



Ministry of
JUSTICE

STATEMENT OF HMG POLICY

**Use of the executive override under the
Freedom of Information Act 2000 as it relates to
information falling within the scope of
Section 35(1)**

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BACKGROUND

The Freedom of Information Act 2000 (“the Act”) contains a provision in section 53 for an ‘accountable person’ to issue a certificate overriding a decision of the Information Commissioner or the Information Tribunal ordering the disclosure of information (the “veto”). The effect of the certificate under this policy is that, in cases concerned with information falling within the scope of section 35(1), the accountable person can substitute his or her view for that of the Commissioner or the Tribunal as to where the balance of the public interest in disclosure lies in a particular case.

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

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

The Government considers that the veto should only be used in exceptional circumstances and only following a collective decision of the Cabinet. This policy is in line with the commitment made by the previous administration during the passage of the Freedom of Information Bill that the veto power would only be used in exceptional circumstances, and only then following collective Cabinet agreement:

“I do not believe that there will be many occasions when a Cabinet Minister – with or without the backing of his colleagues – will have to explain to the House or publicly, as necessary, why he decided to require

information to be held back which the commissioner said should be made available.”¹

In agreeing that the provision should stand as part of the Act, Parliament clearly envisaged certain circumstances in which a senior member of the Executive would be the final arbiter of whether information should be disclosed, subject to judicial review by the courts.

Section 35(1)(b) of the Act exempts information from disclosure when it relates to ‘Ministerial Communications’. Section 35 is a qualified exemption, that is to say, its operation is subject to a public interest test.

This policy statement relates only to the exercise of the veto in respect of information that relates to the operation of the principle of collective responsibility. It does not apply to all information that passes to and from Ministers, for example.

This policy statement – though limited in scope – does not preclude consideration of the veto in respect of other types of information. However, in accordance with our overarching commitment to use the power only in exceptional cases, such consideration would be preceded by a collective Cabinet view on whether it might be appropriate to exercise the veto in a given case. In making his or her decision, the Cabinet Minister or Attorney General (acting as the accountable person) would be entitled to place great weight on the collective assessment of Cabinet in deciding whether or not to actually exercise the veto.

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

REASONING

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

¹ **Rt Hon Jack Straw MP**, then Secretary of State for the Home Department (*Hansard*, 4 April 2000, columns 918-23). Cf. **The Rt Hon the Lord Falconer of Thoroton**, (*Hansard*, 25th October 2000, columns 441-43).

interests with their collective responsibilities. The fact that any Minister requires the collective consent of other Ministers to speak on behalf of Government is an essential safeguard of the legitimacy of Government decisions. This constitutional convention serves very strong public interests connected with the effective governance of the country.

Our constitutional arrangements help to ensure that the differing views from Ministers – which may arise as a result of departmental priorities, their own personal opinions, or other factors – are reconciled in a coherent set of Government decisions which all Ministers have a duty to support in Parliament and beyond.

Cabinet Committee business, sub-Committee business, and Ministerial correspondence are all subject to the same principles of collective responsibility. These points are reflected in paragraph 2.1 of the Ministerial Code:

“The principle of collective responsibility, save where it is explicitly set aside, requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial committees, including in correspondence, should be maintained.”

The risk from premature disclosure of this type of information is that it could ultimately destroy the principle and practice whereby Ministers are free to dissent, put their competing views, and reach a collective decision. It is therefore a risk to effective Government and good decision-making regardless of the political colour of an administration.

The Government recognises that the public interest against the disclosure of much material covered by collective responsibility will often be strong, but that the scheme of the Act does not make protection absolute. Accordingly, the drafting of the section 35 exemption reflects Parliament’s intention that in some circumstances, the public interest in relation to information covered by it may fall in favour of release. So in particular cases the public interest in favour of the disclosure of material covered by collective responsibility may prevail.

The Act has been in force since 1 January 2005. During that period, a significant number of requests for information relating to ministerial communications have been received and the information released without dispute. In other cases, where an initial request has been refused, a subsequent decision of the Information Commissioner or Information Tribunal to release has been accepted without further contest.

The importance of this practice is that by these actions it is acknowledged that each section 35 case must be considered on its individual merits. Cabinet committee correspondence from the mid-1980s was released in 2006 when the Department for Children, Schools and Families withdrew an appeal to the Tribunal in relation to information relating to corporal punishment. The Cabinet Office also released Cabinet minutes from 1986 relating to the Westland Affair following a decision by the Information Tribunal in 2010.

Therefore, the Government has agreed that the following criteria will be used to govern the exercise of the veto in collective responsibility cases. The Government will apply the criteria on a case-by-case basis, by reference to all the relevant circumstances of each case.

CRITERIA

The exercise of the veto would involve two analytical steps. It must first be considered whether the public interest in withholding information outweighs the public interest in disclosure. Only if this test is satisfied can it then be considered whether the instant case warrants exercise of the veto. The Government will not routinely agree the use of the executive override simply because it considers the public interest in withholding the information outweighs the public interest in disclosure.

The criteria below apply only when the first step has been satisfied. The three headline paragraphs – (a) to (c) below – articulate the policy by setting out the situation in which the Government will consider the use of the veto. In this respect, point (c) is particularly important, as it is only by giving full regard to the arguments for and against disclosure that a sustainable view of the public interest balance can be arrived at.

In addition to the set criteria we are also proposing a list of potentially relevant considerations – listed (i) to (vii) below – that

will in all cases be considered in arriving at a final decision. Not all will carry weight in every case. Some may carry none. But consideration of each one in each case can inform the key decision reached in respect of the headline criteria.

Guiding principles

The focus of this policy is section 35(1) of the Act;

- The government has no fixed view on when the use of the veto power would be appropriate, but sees its use as the exception rather than the rule in dealing with requests for government information;
- Use of the power would be considered in all the circumstances of each/any case and may develop over time in the light of experience;
- The government has committed to consider any decision on the exercise of the veto collectively in Cabinet; and
- It will not routinely use the power under section 53 simply because it considers the public interest in withholding the information outweighs that in disclosure.

Criteria for determining what constitutes an exceptional case

At present, the Government is minded to consider the use of section 53 if, in the judgement of the Cabinet:

- a) release of the information would damage Cabinet Government; and/or
- b) it would damage the constitutional doctrine of collective responsibility; and
- c) The public interest in release, taking account as appropriate of information in the public domain, is outweighed by the public interest in good Cabinet Government and/or the maintenance of collective responsibility.

In deciding whether the veto should be exercised the Cabinet will have:

- Reviewed the information in question (or the key documents and/or a representative sample of the information if voluminous); (In the case of papers of a previous administration the Attorney General will review the documents and brief the Cabinet accordingly), and;
- Taken account of relevant matters including, in particular, the following:
 - i) whether the information reveals the substance of policy discussion within Government or merely refers to the process for such discussion;
 - ii) whether the issue was at the time a significant matter, as evidenced by for example the nature of the engagement of Ministers in its resolution or any significant public comment the decision attracted;
 - iii) whether the issue remains significant (or would become so if the documents were released) or has been overtaken by time or events;
 - iv) the extent to which views of different Ministers are identifiable;
 - v) whether the Ministers engaged at the time remain active in public life;
 - vi) the views of the Ministers engaged at the time, especially the views of former Ministers (or the Opposition) if the documents are papers of a previous administration and thus covered by the commitment to consult the Opposition;
 - vii) whether any other exemptions apply to the information being considered that may affect the balance of the public interest.

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

END