

Subject matter: Formulation or development of government policy s.35(1)(a)
Ministerial Communications s.35(1)(b)
International relations s.27
Public interest test s.2

Cases: AG v Jonathan Cape [1976] QB 752
Export Credits Guarantee Department v Friends of the Earth [2008] EWHC 638 (Admin)
Office of Government Commerce v Information Commissioner [2008] EWHC 737 (Admin)
Babcock v Canada (Attorney General) [2002] S.C.C. 57.
Re J R Porter MP and Department of Community Services and Health [1988] AATA 85

Representation:

For the Cabinet Office: Jonathan Swift
For the Information Commissioner: Timothy Pitt-Payne
Dr Lamb did not appear and was not represented.

Decision

The Tribunal upholds the decision notice dated 19 February 2008 and dismisses the appeal by the Cabinet Office against the Information Commissioner's direction to disclose (subject to the redactions specified) the Minutes for the Cabinet Meetings that took place on 13th and 17th March 2003.

The Tribunal dismisses the appeal by Dr Lamb seeking disclosure of the other records of the Cabinet Meetings that took place on 13th and 17th March 2003, as identified in its preliminary decision dated 11 August 2008.

Reasons for Decision

Introduction

1. We have decided that the public interest in maintaining the confidentiality of the formal minutes of two Cabinet meetings at which Ministers decided to commit forces to military action in Iraq did not, at the time when the Cabinet Office refused a request for disclosure in April 2007, outweigh the public interest in disclosure. We have reached that decision by a majority and not without difficulty. We concluded 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 cabinet collective responsibility). However, this is 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.
2. We have decided, unanimously, that the public interest in maintaining the confidentiality of certain informal notes taken during the same Cabinet Meetings did outweigh the public interest in their disclosure. They are therefore not to be disclosed at all and, of course, no question of redaction therefore arises in respect of that information

Background

3. On 11 August 2008 we promulgated a decision on a preliminary issue arising in this Appeal. It determined that the scope of Dr Lamb's original request for information, on which this Appeal is based, included informal records of the discussions and deliberations which took place during meetings of the Cabinet on 13th and 17th March 2003 ("the Additional Material"), as well as the formal minutes of those meetings. In that decision we related the history of the request, the complaint to the Information Commissioner by Dr Lamb in respect of its rejection by the Cabinet Office and the separate Appeals to this Tribunal by Dr Lamb and the Cabinet Office. We will not repeat the detail in this Decision but we adopt the same definitions as we used before.

The Conduct of the Appeal

4. Following promulgation of the Preliminary Decision the Cabinet Office traced certain manuscript notes made by officials who were in attendance at the two Cabinet meetings in question and made them available for the Information Commissioner's inspection. The Parties then filed and exchanged written submissions on the Additional Material. The Cabinet Office maintained that both the Minutes and the Additional Material fell within the exemption provided by FOIA section 35(1)(a) and (b), and that the public interest in maintaining that exemption outweighed the public interest in disclosure. The relevant part of that section is as follows:

"(1) Information held by a government department ...is exempt information if it relates to –

(a) the formulation or development of government policy,

(b) Ministerial communications..."

5. The Cabinet Office also argued (again in relation to both the Minutes and the Additional Material) that, unless certain parts were redacted, disclosure would, or would be likely to, prejudice the relations between the United Kingdom and other States so that the exemption provided for under FOIA section 27 required to be considered. The relevant part of that section is as follows:

"(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

(a)relations between the United Kingdom and any other State ..."

The Cabinet Office acknowledged that some redactions had been proposed by the Information Commissioner in his Decision Notice, but argued that these were not sufficient to avoid the risk of prejudice so that, were we to decide against it on its primary case under section 35, further redactions should be made pursuant to section 27.

6. We should add that FOIA section 2(3) has the effect of designating both the sections 35 and 27 exemptions as qualified exemptions. The result is that the obligation of the Cabinet Office to disclose the information in question did not apply unless (pursuant to section 2(2)(b)) *"in all the circumstances of the case, the public interest in maintaining the exemption outweigh[ed] the public interest in disclosing the information"*. The balancing exercise required by that sub-section should be carried out as at the date when the request for information was refused. The date when the refusal took effect, at the conclusion of the internal review procedure described in paragraph 7 of the Preliminary Decision, was 12 April 2007.
7. In his submission the Information Commissioner stated that he was satisfied that, although the Additional Material fell within the scope of FOIA section 35(1)(a) and (b), the public interest in maintaining the exemption set out in those provisions outweighed the public interest in disclosure. The basis for that concession was said to be that disclosure would add little of substance or value to the information contained in the Minutes themselves, which appeared to be a fair and accurate summary of the discussions at the two meetings, and that the public interest in maintaining confidentiality of the informal notes comprising the Additional Information was considerably stronger than in relation to the Minutes. He maintained his stance that the public interest in maintaining the exemption in respect of the Minutes did not outweigh the public interest in disclosure.
8. Dr Lamb (who, of course, was not given an opportunity to inspect the Additional Material) stated in his submission that he had no reason to doubt the Information Commissioner's assessment that the Additional Material did not contain significant

new information. However, he suggested that if this was the case it might suggest that there had been only limited discussion of the important issues that were decided during the two Cabinet meetings and that there was therefore a strong public interest in disclosure of the Additional Material as it would enable the public to make its own assessment of the performance of their duties by Cabinet Ministers on those occasions. On this basis he indicated that, notwithstanding the Information Commissioner's concession, he wished to pursue his appeal, although he did not intend to appear in person at the hearing. He therefore filed further written submissions on 22nd October 2008, 14th November 2008 and 24th November 2008, all of which we took into account both during the hearing and in our subsequent deliberations.

9. We should add that Dr Lamb also expressed the hope that a decision might help to clarify wider issues regarding the limits of Cabinet collective responsibility but these fell outside our jurisdiction.

10. The Appeal was heard on 25th, 26th and 27th November 2008. The Cabinet Office filed Witness Statements by:

- (a) Sir Gus O'Donnell, the Cabinet Secretary, whose evidence provided background information about the operation of the Cabinet, the impact that disclosure might have on the frankness of its discussion in the future and the public interest in disclosure, which he considered to be limited;
- (b) Sir Peter Ricketts, the Permanent Under-Secretary at the Foreign and Commonwealth Office who dealt principally with the potential impact of disclosure on international relations; and
- (c) Lord Hurd of Westwell, the former Home Secretary and Foreign Secretary, who gave his opinion on the potential impact of disclosure on the convention of collective responsibility and the processes of good government.

Both Sir Gus O'Donnell and Sir Peter Ricketts were cross examined during the Hearing and answered questions from the panel. Lord Hurd did not appear, but his

written evidence was nevertheless taken into account without objection from the Information Commissioner.

11. The Information Commissioner filed a Witness Statement by Professor Peter Hennessy an historian of British government, constitution and politics and a former Whitehall correspondent. His evidence dealt with the historical context and significance of the decision made during the relevant meetings and his opinion on the public interest in having the relevant minutes made available. Professor Hennessy also submitted himself to cross examination at the hearing and answered questions put to him by the panel.
12. Some parts of the evidence expressed opinions on where the public interest balance should lie. Although that balancing exercise constitutes the ultimate question that should be left for the Tribunal to decide, the evidence of all the witnesses was on the whole helpful in identifying the public interests for and against disclosure. Those of the witnesses who attended the hearing gave balanced evidence which we have found helpful in reaching our decision and we are grateful to them for their time and care.
13. We were provided, in confidence, with copies of the Minutes and of transcripts of the Additional Material. In order to preserve confidentiality of that and parts of the evidence we conducted parts of the Hearing (including some parts of the witness cross-examination) in closed session.

The questions for the Tribunal

14. As it is conceded that the exemptions provided by sections 27 and 35 are both engaged the only issues we have to decide, in respect of both the Minutes and the Additional Material, are:
 - i. Does the public interest in maintaining the section 35 exemption outweigh the public interest in disclosure; and, if it does not,
 - ii. What redactions, if any, should be made in order that the resulting disclosure would either not be likely to prejudice international relations (so that the section 27 exemption would not come into play) or would

so reduce the risk that the public interest in maintaining the exemption did not outweigh the public interest in disclosure?

15. The approach we take to these issues is governed by FOIA section 58, under which we may allow an appeal and/or issue a substituted Decision Notice if we think that the Decision Notice is not in accordance with the law or, to the extent that it involved an exercise of discretion by the Information Commissioner, we think that the discretion ought to have been exercised differently. We have an express power to review any finding of fact on which the Decision Notice was based. In the present case we received a considerable body of evidence that had not been before the Information Commissioner when he made the decision appealed against. Part of that evidence, presented through both the Witness Statements and an agreed bundle of documents, dealt with the events and circumstances prior to the two meetings in question and some of the procedures by which the decision made at the second of them, as well as the overall decision-making process, have subsequently been assessed. In order to put the rest of our decision in context we summarise that evidence in the following paragraphs.

Historical Context

16. The question of Iraq's compliance with UN requirements to restore international peace and security following the 1990 invasion of Kuwait had been a continuing source of concern within the international community for several years prior to 2003. A number of resolutions were passed by the UN Security Council, most notably Security Council resolution 678 (29 November 1990) which authorised member states "to use all necessary means to uphold and implement resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area." Resolution 687 was passed following the ceasefire in the first Gulf War. It set out steps required by the Security Council to restore international peace and security in the area. It suspended, but in the view of the UK and US did not terminate, the authority to use force in resolution 678. Thirteen subsequent resolutions reaffirmed the continuation of inspections of Iraq's weapons systems, or cited its failure to comply with them in full.

17. On 8 November 2002 the UN Security Council passed resolution 1441. This required Iraq to provide full information about its weapons programme and to enable UN inspectors to have access to its facilities. It went on to declare that failure to comply would be a material breach of its obligations and that any breach of this or previous resolutions would be reported to the Security Council. The Security Council would then convene "to consider the situation and the need for full compliance" on the basis that Iraq would face serious consequences for any violations.
18. In early 2003, the US, UK and Spain proposed a further resolution, sometimes called an eighteenth resolution, to give Iraq a deadline for compliance with earlier resolutions and to reinforce this with authority for military action. This remained the preferred course of the UK government until it became clear that the required international support for the proposed resolution was not forthcoming. In the absence of a further resolution, questions arose as to whether there was evidence of continuing non compliance with past resolutions, and, if so, whether resolution 1441 was capable in principle of reviving the authorisation to use force set out in resolution 678 without a further *decision* (as opposed to *discussion*) by the Security Council. This became known as "the revival argument".
19. During the same period of time the Attorney General was considering the advice that he should give to the Government on the issue. On 27 February 2003 the Attorney General informed the Prime Minister's Chief of Staff, and other advisers, of his conclusions and was asked to put his views in writing. He did this in the form of an opinion dated 7 March 2003 ("the 7 March Opinion"). This set out the same justification for military action as was subsequently set out in the opinion dated 17 March 2007 ("the 17 March Opinion") referred to in paragraph 22 below, but it also included commentary on certain legal risks, reservations or possible counter-arguments, which did not appear in the later document, and also suggested what further steps might be taken to strengthen the legal position.
20. In the days following the delivery of the 7 March Opinion it became clear that negotiations for a further UN Security Council resolution would not succeed and that if the UK was to become involved in any military action the Armed Forces and the

Civil Service would need an unambiguous statement as to the legality of the proposed legal action.

21. On 13 March 2003 the Cabinet met and considered the state of negotiations. It was informed that, in the event that it proved impossible to secure a further resolution, a special Cabinet meeting would be convened to consider the decision to take military action without it, including the legality of such action. At this meeting two Ministers, Robin Cook and Ms Clare Short appear to have indicated their concerns about, or objections to, any decision to proceed with military action.
22. In the period between 7 and 17 March the Attorney General had reflected on his earlier opinion and concluded, having particular regard to the negotiating history of resolution 1441, that the better view of those canvassed in the 7 March Opinion was that there was a lawful basis for the use of force without a further decision of the Security Council. He then recorded that conclusion in the 17 March Opinion, having first checked with the Prime Minister that he was satisfied that there were continuing material breaches of past resolutions by Iraq.
23. The 17 March Opinion was handed to members of the Cabinet at the start of the meeting that took place on that day and the Attorney General attended the meeting for the purpose of explaining it and answering any questions. Following the decision to take action the Attorney General made a statement to the House of Lords, by way of a Written Answer, setting out his reasons, (in the same form as had been presented to the Cabinet earlier in the day), for concluding that military action was justified. This was then debated by the House of Lords. Also on the same day the Secretary of State for Foreign and Commonwealth Affairs made a statement to the House of Commons on the breakdown of attempts to secure a further resolution of the UN Security Council and a proposal for the House to debate, on the following day, a resolution in favour of military action. He confirmed that he had made available to the House a copy of the Attorney General's Written Answer in the House of Lords and a copy of a more detailed briefing paper, which he had submitted to the Chairman of the Foreign Affairs Select Committee, summarising the legal background and incorporating the conclusion that the authorisation to use force under Security Council Resolution 678 had revived. In

the course of his statement the Foreign Secretary disclosed that he had personally supported military action during the Cabinet meeting the previous day.

24. Earlier on the same day Robin Cook had resigned from the Government (with the result that he did not attend the Cabinet Meeting). That evening he made a personal statement to the House of Commons to explain his decision. This included a statement to the effect that he did not believe that the decision to commit military forces had either international agreement or domestic support.
25. US and UK forces commenced military action in Iraq within days of those events and succeeded in removing the regime of Saddam Hussein relatively quickly. Their military forces remain in Iraq to this day but have not discovered weapons of mass destruction beyond those that had already come to light as a result of pre-war inspections carried out by the United Nations.
26. On 6 November 2003 the Attorney General explained (in a Written Answer in the House of Lords) that the 7 March Opinion constituted a detailed consideration of the relevant legal issues which were subsequently summarised in the 17 March Opinion. (We ought to add that, by contrast, a press release from the Attorney General's office dated 25 February 2005 stated that the 17 March Opinion "did not purport to be a summary of my confidential legal advice to Government").
27. On 28 January 2004 Lord Hutton published a report on his investigation into the circumstances surrounding the death of Dr David Kelly, including his findings on the Government's reliance on, and handling of, intelligence information, in so far as it was relevant to the circumstances of that death. Lord Hutton's inquiry followed judicial procedures, and published the extensive evidence it had taken. It did not consider the decision making process within the Cabinet in March 2003.
28. On 14 July 2004 the conclusions of the Review of Intelligence on Weapons of Mass Destruction (the Butler Report) was published. These included criticism of certain aspects of the management of Cabinet business in the period leading up to the commencement of military action. The criticism included the fact that briefing papers prepared by officials on the subject had not been circulated in advance of meetings but had been replaced by unscripted briefings by the Prime Minister, Foreign Secretary or Defence Secretary. It also included the tendency for a small

circle of individuals to discuss major decisions for which the Cabinet as a whole would ultimately carry responsibility and expressed concern that, viewed overall, the scope for informed collective political judgment by the Cabinet had been reduced. Lord Butler's committee had secure access to intelligence material, its meetings and deliberations were closed, and only its conclusions were published.

29. On 10 March 2005 the House of Commons Public Administration Select Committee, in the course of considering the issue of civil service effectiveness took evidence from Sir Andrew (later, Lord) Turnbull. He had been the Cabinet Secretary in March 2003 and answered questions on the effectiveness of Government in the run-up to the Iraq war and the manner in which the Attorney General's advice had been presented to the Cabinet.
30. In April 2005, following a partial leak, the Government published the 7 March Opinion.
31. On 22 March 2006 the House of Lords Select Committee on the Constitution examined the Attorney General regarding the 7 March Opinion and the 17 March Opinion and the general process by which legal advice is given to the Government.
32. On 22 May 2006 the Information Commissioner issued an Enforcement Notice against the Legal Secretariat to the Law Officers and the Cabinet Office requiring them to disclose certain information about the advice given by the Attorney General to the Prime Minister and/or his staff on the legality of military intervention. The original request had been broad enough to include the 7 March Opinion but, as it had already been disclosed by the time the Information Commissioner made his decision, he did not deal with it specifically. He confirmed that the section 35 exemption (among others) was engaged, but decided that, despite the importance of the Government being able to seek legal advice in confidence and the danger of disclosure having an indirect effect inhibiting the proffering of free, full, frank and powerful advice in the future, some of the requested information should be disclosed. He therefore ordered that the information should be made available to the public in a manner that retained the confidentiality of those parts which took the form of "*uncirculated drafts or were of a preliminary, provisional or tentative nature or which may reveal legal risks, reservations or possible counter-arguments as*

expressed by any of those involved in the provision of advice or information informing that advice" while disclosing "those parts of the Requested Information ...which led to, or supported, the concluded views which were made public by the Attorney General in [the 17 March Opinion]. The Information Commissioner added:

"As the government chose to outline an unequivocal legal position, on such a critical issue at such a critical time, the balance of the public interest calls for the disclosure of the recorded information which lay behind those views"

Because of a perceived difficulty of separating the material to be disclosed from that which was to be retained, so that redacted versions of the originals would not be satisfactory, the Information Commissioner ordered the Legal Secretariat of the Law Officers to publish a disclosure statement setting out the substance of all the recorded material which led to or supported the views made public in the 17 March Opinion.

33. Our copy of the resulting disclosure statement is undated but as it was required to be published within 28 days we assume that this occurred in either late May or early June 2006. It describes the process by which the Attorney General's legal advice developed in the period between January and March 2003 and the communications that took place at that time between his office and the offices of other arms of government, (including the Prime Minister's staff), as well as the diplomatic service and the armed forces.

Balance of public interest - factors for consideration

34. As the quotation from section 2(2)(b) in paragraph 6 above makes clear disclosure of information covered by a qualified exemption must be ordered unless the public interest factors in favour of confidentiality outweigh the public interest in disclosure. Those arguing for disclosure therefore have a slight advantage in that they do not have to show that the factors in favour of disclosure exceed those in favour of maintaining the exemption. They only have to show that they are equal.

35. In the following paragraphs we deal with the factors on each side of the balancing exercise in respect of the Minutes. We will deal with the Additional Material separately.

36. The Cabinet Office argued that in this case there were both general arguments in favour of maintaining confidentiality of Cabinet Minutes as a whole, and also specific reasons why disclosure of these particular minutes would be contrary to the public interest.

37. The general factors were said to arise in this way. The Cabinet Office relied on both sub-sections (1)(a) and (1)(b) of section 35, but it concentrated on the fact that all the disputed information fell squarely within subsection (1)(b), because it concerned policy discussions between ministers in Cabinet. This brought into consideration the long established constitutional convention of collective responsibility. As this lies at the heart of the Appeal we set out in the following paragraphs our understanding of what the convention involves and the manner in which it has developed over the years.

The Convention of Cabinet Collective Responsibility

38. Under the convention members of the Cabinet must publicly support all Government decisions made in Cabinet, even if they do not privately agree with them and may have argued in Cabinet against their adoption. They must also preserve the confidentiality of the Cabinet debate that led to the decision. We were referred to a number of experienced commentators and politicians who have stated that the convention is crucial to the effective functioning of the Westminster model of democratic government. One of the more recent of the commentaries was "Ministers of the Crown" a 1997 publication written by Professor Rodney Brazier. He described the convention in these words:

"All Ministers are bound to maintain the solidarity of the Government in the matter of policies. The doctrine of collective responsibility requires that every Minister loyally supports the Government's policies and actions, and that he should not create the impression that he dissents from the Government line"

Later he wrote:

"The internal processes through which a decision has been made, or the level at which it was taken, should not be disclosed".

39. A consistent theme pursued in the commentaries has been the importance of allowing Ministers to consider, test and modify policy options in robust debate. The impact of disclosure is said to be that Ministers in future would be reluctant to expose themselves to criticism or ridicule by their political opponents, or a hostile media, for seeming to have doubts about an issue or to have changed their mind in the course of Cabinet discussions. When considering the options available they will therefore be reluctant to put forward tentative alternatives or modifications or to explore disadvantages. This was said to create a risk that forthright political discussion will be discouraged, particularly on matters of great sensitivity or controversy. The Cabinet Office has argued that it has long been accepted that maintaining the confidentiality of Cabinet discussions in what its counsel, Mr Swift, referred to as "the ordinary course of events" is a matter that goes directly to maintain the effectiveness of Westminster-style parliamentary democracy and that there was therefore a particularly strong public interest in maintaining confidentiality at the relevant time. There was already a tradition of Cabinet secrecy in the 19th Century, reinforced by the Privy Counsellors' Oath. The Oath remains in effect to this day and, in practice, will bind all Cabinet Ministers. It requires them (in the language of the Elizabethan era in which it first arose) to "*keep secret all Matters committed and revealed unto you or that shall be treated of secretly in Council*".

40. Until the Cabinet Secretariat was created in 1916 the preservation of secrecy was facilitated by the absence of formal minutes or other records of Cabinet deliberations. The existence of minutes, combined with the pressure to record the history of government during the First World War, led to a relaxation of confidentiality restrictions in the years following the 1918 armistice. Ministers were permitted to retain some Cabinet documents on leaving office but were required to consult the Government of the day before publishing any confidential information derived from them. By the 1930s the more restrictive regime that had been in force before the First World War had been largely restored, with a degree of relaxation permitted only where disclosure would vindicate the memory of a deceased person whose reputation had been unfairly damaged, and then only if this could be

achieved without prejudicing the public interest. However, exceptions were again introduced in the aftermath of war during the late 1940s. These recognised that any attempt to maintain the stringent restrictions of the pre-war period would be brought into contempt as a result of the pressure to include in political autobiographies and histories information that had been protected by the requirements of military security during wartime. A memorandum, which was circulated to the Cabinet by the Prime Minister, Clement Atlee, in May 1946 therefore recommended as “guiding principles” that:

- (a) it should be recognised that Ministers whose wartime decisions had been open to public criticism should have a greater measure of relaxation with regard to the publication of information that had been subject to exceptional rules of secrecy at the time when those decisions had been made; but that
- (b) the effect of any disclosure should not have a detrimental effect on future administrations by (in particular, in the context of this Appeal) undermining the confidential relationships between Ministers on which the British system of government was based.

41. Those principles were adopted as the basis on which requests to publish would be considered by the Government of the day. They were accepted by subsequent Governments throughout the 1950s and 1960s and it appears that they came to be applied to all Cabinet debates, not just those that took place during a time of war.

42. In 1975 the confidential nature of material relating to Cabinet proceedings was challenged by the posthumous publication of diaries kept by Richard Crossman, covering the period between 1964 and 1966, when he had been a member of the Cabinet of the day. The Attorney General brought an action against the publisher to restrain publication (reported as *AG v Jonathan Cape* [1976] QB 752). The Court accepted the convention of confidentiality under which Cabinet deliberations would not be publicly disclosed until, as Lord Widgery CJ put it, they had “passed into history”, while acknowledging that the convention was occasionally ignored. The Court ruled that the convention could be enforced by an action for breach of confidence and accepted the Attorney General’s argument that disclosure should

be restrained "*if the public interest in concealment outweighs the public interest in a right to free publication*". However, it decided, on the facts of the case before it, that the detailed content of the particular diaries would have a very limited impact on free and open Cabinet discussion because of the passage of time (ten years) since the events recorded. It reached that decision even though "*the individuals involved are the same, and the national problems have a distressing similarity with those of a decade ago*".

43. The publication of the Crossman Diaries led to the establishment of a Committee of Privy Counsellors, chaired by Lord Radcliffe, which was asked to enquire into the principles which should govern the particular challenge to cabinet confidentiality represented by Ministerial autobiographies and similar publications. The Committee's report of January 1976 encapsulated the issue in these words:

"The problem will always be to find some acceptable principle that can determine when and under what conditions the initial basic secrecy [of Cabinet deliberations] can be laid aside. At what point do the protected confidentialities turn into the admissible records of recent history"

The Committee concluded that the guiding principles set out in the Atlee memorandum of 1946 did not need to be modified but ought to be expanded into a set of specific working rules to assist those faced with requests for publication clearance. These covered matters of national security, international relations and, more importantly for this part of our decision, information which might undermine the confidential relationships between Ministers, if published. The Committee rejected the suggestion that notions of open government should lead to the abandonment of the principle of confidentiality and supported the argument that the UK's system of government would suffer if policy could not be developed on the basis of mutual confidence between Ministers. It added:

"We realise, of course, that [the maintenance of confidentiality] depends on a very sweeping generalisation about the likely conduct and responses of a succession of very diverse public figures. We do not suppose that they will all react in the same way. But the history of the development of the tradition of

confidence as well as the experience of the present leads us to accept the generalisation as a working principle”

44. The conclusion of the Radcliffe Report was that ex-Ministers should comply with three “working rules”. They should not reveal:

- (a) the opinions or attitudes of colleagues as to the Government business with which they had been involved;
- (b) the advice received from officials; or
- (c) their views on the competence of officials with whom they had contact.

The Committee also recommended certain working procedures, which were less onerous than those that had previously been imposed, but which were designed to ensure effective compliance with the rules it had enunciated. These included a requirement that any ex-Minister wishing to write an account of his or her Ministerial life should let the Cabinet Secretary see the full text in advance of publication, not for the purposes of censorship or enforcement of the rules, but for the purpose of objective advice and consistency of approach. But the ultimate decision to publish was to remain that of the author. Developments since 1976 have justified Radcliffe's uncertainty about future attitudes to the tradition of confidentiality. We were provided with extracts from a number of books which have been published by several of those who attended the Cabinet meetings under consideration in this Appeal. These included the following (all of which had been published by the time Dr Lamb made his request):

- (a) “The Blunkett Tapes: Life in the Bear Pit” by David Blunkett. This included detail of an exchange between himself and Clare Short during the Cabinet meeting on 13 March 2003 and the fact that he and Gordon Brown had heavily supported the Prime Minister during the Cabinet meeting on 17 March 2003.
- (b) “The Point of Departure” by Robin Cook which also included a summary of the Cabinet debate on 13 March 2003, although understandably

concentrating on his own contribution to the last Cabinet meeting he attended before his resignation.

(c) "An Honourable Deception? New Labour, Iraq and the Misuse of Power" by Clare Short. This included a number of criticisms about the management of Cabinet business in the years following the 1997 election of a Labour Government led by Tony Blair and quoted from her diary what she had recorded about Cabinet discussions on the question of Iraq in September 2002, 13 March 2003 and 17 March 2003.

We also saw extracts from similar publications written later by Alastair Campbell, Lord Levy and John Prescott.

45. We were also shown a separate publication by Clare Short on her own website in March 2005. This was a letter she had written to the Attorney General, Lord Goldsmith on 8 March 2005. In it she stated her belief that the Butler Report had demonstrated that the Cabinet had been misled by the failure to provide members of the Cabinet with the 7 March Opinion and that this amounted to a breach of the Ministerial Code, which requires the complete text of any advice to the Cabinet to be provided, not just a summary. In the course of making that point Ms Short disclosed that after the 17 March Opinion had been distributed to the Cabinet at the start of the meeting on that day she had been discouraged from discussing the subject. She wrote:

"I then attempted to initiate a discussion. I asked why it was so late and whether you had changed your mind. There were then many voices calling for me to be quiet and not ask such questions and no discussion was allowed."

46. Another development since the 1976 Radcliffe Report has been the practice of briefing the media about Cabinet business on the same day as the meeting. Initially this was done on a non-attributable basis, but more recently the briefing has been given by the Prime Minister's Official Spokesman, with the content of the briefing then being immediately published on the internet. In the course of his evidence Sir Gus O'Donnell explained that this process was intended to put into the public domain as much information as possible, consistent with the public interest in preserving good decision-making conditions within the Cabinet. In other words it

reflects the decisions made in Cabinet, not the debate that may have led up to them.

47. In addition to the selected disclosure of Cabinet business through official briefing it was evident from some of the press reports made available to us that information about Cabinet discussions was clearly released to journalists, presumably by Ministers or others who were in attendance. As an example, the *Guardian* newspaper published an article on 14 March 2003 which quoted unidentified Ministers describing, in general terms, Robin Cook's contribution to the debate on the previous day. Similarly the *Independent* newspaper published detail of the 17 March 2003 Cabinet meeting in its 19 March issue. The Clare Short biography also included criticism of her Cabinet colleagues for having briefed the press untruthfully about what she had or had not said during Cabinet discussions adding:

“...it has moved... beyond being economical with the truth, to having no respect for the truth, only the danger of being caught out. Members of the Cabinet would not break ranks, Cabinet records would not be made available for decades, so they decided to undermine me by lying...”

48. Sir Gus O'Donnell dealt in his evidence with the very limited scope that existed to prevent or discourage those wishing to write memoirs or the like from breaching Cabinet confidentiality. He indicated that, while regrettable, the instances of breaches of the convention did not undermine it. Sir Gus also dealt with the occurrence of "leaking" by individual members of the Cabinet, or those working for them, possibly at the expense of one or more of their colleagues. He again indicated that there was little that could be done in practice to prevent this, beyond exhortation by the Prime Minister to the Cabinet as a whole or a private conversation with the individuals guilty of that type of behaviour. His view was that these types of disclosure created much less risk than would disclosure of an authoritative, objective statement, in the form of official minutes.

49. Finally, of course, we should add that the FOIA has itself introduced the possibility of further modification to the convention addressing, in its own terms, the question that the Radcliffe Committee posed itself in 1975, namely, when should "*protected confidentialities turn into the admissible records of recent history*".

Against that background we now proceed to consider the arguments on each side of the public interest balance, again limiting our consideration at this stage to the Minutes and not the Additional Material.

Factors in favour of maintaining the exemption

50. The Cabinet Office relied in particular on the importance of maintaining the convention of Cabinet collective responsibility and confidence, as described above, and stressed its importance to the effective functioning of a central element of the nation's system of government. The evidence of Sir Gus O'Donnell stressed that the danger to the convention lay, in particular, in the risk that if Ministers anticipated that Cabinet Minutes would be prematurely disclosed they would disrupt genuine debate by speaking for the official record and/or ensure that sensitive issues were addressed in small group discussions outside the Cabinet. However, the Cabinet Office did accept that the section 35 exemption was qualified, not absolute. It acknowledged that there might therefore be occasions when the public interest in disclosing particular information was at least equal to the public interest in maintaining confidentiality. But it argued that cogent reasons must nevertheless be given to establish that, in a given case, the public interest lay in favour of disclosure.

51. For his part the Information Commissioner accepted, in both his Decision Notice and in the submissions made to us by his counsel, Mr Pitt-Payne, that the maintenance of Cabinet confidentiality was a strong factor favouring the maintenance of the exemption. He acknowledged, too, that disclosure shortly after any meeting as a matter of routine would damage policy making and collective Cabinet responsibility and that it was relevant to take into account the possible indirect consequences of particular information being disclosed. That is to say that the potential consequences for future decision-making processes lay at the heart of the public interest test (*Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin) at paragraph 38). The Information Commissioner qualified his concession by adding that in his view the question must always be to what extent will disclosure of the particular information in dispute have the relevant indirect adverse consequences. He encouraged us to focus on the damage to Cabinet collective responsibility that might be caused by the disclosure of these particular minutes in the particular circumstances of this case (including the

passage of time between the events in question and the date when Dr Lamb's request was refused). The Information Commissioner's own Decision Notice had stressed that he considered that the circumstances were exceptional and that the disclosure of the two specific and unusual sets of Cabinet minutes would not have the detrimental effects that the Cabinet Office feared.

52. We recognise the importance of the convention and the damage that may result from publication of Cabinet minutes. We carry that assessment into the public interest balance that we are required to perform.

53. The Cabinet Office supplemented its arguments in favour of maintaining the exemption by two additional elements of support. We felt that the main strength of its argument against disclosure lay in its case based on the history and practice of cabinet government, as summarised above, and did not find either of the supplemental points added significantly to the weight of argument in its favour. However, we will deal with both, for the sake of completeness. The first was the line of authority on the restrictions placed on the disclosure in civil litigation of documents covered by public interest immunity, including *Conway v Rimmer* [1968] A.C. 910 and *Burmah Oil Co. Ltd v Governor and Company of the Bank of England* [1980] A.C. 1090. This was said to demonstrate the importance that has been placed on maintaining the confidentiality of ministerial communications, even in circumstances where this may severely prejudice a private litigant. It was said that the importance of that principle remained, even though the cases relied on are also evidence of the progressive relaxation of that rule, leading to some cases in which the interests of the private litigant have been allowed to overrule the government's preference not to disclose information. It was also said that there has been no suggestion that the FOIA was intended to undermine the importance of confidentiality in this area. Against that we are conscious of the view of the historical context of this line of cases expressed by Mr Justice Burnton in *Office of Government Commerce v Information Commissioner* [2008] EWHC 737 (Admin) at paragraph 68, in which he said:

"It was formerly generally thought that there was a culture of confidentiality, if not secrecy, in the administration of public authorities, and in particular central government. The climate had however been changing in favour of greater

transparency, and therefore disclosure, for some time. It was reflected in the willingness of the Courts to require disclosure of relevant documents for the purpose of litigation, heralded by the decision of the House of Lords in Conway v Rimmer. FOIA introduced a radical change to our law, and the rights of the citizen to be informed about the acts and affairs of public authorities”

Although, therefore, we take full account of the high judicial authority stressing the importance of confidentiality as a means of ensuring the proper functioning of government (an importance which the Information Commissioner went some way to concede) we also remind ourselves that we are required to apply the law set out in the FOIA, in particular, section 2(2)(b), and not the law on the exceptions to the obligation of disclosure in litigation, as it existed at the date when the cases in question were decided.

54. The second line of authority drew on cases from other jurisdictions. It was said that these underlined that the practical reasons for maintaining the confidentiality of Cabinet communications were widely recognised outside the United Kingdom. We acknowledge that this may well be the case but, having accepted the general point in paragraph 53 above, were not convinced that the cases relied on assisted. One that Mr Swift placed particular reliance on was the Canadian Supreme Court case of *Babcock v Canada (Attorney General)* [2002] S.C.C. 57. However, this was a public interest immunity case, which we regarded as less persuasive than those, referred to above, drawn from our own case law on the subject. The second case (*Re J R Porter MP and Department of Community Services and Health* [1988] AATA 85) was an Australian decision on a statutory provision which appears to be similar to FOIA section 36, in that the Australian tribunal was not deciding whether disclosure should be ordered, but only whether the decision to issue a Ministerial certificate that it would be contrary to the public interest for confidentiality to be breached in the particular circumstances of that case, was one that it was open to the minister in question to make, applying normal Judicial Review principles. The passage to which Mr Swift particularly directed us stressed the importance of Cabinet confidentiality and then went on to say that to “*impair it without a very strong reason would be vandalism*”. That does not therefore seem to take us very far. It is acknowledged by the Information Commissioner, and accepted by us, that

Cabinet confidentiality is an important aspect of good government and it is acknowledged by the Cabinet Office that it may sometimes be overruled. *Porter* does not therefore help us in deciding whether the arguments in favour of disclosure in this case constitute the English law equivalent of "a very strong reason" so as to justify overruling it. It is true that elsewhere in the extract provided to us the Australian tribunal states that it "*cannot believe that it was intended that the role of Cabinet...be exposed to a risk of damage by the FOI Act.*" However, that suggests that the Australian law differs from ours because the very fact that section 35 creates a qualified exemption demonstrates that a degree of risk to Cabinet confidentiality was quite deliberately incorporated in our law, the risk being moderated by the public interest balance that we are required to apply in this case.

55. The Information Commissioner argued that the convention of collective Cabinet responsibility would not be harmed in this case because (without disclosing the detailed content of the material) it can be said that the minutes do not provide any evidence of dissent beyond that expressed publicly by Robin Cook and Ms Clare Short. In those circumstances, he says, no member of the Cabinet will be placed in the embarrassing position of being seen to have opposed in private a decision that he or she subsequently supported in public. He also suggested that there is no evidence that the disclosures through memoirs, diaries or briefings, as summarised above, have had an adverse effect on Cabinet decision-making. Against that the Cabinet Office argues that disclosure could lead to a pattern developing whereby Cabinet minutes would be disclosed where there was no dissent, but withheld where there was evidence of disagreement, and that this would lead to a position where non-disclosure operated as a clear sign that there had been dissent. It seems to us that, provided all factors are taken into account whenever a request is made for disclosure of Cabinet minutes, with due weight being given to the potential damage to Cabinet collective responsibility, the danger feared by the Cabinet Office should not arise, although clearly the presence or absence of dissent may be one of the factors to be taken into account, as it has been in this case. It is only if disclosure were to become routine for non-dissenting minutes, with no adequate consideration of all other factors, that the disclosure pattern would become a marker for the existence of dissent.

56. The Information Commissioner also argued that Cabinet collective responsibility would actually be enhanced by the disclosure of material showing how the Cabinet operated. We note the point but do not place any great weight on it.

57. Finally, we should mention the specific reasons for maintaining the exemption. These were that British military forces were still active within Iraq and that the content of the disputed information may impact present and future decisions relating to the disposition of those forces. We can say that, having read the Minutes (and again without disclosing their detailed content), we do not believe that their publication would cause any particular harm in either of those two respects.

Factors in favour of disclosure

58. In his Decision Notice the Information Commissioner stated that the public interest factors in favour of disclosure were:

- (a) The gravity and controversial nature of the subject matter;
- (b) Accountability for government decisions;
- (c) Transparency of decision making; and
- (d) Public participation in government decisions.

He accepted that there was a degree of overlap between those factors and it may be said that the desirability of establishing factors (b) to (d), inclusive, stems from the importance of factor (a). Or, put another way, that the public interest is in knowing, not only whether the UK had been right to go to war, but also how that decision had been reached.

59. The Information Commissioner laid stress on the fact that the decision to go to war was controversial at the time, and remains so, because it was not one that was based on self defence or a united international response to aggression. It had caused the resignation from the Government of one senior Minister, two other more junior members of the Government and one Civil Servant as well as public dissent by another Cabinet Minister. It had been opposed by a mass public demonstration. It had been based on a decision to remove or destroy weapons of mass destruction,

a strategy that was not supported by many other nations and is now perceived as having been based on incorrect intelligence. It had also been based on legal advice which has been challenged by a number of knowledgeable commentators. The Cabinet Office accepted the importance of the decision that had been made but sought to persuade us that it was not so exceptional as to justify the convention of Cabinet collective responsibility being put at risk.

60. On the question of the decision-making process Professor Hennessy suggested in his evidence that there were no greater decisions for a Cabinet to take than those affecting war and peace and that he feared that in this case the Cabinet as a whole had not been sufficiently diligent in testing and questioning the conclusion proposed by its leaders. It was common ground that it was not until the morning of 17 March 2003 that the Cabinet saw the 17 March Opinion and Professor Hennessy stressed the public interest, in those circumstances, of knowing how rigorously the Cabinet had tested out the legal position, given that the 7 March Opinion had been much longer and contained a number of caveats to the opinion expressed. We have seen from the questioning of Sir Andrew Turnbull by the House of Commons Public Administration Select Committee in March 2005 that criticism was levelled at the failure to provide the Cabinet with the 7 March Opinion. It is a failure that has been claimed by Clare Short, rightly or wrongly, to have constituted a breach of the Ministerial Code.

61. Mr Swift criticised the emphasis he thought had been placed on the fact that the relevant decision was to wage war and in particular on the legal opinion that was said to support it. He accused Professor Hennessy of saying, in effect, that once the relevant Cabinet decision had been identified as one affecting war and peace, the counterbalancing factors in favour of maintaining the exemption ceased to be relevant or to carry any weight. We were not convinced that this was a fair or accurate interpretation of Professor Hennessy's evidence, viewed as a whole. It seemed to us that the real impact of his evidence was simply to reinforce a point conceded on both sides, that the decision to commit military forces to Iraq was a grave and controversial one involving the several moral, legal and constitutional issues which we have identified above. We did not think, in any event, that Mr Swift's characterisation of the evidence reflected the way in which Mr Pitt-Payne

approached the case. However, Mr Swift, building on his interpretation of the evidence, stressed the importance of testing the legality of the many other issues that arise during the course of military action. He suggested that the legal advice regarding the detailed manner in which military forces are deployed is as important, if not more important, than the legal advice given at the point at which the initial decision to commit troops is taken, so that a decision to order disclosure in this case would lead, logically, to the disclosure of information relevant to all other cases where the legality of a decision affecting military activity was considered.

62. There may be cases in the future where the particular circumstances do require a consideration of the public interest in support of disclosure of legal advice given during the course of military conflict. But it is not an issue in this case. All we are required to do is to give appropriate weight to, among other factors, the public interest in disclosure at the relevant time of certain specific information about the Cabinet's consideration of the particular legal advice involved in this case. That advice dealt with the initial commitment of forces. The weight we apply to that factor does not imply any judgment as to the weight that might be applied in any future case where the relevant advice relates, not to the initial decision to commit forces to action, but to the detailed conduct of the resulting military action thereafter. Even more clearly, our decision does not contribute anything to the consideration of any other factors that may be required to be applied, on one side of the scale or the other, in any such future case.

63. There was also said to remain a concern that the stated reasons for taking the decision were not genuine, that UK policy was being dominated by the strategy adopted by the USA and that the style of government adopted by the Prime Minister at the time had the effect of emasculating Cabinet as the central forum for decision making on major issues. As we have already noted the last of these points has been supported by statements made by Clare Short, one of the members of the Cabinet at the time and, more significantly, by the conclusions of the Butler Report.

64. In these circumstances the Information Commissioner argued that disclosure of the Minutes should be ordered to enable the public to be aware of what was officially recorded about any evidence and argument the Cabinet considered and the process the Cabinet followed in making its decision. He suggested that, even if the

Minutes disclosed no evidence of the failure of Cabinet decision-making it would still be in the public interest to see whether the information that was placed in the public domain by the Government at the time was consistent with what had been said behind closed doors.

65. Before us the Cabinet Office accepted that the matters discussed at the two Cabinet Meetings were grave and remain matters of controversy. However, it argued, first, that the more important the issue under consideration the more important it was for Ministers to be able to approach it without any concern that their discussions might be made public. Secondly, it made the general point that if a generally stated public interest is relied on, for example, the interest in transparency or accountability, at least some consideration should be given to the way in which disclosure of the particular information sought would actually further that public interest. Counsel argued on its behalf that no such justification had been provided in this case and that consideration should in any event also be given to the cost, in terms of harm to good governance, that the public would suffer if disclosure were to be ordered. It was said that it was therefore for the Information Commissioner to demonstrate that disclosure of the particular information in question would advance the public interests on which he relied and that an examination of the detailed context of the Minutes demonstrated that their disclosure would not in fact result in any true public interest gain. This was particularly the case, it was said, because of the material that was already in the public domain at the relevant time.

66. In fact both sides relied on the detailed review and public debate to which the decision to invade, as well as the legal advice on which that decision had been based, had been subjected. The Cabinet Office argued, in respect of the aspects of public interest concern identified in paragraph 60 above, that there had already been more than sufficient exposure and review. It argued that the FOIA was not the only or even the primary means by which accountability could be promoted. It referred specifically to responsibility to Parliament (relying on the various debates in, and statements to, both Houses of Parliament, as well as the work of various Select Committees) as well as the work of the media, which had put many questions to Ministers over the years on all aspects of the Iraq conflict. It claimed that the Information Commissioner had not shown that the disclosure sought would

advance either a new (and appropriate) form of accountability or accountability on issues not previously subject to public consideration.

67. With regard to the manner in which the Attorney General's opinions had been made available to, and/or debated by, the members of the Cabinet the Cabinet Office relied on the evidence of Sir Gus O'Donnell to the effect that he believed that over the weeks or months leading up to March 2003 Ministers had obtained briefings on the legal issues from their own departments and had discussed those issues individually or in groups outside the formal structure of Cabinet meetings. The Cabinet Office did, however, accept that neither the 7 March Opinion nor the 17 March Opinion would have been available to inform any such discussions. And the Information Commissioner argued, in any event, that neither unminuted discussions before the key Cabinet meetings, nor the enquiries and investigations after the event, justified leaving a gap in the official record by retaining confidentiality over the core material regarding both the decision and the manner in which it had been reached.

68. With particular regard to the decision making process, as opposed to the substance of the decision, the Cabinet Office argued that there had been ample public debate and disclosure in the Butler Report, the briefings by the Prime Minister's Official Spokesman and the work of the Public Administration Select Committee, which it said had explored the effectiveness of the Blair Cabinet. The challenge by Clare Short on this issue, as set out in her letter to Lord Goldsmith referred to in paragraph 45 above, was of course published after the date of the Butler Report. It might be said to have reopened that part of the debate, so as to reinforce or revive the relevance of the Minutes, whether they support her criticism, undermine it or are neutral on the point.

69. As regards the question of whether the full or genuine reasons for the decision had been given Mr Swift said that this amounted to an argument for disclosing the minutes simply to prove a negative and suggested that it would lead to a requirement to disclose all information on all occasions. While not sharing his concern on that score, we do not believe, having considered the Minutes, that they include reasoning that was not aired during the subsequent public debate or that

the public would be significantly better informed on this issue if the Minutes were disclosed.

70. The Information Commissioner challenged the suggestion that the operation of other mechanisms for openness and transparency had been sufficient to satisfy the public interest. He argued that they should not be regarded as alternatives or competing means to freedom of information disclosure; they reinforced it but were not alternatives. Disclosure under FOIA should be regarded as a means of promoting accountability in its own right and a way of supporting the other mechanisms of scrutiny, for example, by providing a flow of information which a free press could use. The Information Commissioner also argued that the scrutiny that had occurred had not placed into the public domain sufficient information to enable the public to scrutinise the decision and that disclosure of the minutes was necessary to enable the public to understand it more fully. In particular it would enable the public to satisfy itself that the justification for the decision articulated by Ministers was consistent with the reasons relied on in reaching it. He also argued that non-disclosure of the Minutes, as the objective and impartial records of the meetings in question, created a vacuum that was being filled by memoirs. These, he said, were written from the perspective of their own individual authors. They were therefore partial and self-serving and their truthfulness and accuracy could not be verified. We have mentioned the more relevant extracts from those publications in paragraph 44 above. Their combined effect was not to disclose the entirety of the information contained in the Minutes or even a substantial part of it. But they do indicate either a dwindling respect by Ministers for the convention of Cabinet collective responsibility in general, or perhaps the difficulty of maintaining it in its strictest form in times of war (as evidenced by the events following the First and Second World Wars). If the former, the stage may be reached where the extent of disclosure by Ministers comes to undermine the convention, rather than constituting the occasional exceptions that Sir Gus O'Donnell believed left it substantially in tact.

71. Two further issues were raised in argument. The first was the relevance of the passage of time between the date when the Minutes were created and the date when Dr Lamb's request for disclosure was either made (December 2006) or finally rejected (April 2007). The second was the extent to which an order for disclosure

in this case would set a precedent for the future. As to the passage of time the Cabinet Office argued that the 'age' of the information was as capable of diminishing the public interests pointing in favour of disclosure as those which support the maintenance of an exemption. And, as regards the public interest in maintaining the exemption, it said that the extent of any diminution will vary from case to case but will not diminish as rapidly in a Cabinet collective responsibility case as in others. Specifically, it argued that factors in favour of maintaining the exemption were that, at the relevant time:

- (a) the decisions in question were fairly recent;
- (b) several of the ministers who took part in it remained in Government;
- (c) the Prime Minister was still in office; and
- (d) the policy in issue (military action in Iraq) remained current so that the Cabinet discussion at the time continued to have a direct impact on present and future decisions on military involvement in Iraq.

72. The Information Commissioner's approach to the passage of time was that he relied on the fact that the requested information had been over three years old at the time of the request and that in the intervening time the military action had been concluded and Saddam Hussein had been overthrown. He argued that, although military forces remained in Iraq, it was unrealistic to suggest that disclosure would have an effect on troop morale or strategic decisions.

73. We recognise that the passage of time is a relevant factor to be taken into consideration and that it will have a different effect from case to case. On the facts of this case we are unable to identify a fixed point after which any risk of disclosure will evaporate or be largely reduced, although any impact on future behaviour of Ministers may be expected to be greater the shorter the period of time between the Cabinet discussion in question and the public disclosure.

74. On the question of precedent the Cabinet Office also argued that Cabinet collective responsibility protection would only be preserved if the maintenance of confidentiality was the norm, i.e. Ministers would only feel comfortable in

participating in a full and open discussion and scrutiny of options if they had an assurance that there would be consistency of approach with regard to disclosure and that, in what Mr Swift referred to as "the normal run of events", their contributions to Cabinet debate would not be disclosed prematurely. It is of course acknowledged on all sides in this case that disclosure should not be routine or premature. It is also acknowledged that the circumstances in this Appeal were unusual. It is likely that, over a period of time, cases involving different sets of facts will be decided at the level of this Tribunal, or higher, and that, in combination, they may provide Ministers with clearer guidance on the risk of disclosure than is available at this stage in the development of freedom of information principles. Our decision is likely to form part of that body of case law. However, we do not see our role in this case as determining where the line should in general be drawn, or in setting down principles for defining it. Our task is simply to decide whether, on the particular facts before us, the undoubtedly strong public interest arguments in favour of maintaining the exemption are sufficient or insufficient to outweigh the arguments in favour of disclosure. When considering how to behave in future Cabinet Ministers will be aware that, as a result of the decision to make this type of information the subject of a qualified, not an absolute exemption, the risk of disclosure in appropriate circumstances has existed since January 2005. Their attitude will no doubt also be affected by the frequency with which disclosure is made and the reasons given for ordering it. Early disclosure as a matter of routine will clearly have greater impact than if it is seen that disclosure is ordered only in cases that merit it and then only after a reasonable passage of time.

Conclusion on the balance of public interest.

75. Although we have been faced with a number of factors, some of which could be argued on both sides of the argument, and all of which raise serious issues, the question ultimately is a simple one. At the date when the request was finally refused on review, in April 2007, did the public interest factors in favour of disclosure at least equal those in favour of maintaining the exemption?

76. In the course of his evidence before us Sir Gus O'Donnell stated that, although many very important issues had come up for decision during the one hundred or more Cabinet meetings that he had attended, he could not think of any for which the

public interest in disclosure would, in his view, have justified the countervailing cost in terms of the detrimental effect on good decision-making. The March 2003 decision predated his tenure as Cabinet Secretary, but he expressed the view that, while it was certainly a very important one, it was not so exceptional as to pass that threshold for disclosure. We find ourselves in the position where one of us agrees with that view, believing that the degree to which the public interest would be served by disclosure did not justify the harm that disclosure would cause to Cabinet collective responsibility. However, the other two of us disagree and believe that the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

The majority view of Mr Ryan and Dr Fitzhugh

77. The convention of collective Cabinet responsibility clearly affords very considerable benefits in terms of good decision making at the highest level of government. Those benefits would be lost or severely reduced if the official records of Cabinet discussions were disclosed prematurely and/or without a thorough examination of the public interest factors for and against such action. However the convention is not a rigid dogma. It has adapted over the years (particularly in the aftermath of war) and we see no reason why it should not continue to do so. Factors influencing its development may include changes in the standards of behaviour in public life, as foreseen as a possibility by the Franks Committee and evidenced in this case by the disclosure made in the memoirs mentioned in paragraph 44 above. The speed and ease of electronic dissemination of facts and opinions may also have an effect. But the more immediate influence, for the purpose of this decision, has been Parliament's decision to categorise the section 35 exemption as qualified, not absolute.

78. On the particular facts of this case the importance of maintaining the convention is diluted by the extent to which some of the information had already been disclosed, through formal and informal channels, by the time Dr Lamb made his request and the fact that, according to the Butler Report, there was already a trend in 2003 of important matters being discussed in small groups outside Cabinet.

79. Notwithstanding the above there is undoubtedly a strong argument in favour of maintaining the section 35 exemption in respect of Cabinet discussions. However, the public interest factors in favour of disclosure are, in the view of the majority, very compelling. The decision to commit the nation's armed forces to the invasion of another country is momentous in its own right and, as recorded in paragraph 59 above, its seriousness is increased by the criticisms that have been made (particularly in the Butler Report) of the general decision making processes in the Cabinet at the time. There has also been criticism of the Attorney General's legal advice and of the particular way in which the 17 March Opinion was made available to the Cabinet only at the last moment and the 7 March Opinion was not disclosed to it at all. The approach adopted during the Cabinet meetings by those who were aware of the 7 March Opinion, as well as those who were not, is of crucial significance to an understanding of a hugely important step in the nation's recent history and the accountability of those who caused it to be taken.

80. The majority view also stresses that it is the coincidence of all of the identified factors being applied to the particular information in question that generates the impetus for disclosure. This is not significantly reduced by the investigations and enquiries that have taken place. In the view of the majority the questions and concerns that remain about the quite exceptional circumstances of the two relevant meetings create a very strong case in favour of the formal records being disclosed.

81. The very unusual nature of those factors, particularly when viewed in combination, also have the effect of reducing any risk that this decision will set a precedent of such general application that Ministers would be justified in changing their future approach to the conduct or recording of Cabinet debate. This is not to say that it is only in such an extreme case as the present that disclosure should be ordered. It will be for future Tribunal panels to decide whether other sets of circumstances may justify disclosure. We simply decide that on the facts of this case the public interest in disclosure was at least equal, at the relevant time, to the public interest in maintaining the exemption.

82. The majority has reached that decision in the belief that in this case the strength of the public interest in understanding the deliberative process recorded in the Minutes did not arise from their detailed content. The Tribunal considered the whole of the

two documents and heard evidence and argument in closed session, which considered whether, for example, the Minutes showed the presence (or absence) of dissent between Cabinet members or the adequacy or inadequacy of the scrutiny applied to either the decision reached or the legal and evidential basis for it. However, the majority considers that the value of disclosure lies in the opportunity it provides for the public to make up its own mind on the effectiveness of the decision-making process in context.

The minority view of Mr Whetnall

83. The minority view seeks to reach the decision most likely to support continued confidence that Cabinets can explore difficult issues in full and in private, and on the basis of papers where appropriate.
84. Professor Hennessey's witness statement and answers to questions laid particular weight on whether the Cabinet had probed the Attorney's advice, and the position taken by the Prime Minister. Had the longer form of the Attorney's advice been available to the full Cabinet, its doubts and difficulties would perhaps have prompted a different or more substantial discussion. But probing of any hesitation in that legal advice, if recorded, might well have been within the scope of the legal professional privilege exemption, and therefore potentially exempt or redactable under section 42 FOIA.
85. In respect of the shorter and more certain form in which the advice was tabled at Cabinet on March 17th, and subsequently made available to Parliament, it may have been that members of Cabinet without a legal background were inclined to rely on the Attorney's concluded advice, and that all members except for the two who resigned on the issue, had reached a view in advance of the meeting and in the light of the history of dealings with Iraq and reports on the situation that had developed in the Security Council, and had decided to support the Prime Minister's leadership on the central issue. Many were no doubt focused on their need to influence opinion in Parliament, the Parliamentary party and the wider public.
86. Leaders of the armed forces and of civilian staff whose duties included assistance in the subsequent conflict were also entitled to rely on the concluded advice from the Attorney. This was one of the reasons why it was commissioned and why in its

concluded form it was expressed in certain terms. It is plausible against this background that any note of uncertainty would have met with impatience at Cabinet on 17th March, and we have the disputed reports (see paragraph 45 above), that one member of the Cabinet who wished to probe the advice further at that meeting was discouraged by her colleagues.

87. The conclusions of Lord Butler's committee include a finding quoted at paragraph 28 above, :

"We do not suggest that there is or should be an ideal or unchangeable system of collective Government, still less that procedures are in aggregate any less effective now than in earlier times. However we are concerned that the informality and circumscribed character of the Government's procedures which we saw in the context of policy-making towards Iraq risks reducing the scope for informed collective political judgement. Such risks are particularly significant in a field like the subject of our Review, where hard facts are inherently difficult to come by and the quality of judgement is accordingly all the more important." [Butler, paragraph 611].

88. To the minority in the Tribunal, it is a significant issue whether the finding we reach is likely to encourage or discourage any trend towards informality and circumscribed procedures. The strictness of observation of Cabinet confidentiality by some Cabinet members, and indeed by the Prime Minister's official spokesman, may have been less than ideal in the view of expert witnesses. Respect for confidentiality of Cabinet discussions may be in longer term decline. Release of formal minutes would add a further degree of doubt to Ministers' confidence that they could hold a full and frank discussion on the basis of fully informative papers in future, without inhibition by the thought that minutes and papers showing internal disagreement could be released within a few months or years. Exceptional cases may create an exceptional need for confidence in Cabinet confidentiality to be strong. Release of the papers in this exceptional and prominent case could encourage rather than discourage any tendency for the real discussion to take place informally, in un-minuted meetings, and without full information. Release

could add to the factors eroding the integrity of the Cabinet process, objective record keeping, and good governance.

89. This leads to the minority view in the Tribunal that, even in the exceptional circumstances of this case and in the redacted form which we go on to discuss, the balance of public interest is against disclosure of both sets of Cabinet minutes. This finding is consistent with the view in the witness statement of Lord Hurd, and is reached on similar grounds:

“Cabinet discussion lies at the heart of our system of Government. The record of that discussion is an essential tool enabling the decisions of Ministers to be accurately implemented. If in future it seemed likely or even possible that Cabinet minutes would be released this tradition would be at risk. Either ministers would feel inhibited from expressing their real opinions or officials preparing the minutes would water down their account of what took place in order to avoid controversy. In either event, the result would not be better information, but worse government.”

[Lord Hurd's witness statement, paragraph 5.]

“I have read the minutes of the Cabinet meetings in question. I believe that the public is much better served by maintaining the confidentiality of the record of these Cabinet discussions”. [paragraph 8]

Lord Hurd also notes in paragraph 7 that a properly constituted inquiry would be *“quite a different process from publishing Cabinet minutes under the Freedom of Information Act.”*

90. The minority view sees limited value in releasing the Minutes simply to confirm a possible negative that there may have been little probing or extended discussion of the Attorney's advice in Cabinet on 17th March, and no discussion of the longer minute from the Attorney that had not been circulated. The minutes are consistent, save for the redacted passages relating to international relations which we go on to discuss, with the public position taken by Cabinet members in subsequent

discussion and scrutiny. To that extent they would add little new content to the information available to the public. In the course of that scrutiny the Attorney's concluded advice has been extensively questioned and probed

91. Professor Hennessey's view is that the decision taken at the meeting of 17th March – to go to war without the specific authorisation of the United Nations – was a remarkable and for Britain an uncharacteristic step and a failure of Cabinet government. The difference of opinion here is not with that assessment, although it cannot generally be appropriate to take disagreement with a decision, however immense or controversial, as a marker in favour of an unusual degree of disclosure of the process by which it was reached. The issue is whether early disclosure under Freedom of Information law of any discussion (or absence of discussion) of legal doubts and hesitations would make such discussion more likely to happen when it is desirable that it should happen, and happen within the reach of formal minuted meetings.

92. Bearing in mind that Iraq was discussed at many Cabinet meetings, it is hard to determine the point at which a partial disclosure of the confidential records of the Cabinet to enable the public to be informed about the process by which the decision to go to war was reached could logically be stopped. Public information about the process of Cabinet decision making could in one sense always be improved by the publication of Cabinet minutes. But such publication would, in the minority view, be more likely than not to drive substantive collective discussion or airing of disagreement into informal channels and away from the record. This would over time damage the ability of historians and any inquiries, if constituted, to reconstruct and understand the process Cabinet followed in any particular instance. And it would not be conducive to good government.

Conclusion on the balance of public interest.

93. On the basis of the majority view the Tribunal therefore decides that the public interest in maintaining the section 35 exemption in respect of the Minutes does not outweigh the public interest in their disclosure. Subject to what we say below in respect of section 27, therefore, we decide that the Information Commissioner was

right to conclude that the Minutes should have been disclosed by the Cabinet Office.

Compliance with section 27

94. The Decision Notice ordered the disclosure of the Minutes but indicated that some redactions could be made in order to respond to the concern of the Cabinet Office that the Minutes included comments that would prejudice the UK's relations with certain other countries. Because the Decision Notice was, of course, a public document it was understandably imprecise as to exactly what redactions could be made. However, by the time the matter came before us the parties had discussed this part of the Appeal and achieved a degree of agreement as to what portions of the Minutes should be redacted, if we were to decide that disclosure should be made. To the extent that agreement had not been reached we were able to hear the evidence in closed session of Sir Peter Ricketts. He resisted the temptation of claiming that every reference to a foreign state should be removed but provided compelling and authoritative justification for redaction of those that he did believe would cause difficulty in diplomatic relations. We accept his evidence and have set out in a confidential schedule to this decision a list of those parts of the Minutes that should be redacted before they are disclosed.

Additional Material

95. As we have mentioned the Information Commissioner, having inspected the Additional Material following our decision on the preliminary issue, indicated that he was satisfied that the public interest in maintaining the exemption outweighed the public interest in disclosure. He considered that the Additional Material would, in public interest terms, add little of substance or value to the information contained in the Minutes themselves. Against that he considered that the public interest in maintaining the exemption was considerably stronger in relation to the Additional Material than in relation to the Minutes. This was because disclosure would be likely to have a greater impact on debates within Cabinet, and the manner in which a record of them was maintained, than in the case of the Minutes themselves. We agree and, having inspected the Additional Material, believe that it could have a further damaging effect in that the manner in which an individual takes

contemporaneous notes is likely to be idiosyncratic and could well give a false impression as to the weight and importance that should be attributed to a particular part of the debate or the tone in which the points of discussion were expressed. The Minutes are written by very senior and experienced civil servants and we believe that disclosure should not extend beyond the formal Minutes prepared by them on the basis of their ability to supplement contemporaneous notes with personal recollection and their professionalism in creating from those notes a fair, accurate and balanced record of the meeting in question. This is not to say that circumstances will never arise when it may be appropriate to disclose informal notes, but we are unanimous in our conclusion that this is not such a case and that no disclosure of the Additional Material should be made. We reach that conclusion after also considering Dr Lamb's arguments for disclosure, to the effect that disclosure might throw further light on the care and vigour with which members of the Cabinet debated their decision. But we conclude that the informal notes would not contribute materially to public knowledge or understanding on the point and that any interest that did exist in furthering public information would be outweighed by the public interest in maintaining confidentiality over the Additional Material.

Conclusion and remedy

96. We conclude, by a majority, that the Information Commissioner was correct to direct that the Minutes should be disclosed in redacted form. We are unanimous in our conclusion that the scale of such redaction should be slightly more extensive than he had indicated in the Decision Notice and should be in the form indicated in the confidential schedule to this Decision. All redactions requested by the Cabinet Office have been granted. We do not believe that any of them remove from the documents anything relevant to the reasons for which Dr Lamb made his original request. We are also unanimous in our decision that the Additional Material should not be disclosed.

Signed



Chris Ryan

Deputy Chairman

Date: 27 January 2009