

Freedom of Information Act 2000

**Ministerial veto on disclosure of Cabinet minutes
concerning military action against Iraq**

Information Commissioner's Report to Parliament

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

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1. Introduction

- 1.1 Section 49(2) of the Freedom of Information Act 2000 (“the Act”) provides that the Information 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 19 February 2008 the Commissioner issued a Decision Notice under section 50 of the Act ordering the Cabinet Office to disclose copies of the minutes of two Cabinet meetings at which the Attorney General’s legal advice concerning military action against Iraq was considered and discussed. That Decision Notice was subject of an appeal to the Information Tribunal. On 27 January 2009 the Tribunal – on a majority decision - upheld the Commissioner’s Decision Notice and dismissed the appeal.
- 1.3 On 23 February 2009 the Rt Hon Jack Straw MP, Secretary of State for Justice, issued a “veto” certificate under section 53(2) of the Act overruling the Information Tribunal's decision to uphold the Commissioner’s Decision Notice. 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 him or her².
- 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

¹ Section 1(1)(a)

² Section 1(1)(b)

³ Section 2

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.

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 an equal number of lay members appointed 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.

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

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 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 or her 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 27 December 2006 a request was made by Dr Christopher Lamb to the Cabinet Office for copies of Cabinet Minutes and records relating to meetings held from 7 to 17 March 2003 at which the Attorney General’s legal advice concerning military action against Iraq was considered and discussed.

3.2 The Cabinet Office responded to the request, confirming that during the period in question there were two meetings of the Cabinet, which took place on 13 March 2003 and 17 March 2003. However, the Cabinet Office refused to disclose copies of the minutes of those meetings under sections 35(1)(a) and 35(1)(b) of the Act.

3.3 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 ...”

¹¹ Section 53

¹² Section 53(2)

3.4 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.

3.5 Dr Lamb subsequently complained to the Information Commissioner's Office about the Cabinet Office's refusal to provide him with the information he had asked for.

4. The Information Commissioner's Decision

4.1 In the course of investigating this matter, the Commissioner was afforded the opportunity of inspecting the Cabinet minutes of the meetings held on 13 and 17 March 2003 ("the Minutes"). On 19 February 2008 the Commissioner issued a Decision Notice under section 50 of the Act¹³.

4.2 The Commissioner accepted that the Minutes contained information relating to the formulation or development of government policy and recorded Ministerial discussions and therefore fell within the scope of the exemptions under section 35(1)(a) and (b) of the Act. Therefore, the 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.

4.3 The Commissioner identified a number of public interest factors in favour of disclosure. These included the gravity and controversial nature of the decision to go to war against another country and the particular public interest in transparency given the controversy surrounding the Attorney General's legal advice on the legality of the military action in question. The Commissioner did not consider that the information in the public domain sufficiently enabled the public to scrutinise the manner in which the decision was taken and took the view that disclosure of the Minutes was necessary to understand that decision more fully.

¹³ http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fs_50165372.pdf

4.4 Collective Cabinet responsibility is a 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 be likely to significantly undermine that convention.

4.5 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 Minutes should therefore, subject to certain redactions, be disclosed.

5. The appeal to the Information Tribunal

5.1 On 12 June 2008 the Cabinet Office appealed against the Commissioner's Decision Notice to the Information Tribunal. The Cabinet Office also sought to rely upon section 27 of the Act¹⁴ in relation to certain parts of the Minutes.

5.2 Dr Lamb also appealed on the grounds that his request had not just been for the Minutes but also the handwritten notes from which the Minutes had been prepared ("the Notebooks"). In a preliminary decision dated 11 August 2008 the Tribunal determined that the scope of Dr Lamb's request for information did include the Notebooks as well as the Minutes.

5.3 In respect of the Notebooks, the Commissioner took the view that the information they contained fell within the scope of section 35(1)(a) and (b) of the Act and, in contrast to his position on the Minutes, the public interest in maintaining the exemption *did* outweigh the public interest in disclosure. The reasons for this were that the Minutes were a fair and accurate summary of the discussions as reflected in the Notebooks and the public interest in favour of

¹⁴ Concerning information the disclosure of which would, or would be likely to, prejudice international relations.

disclosure would be very largely met by disclosure of the Minutes themselves. The public interest in supplementing the Minutes, by disclosing the Notebooks as well as the Minutes, was a very limited one.

5.4 The issues that therefore fell to be decided by the Tribunal were whether, in respect of both the Minutes and the Notebooks, the public interest in maintaining the exemption under section 35(1)(a) and (b) of the Act outweighed the public interest in disclosure. If the Tribunal were to decide that the public interest favoured disclosure, it would then have to decide whether any parts of the Notebooks or Minutes needed to be redacted in order to protect against prejudice to international relations as provided for by the exemption under section 27 of the Act.

5.5 The appeal was heard at an oral hearing over three days on 25-27 November 2008. A significant amount of evidence and legal argument was heard by the Tribunal over the course of the hearing.

5.6 The Cabinet Office filed witness statements by Sir Gus O'Donnell, the Cabinet Secretary; Sir Peter Ricketts, Permanent Under Secretary for the FCO; and Lord Hurd of Westwell. Both Sir Gus O'Donnell and Sir Peter Ricketts were cross examined during the hearing and answered questions from the Tribunal. Professor Peter Hennessy, an historian of British government, constitution and politics and a former Whitehall correspondent, gave evidence in support of the case for disclosure and he also was cross examined and answered questions from the Tribunal.

6. The Tribunal's decision

6.1 In a decision promulgated on 27 January 2009, the Tribunal upheld the Commissioner's Decision Notice dated 19 February 2008 and dismissed the Cabinet Office's appeal, although varying slightly the scope of the redactions to be made to the Minutes to protect international relations. The Tribunal also dismissed the appeal by Dr Lamb seeking disclosure of the Notebooks.

- 6.2 The Tribunal reached its decision on the Cabinet Office's appeal by a majority of two to one. It stressed that it had reached its decision "not without difficulty". The Tribunal considered that there was a strong public interest in maintaining the confidentiality of information relating to the formulation of government policy or Ministerial communications (including in particular the maintenance of the long standing convention of collective Cabinet responsibility). However, the Tribunal concluded that this was "an exceptional case, the circumstances of which brought together a combination of factors that were so important that, in combination, they created very powerful public interest reasons why disclosure was in the public interest. It was this that led the majority of the panel to conclude that they were at least equal to those in favour of maintaining the exemption and that, subject to certain redactions designed to avoid unnecessary risk to the UK's international relations, the minutes should be disclosed".
- 6.3 The decision that the public interest balance lay in withholding the Notebooks was unanimous.
- 6.4 In a press statement issued at the time, the Commissioner welcomed the Tribunal's decision and agreed (as he had stated explicitly in the Decision Notice) that the disclosure of these Minutes did not necessarily set a precedent in respect of other Cabinet minutes.

7. The veto

- 7.1 The Cabinet Office did not appeal the Tribunal's decision to the High Court on a point of law under section 59 of the Act.
- 7.2 However, on 23 February 2009 the Rt Hon Jack Straw MP, Secretary of State for Justice, issued a certificate under section 53 of the Act, overruling the Information Tribunal's decision of 27 January 2009¹⁵. The effect of that certificate is that the Minutes are not required to be disclosed.

¹⁵ <http://www.justice.gov.uk/news/docs/foi-certificate-section53-foi-act-2000.pdf>

- 7.3 The certificate confirmed that the Justice Secretary took the view that the public interest favoured the continued non-disclosure of the Minutes and therefore that there was no failure by the Cabinet Office to comply with its duty to disclose information on request.
- 7.4 The reasons for deciding to exercise the veto in this case were set out in a separate statement of reasons¹⁶. In those reasons the Justice Secretary accepted that the decision to send UK armed forces into Iraq was one of utmost gravity and was extremely controversial but did not consider that it followed that the public interest favoured disclosure of the Minutes. He considered the potential dangers to collective responsibility and good government that would arise from disclosure of the Minutes to be particularly pressing, more so where in his view there was a substantial amount of information in the public domain about the decision to take military action. The Justice Secretary made it clear that this was an exceptional case where in his opinion disclosure would be damaging to the doctrine of collective responsibility.
- 7.5 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 reasons¹⁷. Specifically, the policy relates to the use of the veto in respect of information that engages the operation of the 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.
- 7.6 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.

¹⁶ <http://www.justice.gov.uk/news/docs/foi-statement-reasons.pdf>

¹⁷ *ibid*

7.7 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. The Commissioner notes and welcomes the assurance given that the government will not routinely agree the use of the veto simply because it considers the public interest in withholding the information outweighs the public interest in disclosure.

7.8 In a statement issued on 24 February 2009 the Justice Secretary stated –

”The conclusion I have reached has rested on the assessment of the public interest in disclosure and in non-disclosure of these Cabinet minutes. I have placed a copy of that certificate and a detailed statement of the reasons for my decision in the Libraries of both Houses. I have also published today the criteria against which I decided to exercise the veto in this case.

To permit the Tribunal's view of the public interest to prevail would risk serious damage to Cabinet government, an essential principle of British Parliamentary democracy. That eventuality is not in the public interest.”

7.9 The certificate, statement of reasons, the Justice Secretary's statement to the House of Commons and the policy for the exercise of the veto are included at annex 2 to this report.

8. The Information Commissioner's response

8.1 The Commissioner issued a press statement on 24 February 2009. In that statement the Commissioner expressed his view that it was vital that a certificate should only be issued under section 53 of the Act in exceptional cases and that any greater use would threaten to undermine much of the

progress made towards greater openness and transparency in government since the Act came into force. The Commissioner remains strongly of this view.

8.2 The Commissioner also confirmed that, in light of previous commitments he had made and the interest shown by past Select Committees in the use of the veto, he intended to lay a report before Parliament under section 49(2) of the Act, this being that report.

8.3 This is the first occasion on which the veto has been exercised. In the circumstances the Commissioner considered that it would be appropriate to obtain legal advice on the prospects of successfully challenging the Justice Secretary's certificate by way of an application for judicial review or otherwise.

8.4 The advice received by the Commissioner was that:

(a) the only possible route for challenging the certificate would be by way of an application for judicial review;

(b) the decision to issue the certificate is the kind of decision that is amenable to judicial review and the Commissioner would have standing to bring a claim; but

(c) in this case, a claim for judicial review would not have reasonable prospects of success.

8.5 A copy of the written advice received by the Commissioner is included at annex 1 of this report.

8.6 In summary, the Commissioner was advised that the main potential grounds for a challenge to the issuing of a certificate under section 53 of the Act would be that the accountable person (i) had no reasonable grounds for his opinion; (ii) failed to direct his mind to the question whether there was a breach of the duty to disclose under the Act; (iii) misinterpreted the Act; or (iv) departed without good reason from a general policy on how the veto would be exercised.

8.7 The advice received by the Commissioner is that there are no reasonable prospects of success in establishing any of these grounds in this case.

8.8 In light of the advice he has received, the Commissioner does not intend on taking any further legal or other action in relation to this matter. The Commissioner considers that this report is now the end of his formal involvement with this case.

9. Conclusion

9.1 This case attracted considerable publicity and controversy at all its various stages. Almost an hour's debate in the House of Commons followed the Justice Secretary's statement about his veto certificate¹⁸. Although the circumstances of this case are well-known, the Commissioner has nevertheless decided that it is right to prepare this report and lay it before Parliament. This fulfils his commitment to respond in this way every time that such a certificate is served. This underlines the view of both the Commissioner and the Justice Secretary that any such certificate should be exceptional. The Commissioner is also mindful that less may be known about any future cases and it is therefore important to establish this precedent. Finally, he considers that it right that this report should place into the public domain the legal advice that he has received about his entitlement to challenge a veto certificate by way of judicial review and the potential grounds for such a challenge.

Richard Thomas
Information Commissioner
June 2009

¹⁸ <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090224/debtext/90224-0006.htm>

Annex 1

Counsel's opinion on the prospects of successfully challenging the veto

IN THE MATTER OF SECTION 53
OF THE FREEDOM OF INFORMATION ACT 2000

AND IN THE MATTER OF A CERTIFICATE ISSUED
BY THE SECRETARY OF STATE
DATED 23rd FEBRUARY 2009

ADVICE

Issues raised in my instructions

1. On 19th February 2008 the Information Commissioner issued a decision notice¹⁹ requiring disclosure of Cabinet Minutes for 13th and 17th March 2003 (subject to certain redactions), insofar as they related to the decision to go to war in Iraq.

2. The Cabinet Office appealed to the Information Tribunal. The requester also appealed, arguing that the Commissioner ought to have required the disclosure of additional material as well as the Minutes themselves. On 27th January 2009 the Information Tribunal dismissed both appeals (although varying the scope of the redactions), unanimously in the case of the requester, and by a 2-1 majority in the case of the Cabinet Office: EA/2008/0024 and 0029²⁰. I represented the Commissioner at the hearing of the appeal.

¹⁹ See http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fs_50165372.pdf

²⁰ See [http://www.informationtribunal.gov.uk/DBFiles/Decision/i288/Cabinet%20Office%20v%20IC%20&%20C%20Lamb%20\(EA-2008-0024,29\)%20-%20Decision%2027-01-09.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i288/Cabinet%20Office%20v%20IC%20&%20C%20Lamb%20(EA-2008-0024,29)%20-%20Decision%2027-01-09.pdf)

3. On 23rd February 2009 the Rt Hon Jack Straw MP, Secretary of State for Justice, issued a certificate under section 53(2) of the Freedom of Information Act 2000 (FOIA). The practical effect of the certificate was to overrule the Tribunal's decision.
4. The following relevant material is available online:
 - The certificate itself, dated 23rd February 2009: <http://www.justice.gov.uk/foi-certificate-section53-foi-act-2000.pdf>
 - a written statement of reasons for issuing the certificate, also dated 23rd February 2009: <http://www.justice.gov.uk/foi-statement-reasons.pdf>
 - annexed to the written statement, a statement of HMG policy in relation to the use of the veto under section 53 in respect of information falling within section 35(1) of FOIA; and
 - the Minister's statement in the House of Commons on 24th February 2009: <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090224/debtext/90224-0004.htm#09022444000162>
5. By instructions dated 4th March 2009, I am asked to advise the Commissioner in writing on the prospects of successfully challenging the section 53 certificate, by way of an application for judicial review or otherwise.

Advice

6. In my view:
 - the only possible route for challenging the certificate would be by way of an application for judicial review;
 - the decision to issue the certificate is the kind of decision that is amenable to judicial review, and the Commissioner would have standing to bring a claim; but
 - a claim for judicial review would not have reasonable prospects of success.

7. Section 53 applies to a decision notice or enforcement notice served on (*inter alia*) a Government department, and relating to a failure to comply with section 1(1)(a) or (b) of FOIA in relation to exempt information: see section 53(1)(b). Under FOIA the term “exempt information” covers both information that is absolutely exempt, and information that falls within the scope of a qualified exemption: see FOIA section 2(2). Thus one of the situations in which section 53 applies is where the Commissioner’s decision notice accepts that a qualified exemption is engaged, but concludes that the public interest in maintaining the exemption does not outweigh the public interest in disclosure.
8. By section 53(2), a decision notice or enforcement notice to which the section applies shall cease to have effect if, not later than the twentieth working day following the “effective date”, the “accountable person” in relation to the public authority in question gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure falling within subsection 53(1)(b).
9. The “effective date” means the day on which the notice was given to the public authority, or (where there is an appeal to the Tribunal) the day on which the appeal (or any further appeal arising out of it) is determined or withdrawn: section 53(4).
10. In relation to a decision notice served on a Government department, any Minister of the Crown who is a member of the Cabinet can be the “accountable person”: see section 53(8)(c)(i).
11. There is no provision for any statutory appeal against the decision to issue a certificate under section 53(2). Hence the only possible route for challenge would be by way of a claim for judicial review, governed by Part 54 of the Civil Procedure Rules. Judicial review is available to review the lawfulness of a decision, action or failure to act in relation to the exercise of a public function: CPR 54.1(2)(a)(ii). In my view the decision to issue a certificate under FOIA section 53(2) clearly involves the exercise of a public function. In order to have standing to bring a claim for judicial review, the claimant must have “sufficient interest” in the matter to which the application relates: Supreme Court Act 1981 section 31(3). I have no doubt that

the Commissioner would have sufficient interest in the present case, both because the practical effect of the certificate is to overrule his decision, and, more generally, because of his statutory role under FOIA to enforce compliance with the Act.

12. In relation to the merits of any challenge to a certificate under section 53(2), there are a number of preliminary points to make. First, the section clearly allows the accountable person to reach his own view as to whether or not there has been a failure to comply with the duty to disclose under FOIA section 1(1)(b). That would mean that, in a case where a qualified exemption was engaged, the accountable person could reach his own view as to whether the public interest in favour of maintaining the exemption outweighed the public interest in favour of disclosure. In other words the accountable person can issue a certificate if he disagrees with the Commissioner or the Tribunal on the application of the public interest test. He does not have to conclude that the Commissioner or the Tribunal have reached an unreasonable conclusion. Secondly, it is clearly open to the accountable person to issue a certificate: (i) after the Commissioner's decision notice; or (ii) after a Tribunal decision; or (iii) after any High Court or further appeal from the Tribunal: see section 53(4). It is therefore open to the Government (as has been done here) to appeal to the Information Tribunal and then to issue a certificate under section 53(2) if the appeal is unsuccessful. The fact that an appeal has been brought, and has failed, is no bar to the issue of a certificate under section 53(2). Nor is there any requirement to pursue a further appeal from the Tribunal to the High Court before deciding whether to issue a certificate under section 53(2).

13. The constraints on the issue of the certificate are essentially these.

- The accountable person must certify that his opinion has been formed *on reasonable grounds*. In my view this entitles the Court on an application for judicial review to consider whether there are reasonable grounds for the accountable person's view, and if not to quash the certificate.
- The accountable person's opinion must be as to whether there was a breach of the duty to disclose under section 1(1)(b) of the Act. The accountable person cannot issue a certificate merely because he considers that disclosure would be

undesirable: he must apply his mind to the question whether there is a duty to disclose under the Act.

- Hence the accountable person must direct himself properly in law as to the meaning of the Act. For instance, if the accountable person in forming his opinion treated a qualified exemption as if it was an absolute exemption, then this would be an error of law and the certificate could be quashed.
- Finally, if a policy has been adopted as to the way in which the section 53 power will be exercised, then a departure from that policy without good reason could potentially give rise to a successful claim for judicial review, on the basis that the accountable person had acted in breach of the legitimate expectations to which the policy gave rise.

14. Hence the main potential grounds for a successful judicial review application are that the accountable person: (i) had no reasonable grounds for his opinion; (ii) failed to direct his mind to the question whether there was a breach of the duty to disclose under the Act; (iii) misinterpreted the Act; or (iv) departed without good reason from any previously adopted general policy as to how the section 53 power would be exercised. I do not see any reasonable prospects of success in establishing any of these grounds in the present case.

15. As far as the question of reasonable grounds is concerned, the Cabinet Minutes are undoubtedly exempt information falling within section 35(1)(a) and (b) of FOIA, as the Commissioner accepted in his decision notice. The only question is as to the application of the public interest test. Essentially this involves balancing: (i) the interest in maintaining confidentiality in relation to policy formulation and Ministerial deliberations, and in maintaining the convention of collective Cabinet responsibility; against (ii) the interest in the public being fully informed about the circumstances leading to a decision to go to war.

16. The Tribunal reached their conclusion “not without difficulty”, and by a majority (paragraph 1). The majority accepted that there was a strong argument for maintaining the section 35 exemption, but considered that the public interest factors in favour of disclosure were very compelling (paragraph 79). The minority member

considered that even in the exceptional circumstances of this case the public interest in favour of maintaining the exemption was stronger (paragraphs 83-92).

17. The basis for the Ministerial certificate, as set out in the statement of reasons, was that the public interest in maintaining the exemption outweighed the public interest in disclosure. In my view it cannot be said that this is an unreasonable view for the Minister to have reached. The Tribunal had referred to the gravity of the decision to go to war in Iraq, as being a factor favouring disclosure. The Secretary of State's response to this, in the reasons for his certificate, was that the intrinsic importance of the decision made it all the more important to maintain Cabinet confidentiality. I do not consider that either the Tribunal's view, or the view taken in the certificate, can be characterised as intrinsically unreasonable. In my view there is no realistic prospect of persuading the court that the Minister reached an unreasonable view. In particular, the fact that the Tribunal clearly found this a difficult matter, and upheld the Commissioner's decision notice only by a majority, would make it particularly unlikely that the court would regard the Minister's decision as intrinsically unreasonable.
18. In relation to the second of the four points identified at paragraph 14 above, it would certainly be possible to pick out isolated passages in the reasons for the certificate, and to criticise them as not reflecting the precise language of FOIA. I do not consider that the Court would approach the certificate in this way. Looking at it as a whole, the Minister was clearly considering whether or not there was duty to disclose the requested information under FOIA. His conclusion was that there was not, *and* in addition that there were compelling circumstances justifying the exercise of the veto in this case. In my view there is no realistic prospect of persuading a court that the Minister asked himself the wrong question, by failing to focus on whether there was a duty to disclose the information under FOIA.
19. In relation to the third point, I cannot see any self-misdirection of law in the Minister's certificate. The certificate clearly recognises that the section 35 exemption is qualified, not absolute. It considers the strength of the public interest in disclosure. It takes the view that the public interest is reduced because of the volume of material that has already been put into the public domain about the

decision to go to war in Iraq. While it is debatable whether on the facts of the case this view is correct, I do not consider that it involves any error of law.

20. In relation to the fourth point the policy as to exercise of the veto is set out in an annex to the reasons for the certificate. The policy as stated was that the veto power would only be exercised in exceptional circumstances and following consultation with Cabinet. The statement of reasons makes it clear that there has been such consultation, and also gives reasons why the present case is thought to be exceptional. I do not consider there is any realistic prospect of successfully arguing that the certificate was issued contrary to or in disregard of Government policy as to the exercise of the section 53 veto.
21. Finally, could it be said that the certificate was unlawful because Jack Straw, the Minister in question, had a personal interest as being one of the members of the Cabinet in March 2003? I do not consider that this argument has a reasonable prospect of success either. Issuing the certificate is not a judicial function and is not therefore subject to the same rules as to the avoidance of actual or apparent bias. In any event, the opinion set out in the certificate is not the opinion of Jack Straw alone, but is the collective opinion of the entire Cabinet.

Conclusion

22. For the reasons given, I do not consider that a claim for judicial review in relation to the section 53(2) certificate would have any reasonable prospects of success.
23. The result is that the Secretary of State can effectively overturn the decision of the Commissioner and the Tribunal. This is a serious incursion on the decision-making mechanism set up by FOIA, but the possibility of an outcome of this kind is inherent in the existence of the section 53(2) power. There is a strong argument that it is undesirable for the Act to include a power of executive veto, but this is of course a matter for Parliament and not for the courts. There may also be questions as to whether the exercise of the section 53(2) power in the present case was desirable in policy terms, or politically expedient: these are not questions for the courts either. The only issue is whether there are reasonable prospects of establishing that the

Secretary of State acted unlawfully in issuing the certificate; for the reasons explained above, I consider that the answer is no.

24. I would be very happy to assist further if so instructed.

11KBW

Temple

TIMOTHY PITT-PAYNE

9th April 2009



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