

**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 Arbutnott 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

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.

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).

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.

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