



Information Commissioner's Office

Freedom of Information Act 2000

Ministerial veto on disclosure of the minutes of the Cabinet Sub-Committee on Devolution for Scotland, Wales and the Regions

Information Commissioner's Report to Parliament



Information Commissioner's Office

Freedom of Information Act 2000

Ministerial veto on disclosure of the minutes of the Cabinet Sub-Committee on Devolution for Scotland, Wales and the Regions

Information Commissioner's Report to Parliament

**Presented to Parliament by the Information Commissioner pursuant to Section
49(2) of the Freedom of Information Act 2000**

Ordered by the House of Commons to be printed on 5 January 2010

HC 218

London: The Stationery Office

Price: £9.50

© Crown Copyright 2010

The text in this document (excluding the Royal Arms and other departmental or agency logos) may be reproduced free of charge in any format or medium providing it is reproduced accurately and not used in a misleading context. The material must be acknowledged as Crown copyright and the title of the document specified.

Where we have identified any third party copyright material you will need to obtain permission from the copyright holders concerned.

For any other use of this material please contact the Office of Public Sector Information, Information Policy Team, Kew, Richmond, Surrey TW9 4DU
or e-mail: licensing@opsi.gsi.gov.uk.

ISBN: 9780102964042

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office

ID 2342050 01/10

Printed on paper containing 75% recycled fibre content minimum.

Index

1. Introduction
2. Background
3. The request for information
4. The Information Commissioner's Decision
5. The appeal to the Information Tribunal
6. The veto
7. The Information Commissioner's response
8. Conclusion

Annex. Ministerial certificate

Minister of Justice's statement of reasons

Minister of Justice's written statement to the House of Commons

Statement of HMG policy on the use of the executive override

1. Introduction

- 1.1 Section 49(2) of the Freedom of Information Act 2000 (“the Act”) provides that the Information Commissioner (“the Commissioner”) may from time to time lay before each House of Parliament such report with respect to his functions under the Act as he thinks fit.
- 1.2 On 23 June 2009 the Commissioner issued a Decision Notice (reference number FS50100665) under section 50 of the Act ordering the Cabinet Office to disclose copies of the minutes of the meetings of the Cabinet Sub Committee on Devolution to Scotland and Wales and the English Regions, dating from 1997.
- 1.3 On 10 December 2009 the Rt Hon Jack Straw MP, Secretary of State for Justice, issued a certificate under section 53(2) of the Act overruling the Commissioner’s Decision Notice and vetoing disclosure of those minutes. This report sets out the background that led to the issue of that certificate.

2. Background

- 2.1 Under section 1(1) of the Act any person who has made a request to a public authority for information is, subject to certain exemptions, entitled to be informed in writing whether the information requested is held¹ and if so to have that information provided to him².
- 2.2 This general right of access to information held by public authorities is not unlimited³. Exemptions from the duty to provide information 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 if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information⁴.

¹ Section 1(1)(a)

² Section 1(1)(b)

³ Section 2

- 2.3 Any person (known as a “complainant”) may apply to the Commissioner for a decision whether a request for information made to a public authority has been dealt with in accordance with the requirements of the Act⁵. With certain exceptions⁶, 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 Information Tribunal against the Commissioner’s Decision Notice⁷. The Tribunal consists of a legally qualified chairman and two lay members appointed, in equal numbers, to represent the interests of those who make requests for information under the Act and the interests of public authorities.
- 2.5 If the Tribunal considers that the Decision Notice under appeal is not in accordance with the law, or involved a wrong exercise of discretion by the Commissioner, then the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner⁸. The Tribunal may also review any finding of fact on which the Decision Notice was based⁹. In applying the public interest test, the Tribunal is therefore entitled to reach its own conclusion as to where the balance of public interest lies, and it may substitute that conclusion for the conclusion reached by the Commissioner.
- 2.6 A decision of the Tribunal may be appealed to the High Court (or the Court of Session in Scotland) on a point of law¹⁰.
- 2.7 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 effect¹¹. A certificate can only be issued where the “accountable person” (in this instance a Cabinet Minister) has on reasonable grounds formed the opinion that there was no failure in respect of complying with the general

⁴ Section 2(2)(b)

⁵ Section 50(1)

⁶ Section 50(2)

⁷ Section 57(1)

⁸ Section 58(1)

⁹ Section 58(2)

¹⁰ Section 59

duty to provide information on request in a particular case¹². This certificate is the so-called “veto”. In such cases a Cabinet Minister can substitute his view for that of the Commissioner or Tribunal as to where the balance of the public interest lies in a particular case. 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 is brought, within twenty working days of the day on which any such appeal is determined or withdrawn.

3. The request for information

3.1 On 3 October 2005 a request was made by Mr Andrew McFadyen to the Cabinet Office for copies of “*all the minutes of the Cabinet Sub-Committee on Devolution [for] Scotland, Wales and the Regions*”, together with “*any briefing papers, supporting documentation or other materials*” relevant to the preparation of a White Paper, “Scotland’s Parliament”, published in July 1997.

3.2 In his request, Mr McFayden stated that it was his understanding that the Sub-committee in question had met fifteen times from May to July 1997.

3.3 The Cabinet Office responded to the request on 6 October 2005, confirming that it held information relating to the first part of the request (the request for the minutes). However, the Cabinet Office refused to disclose copies of the minutes under sections 35(1)(a) and 35(1)(b) of the Act.

3.4 Sections 35(1) of the Act states that –

“Information held by a government department ... is exempt information if it relates to –

(a) the formulation or development of government policy,

(b) Ministerial communications ...”

3.5 Section 35 of the Act is a qualified exemption and the Cabinet Office took the view that the balance of public interests was in favour of maintaining the exemption.

¹¹ Section 53

¹² Section 53(2)

3.6 In relation to the second part of Mr McFayden's request (for the materials relevant to the White Paper), the Cabinet Office stated that Mr McFayden's request was too broad and it invited him to refine it.

3.7 On 4 January 2006 Mr McFayden complained to the Commissioner's Office about the Cabinet Office's refusal to provide him with the information he had asked for. When doing so he informed the Commissioner that his complaint only related to the Cabinet Office's handling of the first part of his information request – namely his request for the minutes of the Cabinet Sub-committee meetings. It was therefore on that basis that the Information Commissioner investigated Mr McFayden's complaint and issued his Decision Notice.

4. The Information Commissioner's Decision

4.1 In the course of the Commissioner's investigation of this matter, the Cabinet Office declined to provide him with a copy of the requested information. However, the Commissioner was afforded the opportunity of physically inspecting the Cabinet Sub Committee minutes of the meetings held in 1997 ("the 1997 minutes"). That inspection took place on 11 October 2007 at the Cabinet Office in London.

4.2 Due to the inspection protocol imposed by the Cabinet Office, the Commissioner's representative was not permitted to take copies of the 1997 minutes and was not permitted to make detailed notes, such as the names of attendees at the meetings referred to in the 1997 minutes.

4.3 At no point during the physical inspection of the 1997 minutes, or during the Commissioner's subsequent investigation, was reference made by the Cabinet Office to the existence of any later minutes recording meetings of the Cabinet Sub-committee after 1997.

- 4.4 On 23 June 2009 the Commissioner issued a Decision Notice (reference number FS50100665) under section 50 of the Act¹³.
- 4.5 The Commissioner accepted that the 1997 minutes contained information relating to the formulation or development of government policy and recorded Ministerial discussions and consequently fell within the scope of the exemptions under section 35(1)(a) and (b) of the Act. Therefore, the 1997 minutes were only to be disclosed if the public interest in disclosure was equal to or greater than the public interest in maintaining the exemption.
- 4.6 The Commissioner identified a number of public interest factors in favour of disclosure and acknowledged that the Cabinet Office's main argument for maintaining the exemption at section 35 of FOIA was that disclosure could undermine the convention of collective Cabinet responsibility.
- 4.7 Collective Cabinet responsibility is the constitutional convention that members of the Cabinet must publicly support all Government decisions made in Cabinet, even if they do not privately agree with them. The Cabinet Office sought to rely on the convention in arguing against disclosure of the minutes. Whilst the Commissioner accepted that the protection of the convention of collective Cabinet responsibility was in general terms a strong factor favouring the withholding of Cabinet minutes, he did not consider that disclosure of these particular minutes would in itself would be likely to undermine that convention.
- 4.8 In reaching this conclusion the Commissioner took into account the fact that the policy issues discussed by the Cabinet sub-committee had already resulted in the enactment of legislation some time before.
- 4.9 In all the circumstances of the case the Commissioner decided that the public interest in maintaining the exemption did not outweigh the public interest in disclosure and that the 1997 minutes should therefore be disclosed.

¹³ http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50100665.pdf

5. The appeal to the Information Tribunal

- 5.1 On 22 July 2009 the Cabinet Office appealed against the Commissioner's Decision Notice to the Information Tribunal. The Cabinet Office argued that the Commissioner was correct to conclude that section 35(1)(a) and (b) of the Act was engaged in relation to the 1997 minutes, but that he was incorrect to conclude that the public interest in favour of withholding the 1997 minutes did not outweigh the public interest in disclosing them.
- 5.2 The Cabinet Office also for the first time sought to rely upon section 28 of the Act¹⁴ in relation to certain parts of the 1997 minutes. The Cabinet Office again argued that, under that section, the public interest favoured withholding the relevant parts of the 1997 minutes.
- 5.3 On the 11 August 2009 the Commissioner served his response to the appeal, defending the overall findings of his original Decision Notice whilst conceding that it contained a factual error with regard to the number of members of the Cabinet sub-committee who remained active in Government at the time of the information request. In doing so, the Commissioner acknowledged that his original Decision Notice might be subject to amendment by the Information Tribunal.
- 5.4 The Commissioner's response noted that there were elements of the Cabinet Office's grounds of appeal which did not appear to be made out, or which were not sufficiently particularised so as to be capable of being answered by the Commissioner.
- 5.5 On 20 August 2009, the Deputy Chairman of the Information Tribunal issued initial directions as to how he wished the case to be progressed. Those directions made provision for the Cabinet Office to serve further particulars of its grounds of appeal and those further particulars were served on the Commissioner and on the Information Tribunal on 10 September 2009.

¹⁴ Section 28 of the Act concerns the disclosure of information which would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration.

- 5.6 The Cabinet Office's further particulars, whilst addressing the lacuna in its original pleadings and expanding upon its arguments in support of its late reliance upon the exception at section 28 of the Act, also sought to introduce further exemptions which it wished to rely on, namely section 35(1)(c) and section 42 of the Act.¹⁵
- 5.7 On the 22 October 2009 the Deputy Chairman of the Information Tribunal ordered that Mr McFayden be joined to the proceedings as an additional party and approved a set of directions which had been agreed between the Cabinet Office and the Commissioner for the future conduct of the Appeal. The Tribunal ordered that the appeal be listed for a three day hearing on 25, 26 and 27 January 2010.
- 5.8 The agreed directions made provision for copies of the 1997 minutes to be provided, on a confidential basis, to both the Commissioner and the Information Tribunal. In accordance with those directions, numbered copies of the 1997 minutes were sent to the Commissioner and the Information Tribunal by Royal Mail Recorded Delivery on 26 October 2009.
- 5.9 On 18 November 2009 the Cabinet Office, through its solicitor, wrote to the Commissioner and the Information Tribunal, advising them that in the course of preparation for the hearing, further minutes dating from 1998 (the "1998 minutes") had come to light. Although covered by the scope of the original information request, the Cabinet Office stated that, due to the wording of the original information request, the 1998 minutes had previously been overlooked.
- 5.10 As the 1998 minutes clearly fell within the scope of the original information request, the Commissioner requested that copies be provided both to the Commissioner and to the Information Tribunal. Copies of the 1998 minutes were duly sent to both the Commissioner and the Information Tribunal, again by Royal Mail Recorded Delivery, on 3 December 2009.

¹⁵ Section 35(1)(c) of the Act deals with the provision of advice from the Law Officers and section 42 of the Act concerns material which attracts legal professional privilege.

- 5.11 On 3 December 2009 the Cabinet Office also served what it described as voluntary further particulars addressing its late reliance on section 35(1)(c) and section 42 of the Act in respect of the 1997 minutes.
- 5.12 On 4 December 2009 the Cabinet Office provided details of its case in relation to the 1998 minutes, stating that it believed the exemptions at section 35(1)(a) and (b) and section 28 of the Act were engaged in relation to those minutes and that the public interest favoured non-disclosure.

6. The veto

- 6.1 On 26 November 2009 the Rt Hon Jack Straw MP, Secretary of State for Justice, wrote to the Commissioner indicating that he was minded to exercise the ministerial veto available to him under section 53(2) of the Act, overruling the Commissioner's Decision Notice. Prior to consulting with Cabinet colleagues concerning the exercise the veto, the Secretary of State for Justice wished to consult with the Commissioner and canvass his views.
- 6.2 The Commissioner responded to the Secretary of State for Justice by letter on 30 November 2009, acknowledging the divergence of their respective positions but setting out his view that, given that an appeal had been lodged and was shortly due to be heard, it was appropriate for the Tribunal process to be allowed to proceed. The Commissioner's conclusion was that the section 53 veto should not be exercised in this particular case.
- 6.3 Nevertheless, on 10 December 2009 the Secretary of State for Justice issued a ministerial certificate under section 53 of the Act, overruling the Commissioner's Decision Notice of 23 June 2009¹⁶. The practical effect of that certificate is that neither the 1997 minutes nor the 1998 minutes are required to be disclosed.
- 6.4 The certificate confirmed that the Secretary of State for Justice took the view that the public interest favoured the continued non-disclosure of the minutes

¹⁶ <http://www.justice.gov.uk/news/docs/section53-certificate.pdf>

and therefore that there was no failure by the Cabinet Office to comply with its duty to disclose the information on request.

- 6.5 The ministerial certificate made no reference to the 1998 minutes which came to light as part of the appeal process. The existence of those minutes was not disclosed to the Commissioner during the course of his original investigation and therefore were not referred to in his Decision Notice. However, as they were clearly within the scope of the original request, and were disclosed as part of the Appeal process, they would have fallen to be considered by the Information Tribunal had the Appeal proceeded to a final hearing.
- 6.6 The reasons for deciding to exercise the veto in this case were set out in a separate statement of reasons¹⁷. In those reasons the Secretary of State for Justice accepted that there was a public interest in disclosure of information which would improve the public's understanding of the sub-committee's work and enable the public to scrutinise historic policy discussions. Where those issues concerned matters of constitutional significance those public interest considerations were of particular importance. However, the Secretary of State for Justice did not consider that it followed that the public interest favoured disclosure of the 1997 minutes. He considered the potential dangers to collective responsibility and good government that would arise from disclosure of the minutes to be particularly pressing and more so where, in his view, there was already a substantial amount of information in the public domain about the debate surrounding devolution for Scotland, Wales and the Regions.
- 6.7 The Secretary of State for Justice stated that he believed that this was an exceptional case where, in his opinion, disclosure would be damaging to the doctrine of collective Cabinet responsibility.
- 6.8 A copy of the government's policy on the use of the veto in cases where the information in question is said to be exempt under section 35(1) of the Act was annexed to the statement of reasons¹⁸. Specifically, the policy relates to the use of the veto in respect of information that engages the operation of the

¹⁷ <http://www.justice.gov.uk/news/docs/statement-of-reasons.pdf>

¹⁸ *ibid*

principle of collective Cabinet responsibility. In that policy the government reiterates the assurances it gave during the passage of the Freedom of Information Bill through Parliament that it would only seek to exercise the use of the veto in exceptional circumstances and then only following collective Cabinet agreement.

- 6.9 The policy notes that whilst the government considers that the public interest against disclosure of information covered by collective Cabinet responsibility will often be strong, the exemption is not absolute and that it was clearly Parliament's intention that in some circumstances the public interest may favour disclosure.
- 6.10 The policy sets out the criteria to be used by the government in deciding whether or not to exercise the veto. In particular, the government will not consider the use of the veto unless, in the view of the Cabinet as a whole, the release of the information would damage Cabinet government and / or the constitutional doctrine of collective responsibility and the public interest in disclosure is outweighed by the public interest in good Cabinet government and / or the maintenance of collective responsibility.
- 6.11 In a statement issued on 10 December 2009 the Secretary of State for Justice said –

"I have today given the Information Commissioner a certificate under section 53 of the Freedom of Information Act 2000 ('the Act'). The certificate relates to case FS50100665 from 23 June 2009 in which, in my opinion, the Information Commissioner wrongly found that the Cabinet Office had failed to comply with section 1(1)(b) of the Act by withholding copies of the minutes of the Cabinet Ministerial Committee on Devolution to Scotland and Wales and the English Regions (DSWR) of 1997. The consequence of my giving the Information Commissioner a certificate is that the Commissioner's decision notice ceases to have effect.

A copy of the certificate has therefore been laid before each House of Parliament. I have additionally placed a copy of the certificate and a detailed statement of the reasons for my decision in the libraries of both Houses, the Vote Office and the Printed Paper Office.”

6.12 The certificate, statement of reasons, the Secretary of State for Justice’s statement to the House of Commons and the policy for the exercise of the veto are included in the annex to this report.

7. The Information Commissioner’s response

7.1 The Commissioner issued a press statement on 10 December 2009. In that statement the Commissioner noted that this case was the first time that the Commissioner had ordered the disclosure of Cabinet minutes since the ministerial veto was first exercised in respect of Cabinet minutes in February 2009. In other cases, the Commissioner had agreed with the Cabinet Office’s decision to withhold Cabinet minutes and the Commissioner expressed concern that the government might routinely use the veto whenever he ordered the disclosure of the minutes of Cabinet proceedings, irrespective of the subject matter or age of the information.

7.2 The Commissioner observed that the Cabinet Office had appealed the Commissioner’s decision to the Information Tribunal and that a full hearing of that appeal was due to commence on 25 January 2010. The Commissioner expressed his regret that the Tribunal’s role was disregarded at such a stage in proceedings and noted that the only previous occasion when the veto was exercised, in relation to Cabinet minutes on the declaration of war on Iraq, the Tribunal had heard the appeal and had upheld the Commissioner’s decision.

7.3 In a reply to the Secretary of State’s letter on the same day, a reply copied to the Chair of the Justice Committee, the Commissioner stated:

“I find it a matter for regret that the Tribunal’s role has been disregarded at this stage. Clearly this goes to the heart of the constitutional issue of the separation of powers between the

executive and the courts. On the previous occasion, the Tribunal heard on its merits the government's appeal against my predecessor's decision before the veto was invoked. I am also concerned that the veto has been applied to the minutes of all the meetings, where a selective approach might have been possible. This would have been more in keeping with the spirit of freedom of information. A blanket approach to Cabinet minutes appears to have been adopted.”

- 7.4 Further to his press statement and letter to the Secretary of State, the Commissioner particularly regrets that the exercise of the veto prior to the full hearing of the appeal before the Tribunal meant that the issues in dispute were not put to the Tribunal for a consideration which would, in part, have been conducted in closed session. The Commissioner notes that, notwithstanding the criticisms in relation to paragraph 29 of his Decision Notice which were contained in the Secretary of State for Justice's statement of reasons, these were issues which the Commissioner had conceded as early in proceedings as his response. Given that concession, the Tribunal might have varied the original Decision Notice in any event.
- 7.5 Whilst the veto cannot, by definition, be exercised until the Commissioner has issued a Decision Notice, it is regrettable that this case has, in effect, been summarily determined so close to the date fixed for a final hearing.
- 7.6 Had the case been permitted to proceed to a full hearing of the appeal, the arguments both for and against disclosure would have been rehearsed fully (albeit in closed session) before an impartial Tribunal comprising of a legally qualified Chair and two experienced lay members. As already noted, that panel might have concluded that, to a greater or lesser extent, Commissioner's findings were flawed and might have substituted the Decision Notice. In the Commissioner's view, that is precisely the function of the Tribunal.
- 7.7 However, in the present case, the statement of reasons set out by the Secretary of State for Justice essentially rehearse the Cabinet Office's

pleadings and do not put forward additional arguments over and above those which would have been presented before the Tribunal in any event.

7.8 The Commissioner is perturbed by the “blanket” nature of the exercise of the veto in the present case. Whilst acknowledging the importance of the constitutional convention which the Secretary of State for Justice seeks to protect, it seems to the Commissioner that a considered review of the 1997 Minutes as part of the appeal process might have resulted in the disclosure of some, or portions of some of the 1997 minutes in redacted form. The Commissioner considers that the convention of collective Cabinet Responsibility could only justify such a blanket refusal if all Cabinet papers were absolutely exempt from disclosure under the Act. However, that is not how the Act is drafted.

7.9 The Commissioner is aware that consideration is being given within government to amendments to legislation that would afford greater protection to certain categories of material including ‘Cabinet papers’. A decision on this and related matters is awaited. The Commissioner is clear that until such time as any such proposal is enacted each case must continue to be considered on its own merits under the current legislation which, in any event, cannot be retrospective in its application.

7.10 It was the previous Commissioner’s expressed view at the time that the veto was exercised for the first time in February 2009 that it was vital that a ministerial certificate should only be issued under section 53 of the Act in exceptional cases. At that point he was concerned that any greater use of such certificates would threaten to undermine much of the progress made towards greater openness and transparency in government since the Act came into force. The Commissioner agrees strongly with this view and, for this reason, would be very concerned to see the exceptional become the routine.

7.11 This is the second occasion on which the veto has been exercised. On the first occasion the Commissioner considered it appropriate to obtain, and publish, legal advice on the prospects of successfully challenging the Secretary of State for Justice’s certificate by way of an application for judicial review or otherwise.

The advice was that, on that occasion, such an application for judicial review would be unlikely to succeed. The circumstances in the current case are sufficiently different for the Commissioner to have considered taking further advice. On reflection, he is inclined to wait and see whether the exceptional does indeed become more routine.

7.12 Accordingly, the Commissioner has not sought a further opinion in this case and does not intend taking any further legal or other action in relation to this matter. But, in the event of a similar veto in relation to Cabinet materials being imposed in the future in advance of a Tribunal hearing, he will not hesitate to seek Counsel's advice with a view to challenging the decision.

7.13 The Commissioner considers that this report is now the end of his formal involvement with this case.

8. Conclusion

8.1 In light of previous commitments made by the Commissioner's predecessor, 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) of the Act on each occasion that the veto is exercised. This document fulfils that commitment.

8.2 Laying this report before 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. The Commissioner is also mindful that less may be known about any future cases and it is therefore important to continue with the precedent already set.

Christopher Graham
Information Commissioner
5 January 2010.

ANNEX

Ministerial certificate

Minister of Justice's statement of reasons

Minister of Justice's written statement to the House of Commons

Statement of HMG policy on the use of the executive override



Ministry of **JUSTICE**

10 December 2009

**CERTIFICATE OF THE SECRETARY OF STATE FOR JUSTICE, MADE IN
ACCORDANCE WITH SECTION 53(2) OF THE FREEDOM OF INFORMATION ACT
2000**

In a decision notice dated 23 June 2009 (ref. FS50100665) the Information Commissioner ordered the disclosure of all of the minutes of the Cabinet Ministerial Committee on Devolution to Scotland and Wales and the English Regions of 1997.

As an accountable person within the definition of section 53(8) of the Freedom of Information Act 2000 [“the Act”], I have taken the view that the public interest favours the continued non-disclosure of all the information that the Cabinet Office was ordered to disclose.

Therefore I am of the opinion that there was no failure falling within section 1(1)(b) of the Act, and I make this certificate accordingly.

[SIGNED COPY OF THIS CERTIFICATE PROVIDED TO THE
INFORMATION COMMISSIONER]

THE RT HON JACK STRAW MP

**LORD CHANCELLOR AND
SECRETARY OF STATE FOR JUSTICE**

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

**IN RESPECT OF THE DECISION OF THE INFORMATION COMMISSIONER
DATED 23 JUNE 2009 (REF: FS50100665)**

**STATEMENT OF REASONS
(under section 53(6) of the Freedom of Information Act)**

INTRODUCTION

Pursuant to section 53 of the Freedom of Information Act 2000 (the 'Act'), and having considered the Government's policy on use of the 'Ministerial Veto' in section 35(1) cases and the views of both Cabinet and the Information Commissioner on 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 23 June 2009 (case reference FS50100665). That Decision Notice ordered disclosure of all of the minutes of the Cabinet Ministerial Committee on Devolution to Scotland and Wales and the English Regions of 1997 (DSWR). The information considered by the Information Commissioner in his Decision Notice comprised the minutes of meetings of DSWR which took place in the course of 1997.

It is my opinion as the 'accountable person' in this case that the decision taken by the Cabinet Office not to disclose this information in response to the request under the Freedom of Information Act was in accordance with the provisions of that Act. Disclosure of this information:

- 1) Is not required having regard to the balance of the public interests in favour of disclosure and those against, and
- 2) would be 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 October 2005, the balance of the public interest in this case fell in favour of maintaining the confidentiality of the requested information.

The DSWR Committee was a Cabinet Committee established to consider devolution policy throughout the United Kingdom, and in particular to consider the Government's proposals for devolved administrations in Scotland and Wales. Decisions made by the DSWR Committee continue to have a significant impact on the lives of citizens of the UK, particularly those living in Scotland and Wales. The changes brought about as a result of the work of the Committee cover important areas such as the way that citizens are governed and how they are represented in the UK Parliament. Devolution has also had a profound impact on public administration within the UK with policy divergence across the nations leading to different outcomes for UK citizens living in Scotland, Wales, Northern Ireland and England. In part because it is a major constitutional change, but also due to its evolving nature, devolution was still the subject of much debate at the time of the request in 2005. For example, the House of Lords Constitution Committee in its Second Report on Devolution in 2003 questioned the continuing use of the Barnett funding formula. Indeed debate continues today, exemplified in the Government's recently published White Paper on strengthening devolution *Scotland's Future in the United Kingdom*.

I recognise that there is a public interest in disclosure of information which would improve the public's understanding of the Committee's work, promote further debate on devolution issues, and enable the public both to scrutinise historic, and contribute to ongoing, policy discussions in this area. These considerations are particularly important where, as here, the matters under discussion by the Committee were of constitutional significance.

However, in order to consider the competing public interests in disclosure and the maintenance of confidentiality in this case, I have also taken into account the fact that there is already a considerable amount of material in the public domain on the decisions taken on devolution for Scotland, Wales and the English Regions. For example, all of the parliamentary debates on the Referendums Bill, the Scotland Bill and the Government of Wales Bill have been published in Hansard, and this material exposes the judgments being made by the Government when developing the many aspects of devolution policy.

I have also taken into account the fact that the decisions taken by the Committee are consistent with the public position stated by the Cabinet and by the Government ministers of the day, and that these decisions were themselves the subject of lengthy discussion and scrutiny both inside and outside Parliament at the time. Cabinet decisions, once taken, are then scrutinised through a number of long-standing mechanisms. These provide a good and fair opportunity for thorough and rigorous analysis of the Government's decision. Parliament, where appropriate, will endorse a decision of the Government, or in other cases provide detailed examination of the policy through Select Committees or the passage of legislation. In the present context it is important to recognise that the legislation proposed by government as a result of the work of the DSWR Committee was debated by Parliament and recorded in Hansard. Decisions were also communicated to the public, providing the opportunity for in-depth analysis by the media and the electorate, for example, as afforded by the

White Papers of July 1997 – *Scotland's Parliament* and *A Voice for Wales*. These White Papers, and the referendums on devolution (held on 11 September 1997 in Scotland and 18 September 1997 in Wales), also provided opportunities to the public to participate directly and determinatively in the policy-making process in respect of devolution, underlining that there are other means by which the Government's commitment to public participation is made good.

Furthermore, the public interest in public engagement with decision making does not mean it is necessarily appropriate at every stage of the decision-making process. Robust debate and candid discussion are central to the Cabinet process and our system of government. They promote effective decision-making, help to reconcile differing Ministerial views and produce better policy. For this to be achieved, the preservation of frankness and candour in the collective deliberation of policy is of paramount importance and necessarily depends on a high level of confidentiality attaching to such deliberation. A lack of confidentiality would result in watered-down discussion and as a result decision-making would be impaired – an outcome which is not in the public interest.

I am aware that at paragraph 28 of the Decision Notice the Commissioner took the view that the policy issues being discussed by DSWR were no longer live at the time of the request. In fact, this is not correct. Matters discussed in the DSWR minutes in 1997 were again being debated by the Government in 2005. These matters included the difference between the devolution settlements in Scotland and Wales and electoral systems. These examples are illustrated by, amongst other things, the work surrounding the Arbuthnott Commission and the White Paper *Better Governance for Wales*, both of which were underway in 2005. Furthermore the structure of devolution in Wales as discussed in the minutes of DSWR was a live issue of Government policy at the time of the request which led to the Government of Wales Act 2006. I consider that these matters are important in the present case. Disclosing the information requested would, in my view, have run the risk of an adverse effect on officials' and ministers' ability to conduct rigorous and candid risk assessments of their policies and programmes. It is not in the public interest for this to occur.

More importantly however, I do not consider that the impact of disclosure on Cabinet collective responsibility is diminished by the fact that the request was made in 2005, and the information requested concerned Cabinet discussions that had occurred in 1997. It is the constitutional obligation of Ministers to accept responsibility for Government decisions, and to be publicly accountable for them even if in Cabinet Committee those Ministers may have expressed a different viewpoint. The disclosure of individual and divergent Ministerial views would mean that the Government would be unable convincingly to put forward the collective decision for which all Government ministers are accountable. I am satisfied that the issues that were the subject of collective decision making in 1997 were live political issues in 2005. Disclosure of the Cabinet discussions from 1997 would inevitably have risked undermining thorough collective consideration of related issues in 2005. Accordingly my view is that disclosure of information would have been as harmful to the convention of collective Cabinet responsibility precisely because devolution issues continued to be the subject of debate in 2005.

I agree with the Commissioner's view that collective Cabinet responsibility does not represent the entirety of the public interests that are in play in the present case. However, collective responsibility is a cornerstone of our political and governmental

system. Preservation of the practice of collective government goes directly to the public interest in good governance, and its importance must be recognised in the balancing exercise required by the provisions of the Freedom of Information Act.

At paragraph 29 of his decision notice the Commissioner stated that only one member of the Committee ‘...remains active in government...’ and that ‘...only a handful remain in any way involved in politics’. The implication is that disclosure of this information would not undermine collective responsibility as those responsible for the discussion are no longer involved. I do not accept in principle or as a matter of law that the balancing decision about the public interest should be reduced to a matter of arithmetic, and whether those in fact involved in the relevant discussions were still involved at the date of the request. The need for collective Cabinet responsibility and this “space” to be preserved goes beyond the individuals involved, not least because of the strong institutional characteristics of our system with strong political parties. Ministers will be far less willing to engage in frank and open exchanges in the privacy of the Cabinet and Cabinet committee system if they face, among other things, a future risk of unjustified damage to the reputation of their party, even though they as individuals may have left politics.

In any event, the Commissioner’s statement at paragraph 29 is incorrect. At the time of the request, of those who attended the DSWR meetings, nine were members of the House of Commons and a further 14 members of the House of Lords. 15 of those were still Government Ministers.

The Commissioner further stated at paragraph 29 that he ‘...does not consider that the minutes attribute any specific opinions to any individual Minister’ and at paragraph 31 that ‘the minutes themselves do not offer much insight into the nature of the debate or the contributions of individual Ministers which would...undermine the convention’. Again, I disagree with this point. In fact a number of individuals – and indeed current Government Ministers - have comments attributed to them in the minutes. There are around a dozen issues where the Chair either summarises an agreed position following discussion during which different views had been stated by identified Ministers, or even acknowledges that the Committee cannot come to an agreed position at that time. These instances are dispersed throughout the minutes.

Of course, the weight to be attached to the considerations that I have set out will vary depending on the content and nature of the discussion and the information contained in each of the minutes. But, having assessed how those considerations apply to all of the information contained in the minutes, I have reached the view that the public interest favours withholding the information in its entirety.

Therefore, while I consider that disclosure of these minutes might have provided a degree of assistance to the public in understanding the issue of devolution in general and contributing to policy-making discussions by Government at the time of the request in October 2005, 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, having considered the Government’s policy on use of the ‘Ministerial Veto’ in section 35(1) cases, 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 simply because I disagree with the decision of the Commissioner. I also fully recognise that Parliament has not made section 35 an absolute exemption. The Government has released information other than minutes under the Freedom of Information Act in the past. Every case must be assessed on its own merits.

However, in this case, I am satisfied that the veto should be exercised, both because the balance of the public interest favoured non-disclosure, and because I am firmly of the view that disclosure of the information would prejudice seriously the maintenance of the convention of collective responsibility. I consider that, having had the benefit of the views of former and current members of the Cabinet, and having also taken into account the opinion of the Information Commissioner, I am well-placed to make this assessment.

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 in this case records considerable discussion of the substance of Government policy on devolution. It is not simply concerned with the process of decisions being taken, or the substance of a policy on a marginal issue.
2. Devolution was a key priority of the Government at the time the minutes were produced, and a matter of substantial media and public interest. Indeed, the importance of the work is evidenced by the fact that the Committee first met within a week of the General Election and fact that the intention to hold referendums on devolution was in the Queen's speech of 14 May 1997. The DSWR Committee represented the apex of Government decision-making on devolution issues, and these minutes cover the issues most central to this fundamental constitutional change;
3. Significant decisions taken by the DSWR Committee were under scrutiny in 2005. In fact some remain under active scrutiny now, including those and reviewed recently by the Calman Commission and Holtham Review. These and other issues continue to be of public debate within the context of the Government's White Paper on strengthening devolution, *Scotland's Future in the United Kingdom*, published on 25 November 2009, and the Scottish Executive's White Paper, *Your Scotland, Your Voice: a National Conversation*, published on 30 November 2009. The matters discussed at DSWR are manifestly not matters of purely historical interest and importance;
4. A number of participants, including current Government Ministers, have their respective views recorded in the minutes;
5. Of the large number of Ministers who took part in at least one of the DSWR meetings, the majority remain active in Parliament. 16 are members of the House of Commons and a further 15 members of the House of Lords. Additionally, seven Ministers are still in Government.

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 provided to the Information Commissioner and copies have been 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 power under section 53 of the Act as it relates to section 35(1) of the Act is annexed to this document.

THE RT HON. JACK STRAW MP

**LORD CHANCELLOR AND
SECRETARY OF STATE FOR JUSTICE**

10 December 2009

WRITTEN MINISTERIAL STATEMENT

MINISTRY OF JUSTICE

Freedom of Information Act

The Lord Chancellor and Secretary of State for Justice:

I have today given the Information Commissioner a certificate under section 53 of the Freedom of Information Act 2000 ('the Act'). The certificate relates to caseFS50100665 from 23 June 2009 in which, in my opinion, the Information Commissioner wrongly found that the Cabinet Office had failed to comply with section 1(1)(b) of the Act by withholding copies of the minutes of the Cabinet Ministerial Committee on Devolution to Scotland and Wales and the English Regions(DSWR) of 1997 . The consequence of my giving the Information Commissioner a certificate is that the Commissioner's decision notice ceases to have effect.

A copy of the certificate has therefore been laid before each House of Parliament. I have additionally placed a copy of the certificate and a detailed statement of the reasons for my decision in the Libraries of both Houses, the Vote Office and the Printed Paper Office.

This is only the second time this power (the 'veto') has been exercised since the Act came into force in 2005 and over that period of time central government has received approximately 160,000 non-routine requests for information. The decision to exercise the veto in this case was not taken lightly but in accordance with the Statement of Government Policy¹ on the use of the executive override as it relates to information falling within the scope of section 35(1) of the Act.

In accordance with the Policy, my conclusion rests on an assessment of the public interest in disclosure and non-disclosure of these Cabinet minutes, and of the exceptional nature of the case. Whilst the convention of collective Cabinet responsibility is only one part of the public interest test, in my view disclosure of the information in this case would put the convention at serious risk of harm. As an integral part of our system of government the maintenance of the convention is strongly in the public interest and must be given appropriate weight when deciding where the balance of the public interest lies.

Having done that, and having taken into account all of the circumstances of this case, I have concluded that the public interest falls in favour of non-disclosure and that this is an exceptional case where release would be damaging to the convention of collective responsibility and detrimental to the effective operation of Cabinet government . Consequently, this case warrants the exercise of the veto.

¹ Annexed to 'Statement of Reasons' at [http://www.justice.gov.uk/news/announcement240209a .htm](http://www.justice.gov.uk/news/announcement240209a.htm)

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.

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).

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.

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.

END



information & publishing solutions

Published by TSO (The Stationery Office) and available from:

Online

www.tsoshop.co.uk

Mail, Telephone, Fax & E-mail

TSO

PO Box 29, Norwich, NR3 1GN

Telephone orders/General enquiries: 0870 600 5522

Order through the Parliamentary Hotline Lo-Call 0845 7 023474

Fax orders: 0870 600 5533

E-mail: customer.services@tso.co.uk

Textphone: 0870 240 3701

The Parliamentary Bookshop

12 Bridge Street, Parliament Square

London SW1A 2JX

Telephone orders/General enquiries: 020 7219 3890

Fax orders: 020 7219 3866

Email: bookshop@parliament.uk

Internet: <http://www.bookshop.parliament.uk>

TSO@Blackwell and other Accredited Agents

Customers can also order publications from:

TSO Ireland

16 Arthur Street, Belfast BT1 4GD

Tel 028 9023 8451 Fax 028 9023 5401

ISBN 978-0-10-296404-2



9 780102 964042