Cabinet collective responsibility might be caused by the disclosure of the information at issue. In other words, in this case, he has focused on the damage that might be caused by the disclosure of these particular minutes, giving due consideration to the circumstances of the case, including the passage of time.

56. In this respect, he has considered the extent to which the views of different ministers can be identified, both with respect to those views being specifically attributed and with respect to the context of what is said enabling the identification of individuals. He has also taken into account whether any of the ministers in the Cabinet at the time are still in office and notes that some are still active in politics.

The change of administration

57. The Commissioner considers it relevant when considering the balance of the public interest in this case that the withheld minutes are those of two Cabinet meetings held under a previous administration. Furthermore, that administration was of a different party political composition than that which was in office at the time of this request (and this decision notice.)

58. In this respect, the Commissioner has consulted his published guidance (LTT 132) that states:

> *"The Commissioner would also comment that the public interest in maintaining the convention of collective Cabinet responsibility may diminish with changes to the Cabinet, Government restructures or the formation of a new Parliament (a new Parliament is formed following a general election). This would be on the basis that there may be less potential harm (of the kind detailed above) from revealing that a Cabinet that no longer exists were in disagreement, than there might be in revealing that the current Cabinet has divergent views."*

59. The Commissioner accepts that the impact of disclosure may be different in circumstances where there has been a change of administration, for example in respect of holding the government of the day to account. Nevertheless, the Commissioner considers that the need for public accountability is very great indeed when any government is discussing the lawfulness of military action and a decision to go to war, irrespective of any change in administration.

The veto

60. The Commissioner has taken into account that the final outcome of the complainant's earlier request for the Iraq War Cabinet Minutes was the exercise of the Ministerial veto. He considers this to be a factor of some relevance to his deliberations in this case. He must consider, for example, whether the reasons for the veto reveal anything new or different about the situation at the time of this request and whether the reasons for the veto have been displaced by subsequent events, such as the change in administration.

61. Notwithstanding the fact that the veto was exercised in relation to the earlier request, the Commissioner recognises that his duty is to decide, on a case-by-case basis, whether a request for information has been dealt with in accordance with FOIA, taking into account all the circumstances at the time when the request was made. It should be noted that the Ministerial veto operates only to overturn a particular disclosure decision. It does not have continuing effect as an absolute exemption attaching to the information itself.

62. The Commissioner notes that, in accordance with the relevant policy, the veto was exercised by the then Secretary of State for Justice after consultation with the then Cabinet. In other words, the issue of disclosure was considered in 2009 by a Cabinet of the same administration as that in power at the time of the original request.

63. While mindful of the execution of the veto in the past, and having due regard to the reasons given by the then Secretary of State for Justice for exercising the veto, the Commissioner has focused on the arguments put forward by the Cabinet Office and the complainant in this case. In doing so, he notes that the Cabinet Office has referred him to arguments expressed in that veto on the basis that they still have merit.

Memoirs and other public statements

64. The Commissioner is mindful that memoirs and other public statements exist that make reference to the Cabinet meetings, the minutes of which are the subject of this request. When considering the public interest in disclosure, he has taken into account the volume of information already in the public domain about the decision to go to war. He also considers it appropriate to assess the extent to which the confidentiality of what took place has been eroded as a result of those publications.

65. However, in the Commissioner's view there is a very significant difference between the publication of a personal account of events, for example in a memoir or diary, and the disclosure of the official record of proceedings at the highest level of government. In his view, memoirs are not necessarily endorsed and cannot therefore be regarded as authoritative whereas the release of an official record is qualitatively different.

The passage of time

66. The Commissioner acknowledges that the passage of time is a relevant factor with respect to disclosure. In the Commissioner's view, the age of requested information is also a relevant public interest factor because in many cases it can be seen that its sensitivity decreases over time.

67. Importantly in this case, although the Iraq war was a conflict that continued from 20 March 2003 until 15 December 2011, at the time of the request the UK was no longer actively engaged in that conflict, UK forces having ended combat operations on April 30 2009.

68. The Commissioner notes that the passage of time has lead to a number of differences between the circumstances pertaining at the time of this request and those at the time of the earlier request for essentially the same information. For example, the Commissioner recognises that at the earlier time, a FOIA request was the main, if not the only, means by which the information sought might be required to be made available to the public. At the time of this later request, further relevant information had been released into the public domain and the Iraq Inquiry had been established and commenced its work.

69. However, it is still the case that less than 10 years have passed since the date of the Cabinet meetings at issue. The withheld information is therefore still some years away from being considered for routine release as an historic record.

The significance or sensitivity of the information. Is the issue still 'live'?

70. Although the withheld information is now several years old, that does not mean that the issue is not still topical. Taking into account the ongoing public debate and controversy surrounding the lawfulness of military action against Iraq and the decision to go to war, the Commissioner accepts that the issue is still 'live'.

71. He also considers it significant to the balance of the public interest that there is a public inquiry into those matters. In his view, the existence of the Iraq Inquiry suggests that the matter is still live and a matter of significant public interest.

The Iraq inquiry

72. The Commissioner acknowledges that the purpose of the 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."*

73. From reading the correspondence between the complainant and the Cabinet Office, the Commissioner understands that the Iraq Inquiry may be seeking declassification of extracts of the two sets of minutes at issue in this case. However, the Commissioner does not know to what, if any, extent the Inquiry will publish details of the requested information. Nor is he aware that it is known with any certainty when the Inquiry will publish its report.

74. Therefore, in the Commissioner's view, the extent to which the Iraq Inquiry will meet the public interest in respect of the specific matter which is the subject of this decision notice is uncertain, given that it is not clear what information the Inquiry will report on or recommend for disclosure.

Conclusion

75. In considering the opposing public interest factors in this case, the Commissioner has been mindful of the intention behind FOIA, whose short description is:

"An Act to make provision for the disclosure of information held by public authorities".

76. Focusing on the nature of the information itself, in the Commissioner's view there is nothing distinctive about the withheld information in this case; in other words, the withheld information apparently follows the typical pattern of minutes recording Cabinet meetings. He is satisfied that the minutes at issue in this case are neither more nor less full than other minutes of full Cabinet meetings he has seen, nor that they contain either more or less information in respect of the attribution of comments to individual Cabinet members.

77. The Commissioner has also been mindful of the context of the request, including the continuing public interest in matters relating to the Iraq war.

78. He recognises that, since the public interest in relation to a request for the information at issue in this case was last considered, there have been changes in the circumstances relating to the public interest arguments both in favour of disclosure and in favour of maintaining the exemption.

79. With respect to his deliberation in this case, the Commissioner accepts that there are significant public arguments both in favour of maintaining the exemption and in favour of disclosure and that the issues are finely balanced.

80. In reaching a decision in this case, the Commissioner considers it appropriate to take into account the immense public policy controversies generated by the Iraq invasion and occupation and the cost in lives resulting from the conflict. In his view, and in line with the recently expressed view of the Tribunal in the case of *Plowden & FCO v Information Commissioner* (EA/2011/0225 & 0228), information that can provide a better understanding of how the decision to go to war was made is subject to an exceptionally strong public interest in disclosure.

81. However, he acknowledges that the work of the Iraq Inquiry lessens that public interest in disclosure to the extent that the Inquiry's report will contribute to the public being better informed about the circumstances leading to a decision to go to war. At present, however, that is not quantifiable.

82. Having considered the strength of the arguments on both sides of the public interest debate, and taking into account the various changes in circumstances since he last considered this matter, the Commissioner has concluded that there is no good reason for him to reach a substantially different decision in this case to that reached in the

previous decision notice (FS50165372), a decision that was supported on appeal to the Tribunal, albeit by a 2:1 majority.

83. The Commissioner accepts that there will be cases in which it is entirely proper to refuse to disclose Cabinet Minutes under FOIA. Indeed he has upheld refusals to disclose minutes of Cabinet meetings on a number of occasions. However, he considers that the decision to go to war with Iraq was of exceptional gravity and controversy, and continues to be a matter of public debate. He therefore considers that there is a significant and continuing public interest in disclosure of the requested information in this case, in order to serve the interests of accountability and transparency and to inform the public debate surrounding a decision seen as controversial and significant both at the time and since.

84. The Cabinet Office is citing section 35(1)(a) in relation to the same information for which it is citing section 35(1)(b). As he has found the public interest favours disclosure of the information withheld under section 35(1)(b), and as the arguments put forward by the Cabinet Office in relation to section 35(1)(a) are essentially the same, the Commissioner has not gone on to articulate separately the public interest arguments in relation to section 35(1)(a). He is satisfied that the public interest in disclosure of the withheld information outweighs that in the maintenance of that exemption also.

Procedural Requirements

85. Section 1(1)(a) of FOIA requires a public authority in receipt of a request to confirm whether it holds the information requested. Section 10(1) of FOIA provides that a public authority should comply with section 1(1) of FOIA within 20 working days.

86. In this case, the complainant's request was received by the Cabinet Office on 19 March 2011 but the Cabinet Office did not issue its refusal letter until 28 July 2011. The Commissioner therefore finds that the Cabinet Office failed to comply with section 1(1)(a) and breached section 10(1) by failing to comply with section 1(1)(a) within the statutory time period.

Other matters

Time taken conducting the internal review

87. The complainant brought to the Commissioner's attention what he described as:

> *"the lamentable performance of the Cabinet Office in meeting its legal duties".*

88. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.

89. The Commissioner is concerned that, in this case, it took more than four months for an internal review to be completed and would remind the public authority of its obligations in this regard.

Right of appeal

90. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

    First-tier Tribunal (Information Rights)
    GRC & GRP Tribunals,
    PO Box 9300,
    LEICESTER,
    LE1 8DJ

    Tel: 0300 1234504
    Fax: 0116 249 4253
    Email: informationtribunal@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

91. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

92. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed .....

Christopher Graham
Information Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

31 July 2012

CERTIFICATE OF THE ATTORNEY GENERAL, MADE IN ACCORDANCE WITH SECTION 53(2) OF THE FREEDOM OF INFORMATION ACT 2000

In a decision notice dated 4 July 2012 (Reference: FS50417504), the Information Commissioner ordered the disclosure of information relating to Cabinet discussions on 13 March 2003 and 17 March 2003.

As an accountable person within the definition in section 53(8) of the Freedom of Information Act ("the Act"), I have on reasonable grounds formed the opinion that, in respect of the request concerned, the public interest favours the continued non-disclosure of the information that the Cabinet Office was ordered to disclose and that there was no failure to comply with section 1(1)(b) of the Act.

Therefore I make this certificate in accordance with section 53(2) of the Act.

RT HON DOMINIC GRIEVE QC MP

ATTORNEY GENERAL

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 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 (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.

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.

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.

[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.

Ministry of JUSTICE

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)

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' 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 under this policy is that, in cases concerned with information falling within the scope of section 35(1), the accountable person 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.

For the purpose of issuing a certificate in line with this policy the accountable person will, where possible, be the Cabinet Minister with responsibility for the policy area to which the information relates. In cases involving papers of a previous administration, the Attorney General will act as the accountable person.

When using the veto, the accountable person is required by the Act to provide a certificate to the Information Commissioner outlining their reasons for deciding to exercise the veto. That certificate must also then be laid before both Houses as soon as practicable.

The Government considers that the veto should only be used in exceptional circumstances and only following a collective decision of the Cabinet. This policy is in line with the commitment made by the previous administration 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]

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.

This policy statement relates only to the exercise of the veto 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 or Attorney General (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.

In cases where the information being considered relates to papers of a previous administration the Attorney General will consult former Ministers and the opposition in line with the process set out in this policy. In accordance with the convention on papers of a previous administration only the Attorney General will have access to the information being considered.

REASONING

The Cabinet is the supreme decision-making body of Government. Cabinet Government is designed to reconcile Ministers' individual

[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*).

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:

> *"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."*

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. 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 it is 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 Cabinet Office also released Cabinet minutes from 1986 relating to the Westland Affair following a decision by the Information Tribunal in 2010.

Therefore, the Government has agreed that the following criteria will be used 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 (vii) 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;

    vii) whether any other exemptions apply to the information being considered that may affect the balance of the public interest.

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

END

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