



Fol and Ministerial vetoes

Standard Note: SN/PC/05007

Last updated: 11 March 2009

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The Lord Chancellor, Jack Straw, issued the first ministerial veto in relation to an Fol request on 23 February 2009. This Standard Note traces the history of the veto within Fol legislation and summarises comparative examples abroad.

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1 Background

During the passage of the *Freedom of Information Act 2000*, the need for a ministerial veto to override the decisions of the Information Commissioner was the subject of contention. Government amendments were made to the original bill to limit the veto to information relating to government departments, the National Assembly for Wales and any public authority designated by order, subject to the affirmative resolution.¹ The then Home Secretary, Jack Straw, made a commitment that such a veto or executive override would be a collective Cabinet decision:

It is neither possible nor necessary to write into the Bill that the decisions made by a Cabinet Minister must be made only after consultation and agreement with all of his or her Cabinet colleagues--not least because some of the decisions are quasi-judicial. In practice, it would be an extremely unwise Cabinet Minister who chose to issue an exemption certificate amounting to a veto of a decision made by the commissioner to order disclosure without consulting his or her Cabinet colleagues. That might lead to that Cabinet Minister's speedy demise and the receipt of his or her P45 by return of post.

To reinforce those arrangements, I propose that there should be written into the ministerial code--which is a published document available in the Library of the House and, I believe, on the internet--guidance on how decisions relating to Executive exemption certificates should be made and the way in which other colleagues should be consulted, other than on quasi-judicial decisions. I hope that those two changes, one that will be written into the Bill and one that will be made public, are to the approbation of the House.²

In Lords committee stage, there were attempts to examine the possibility of a judicial review challenge against a veto. In response, the then Lord Chancellor, Lord Falconer, said that the exercise of the veto would only occur after consultation within the Cabinet, although this could not be written into the Bill.³ A minister would be required to inform the applicant of the reasons for the decision to use the veto, and would be accountable to Parliament for the decision. Finally he said that the courts would need to develop procedures to examine decisions by ministers to use the veto.⁴

At Lords report, Opposition amendments to introduce a serious harm test to the exercise of the veto and to enhance parliamentary scrutiny were not accepted.⁵ Lord Falconer said that a minister signing an exemption certificate would have to give public reasons for his decision and the Commissioner would report any shortcomings in the decision-making procedure to Parliament.⁶

Only a Minister of the Crown who is in the Cabinet, or a UK Law Officer, can use the 'ministerial veto' that overrides a relevant decision of the Information Commissioner requiring disclosure. Section 53(2) of the FoI Act requires the accountable person to present a certificate to the Commissioner and to lay a copy before each House, or the Northern Ireland

¹ HL Deb 25 October 2000 c443

² HC Deb 4 April 2000 c922. See also HL Deb 25 October 2000 c441-443

³ HL Deb 25 October 2000 c441

⁴ HL Deb 25 October 2000 c445

⁵ HL Deb 14 November 2000 c258 There were similar debates on Lords third reading HL Deb 22 November 2000 c842

⁶ HL Deb 14 November 2000 c259

Assembly or National Assembly for Wales where relevant. The accountable person has 20 working days in which to serve the certificate.

The power can be used only when the Commissioner and/or Tribunal has decided in favour of disclosure on public interest grounds; it is not available where a Commissioner has decided that the information is not covered by an exemption.⁷

There has been some academic debate as to the possibility of an executive override being subject to a judicial review. The lawyer, Jeremy Ison, noted as follows in the *Freedom of Information Handbook*;

The ministerial decision would, however, be subject to judicial review on the application of a party with the requisite standing – the most obvious candidates being the complainant or the Information Commissioner. To succeed in the Administrative Court, however, would generally mean showing that the Minister had acted irrationally or in a way that no one in his position could reasonably have done, which will often be a difficult test to meet.⁸

2 The use of the veto

The FoI Act came into force on 1 January 2005. Jack Straw made the following announcement to Parliament on 24 February 2009, when he explained his decision to use the veto or executive override procedure for the first time:

In December 2006, the Cabinet Office received a freedom of information request for Cabinet minutes and records relating to the meetings that it held between 7 and 17 March 2003, where the Attorney-General's legal advice concerning military action against Iraq was considered and discussed. There were two such meetings, on 13 and 17 March. Cabinet Office refused the request, citing the Act's exemptions for information relating to policy development and ministerial communications. In keeping with its statutory obligations, the Cabinet Office had considered the public interest in releasing the information, but found twice, on balance, that there was a greater public interest in withholding it.

The applicant duly exercised his right to ask the Information Commissioner to investigate the handling of his request. In February 2008 the commissioner reasoned, for the first time, that Cabinet minutes—these ones—should be released. The Cabinet Office appealed the commissioner's decision to the Information Tribunal.

On 27 January 2009 the tribunal published its decision. The tribunal was unanimous in deciding that the informal notes of the Cabinet meetings should be withheld. But, by a majority of two to one, it decided that the public interest balance fell in favour of release of the minutes. It therefore upheld the decision of the Information Commissioner ordering information to be disclosed, subject to some minor redactions.

Following that decision, and having taken the view of Cabinet, I have today issued a certificate under section 53 of the Act in an appropriate form and consistent with the Act, the effect of which is that these Cabinet minutes will not now be disclosed. The conclusion that I have reached rests on the assessment of the public interest in disclosure and non-disclosure. I have laid a copy of my certificate, and a detailed statement of the reasons for my decision, in the Libraries of both Houses. My decision was made in accordance with the Government's policy criteria, which are annexed to

⁷ See Patrick Birkenshaw *Freedom of Information: The Law, the Practice and the Ideal* (3rd ed 2002) p320

⁸ Chapter 10 in *Freedom of Information Handbook* ed Peter Carey and Marcus Turle p307

my statement of reasons. Copies of these documents have been sent to the requester and are available in the Vote Office.

To permit the commissioner's and the tribunal's view of the public interest to prevail would, in my judgement, risk serious damage to Cabinet government—an essential principle of British parliamentary democracy.⁹

For the Opposition, Dominic Grieve, agreed with the use of the veto, but continued to press for an independent inquiry into the circumstances leading to the Iraq war in 2003.¹⁰ In response to a question from the Conservative John Greenaway, Mr Straw indicated that a reduction in the number of years that Cabinet papers are closed under public records legislation might lead to changes in FoI legislation:

Mr. Straw: I am very grateful to the hon. Gentleman for what he has said. He has the benefit of being correct and also consistent about this over more than 10 years. So far as an opportunity to look at the Act is concerned, recommendation 8.8 of the Dacre review said, as I indicated in my statement, that if the minimum period for the release of documents generally was reduced, as he recommended, from 30 years to 15, but even if it came down to, say 20, there would need to be consideration of changes to the Freedom of Information Act provision in this respect. We are actively considering that. I am happy to do it in conjunction and co-operation with the Opposition.¹¹

David Howarth, for the Liberal Democrats, argued that the exceptional circumstances justified release of the Cabinet minutes:

Does the Secretary of State accept that the much greater threat to Cabinet government is not the release of the minutes, but any repeat of the collapse of Cabinet decision making in the Government of Mr. Blair? The argument against disclosure is that it might undermine full and frank discussion in Cabinet and mean that discussion will take place informally, outside the meeting. However, is not that precisely what happened under Mr. Blair, with the rise of sofa government? At least the prospect of disclosure in exceptional circumstances—the tribunal made it clear that it is not a matter of disclosing Cabinet minutes all the time, only in exceptional circumstances—might persuade future Cabinets to remember that Cabinet discussion should matter.¹²

The Campaign for Freedom of Information issued a press release which stated:

The Campaign said the government should have abided by the Information Tribunal's decision on the release of the cabinet minutes - or appealed against it, but not overruled it. It said the UK Freedom of Information Act had one of the most elaborate appeals processes of any in the world, involving the Information Commissioner, the Information Tribunal, the High Court and if necessary the Court of Appeal and House of Lords.

The Campaign's director Maurice Frankel said the Campaign *"was concerned that having been used once, the veto might now be used in other cases involving the examination of policy at lower levels in government."*¹³

Professor Robert Hazell at the Constitution Unit, University College London, commented:

⁹ HC Deb 24 February 2009 c156

¹⁰ Ibid c159

¹¹ HC Deb 24 February 2009 c164

¹² Ibid c160

¹³ "Iraq veto decision "extremely retrograde" 24 February 2009 *Campaign for Freedom of Information*

“I am not surprised at the government’s decision to use the veto. It follows a series of rulings by the Information Commissioner and Tribunal to order disclosure of policy documents which sent shock waves round Whitehall. Ministers are anxious to preserve a private space for policy discussions, and being ordered to disclose Cabinet minutes proved to be the last straw”.¹⁴

The decision is also discussed in an article by Reuters Institute.¹⁵ Mr Straw’s former position as Foreign Secretary at the time of the Iraq war was also the subject of some comment.¹⁶

Mr Straw placed a copy of the certificate and a paper setting out the reasons for the use of the veto in the Commons Library.¹⁷ The Information Commissioner decision of 18 February 2008 is available online,¹⁸ as well as the Information Tribunal decision of 27 January 2009.¹⁹

3 The use of the veto in other FoI jurisdictions

Many states with FoI regimes also have a ministerial veto. These include:

- Ireland. The Minister of Justice has power to issue certificates to prevent the release of sensitive information such as law enforcement, confidential informants, security, defence, international relations or matters relating to Northern Ireland. Certificates must be reviewed by the Taoiseach within 6-12 months. According to the Constitution Unit, 2 have been served in 2000.²⁰
- Australia. Under the Australian Freedom of Information Act, a form of ministerial certificate can be used to prevent certain decisions being questioned by the Administrative Appeals Tribunal (AAT), which deals with appeals. According to the Constitution Unit, there were 14 served by the Howard government between 1996 and 2007.
- New Zealand. The Governor General can issue a “Cabinet veto” directing an agency not to comply with an Ombudsman decision requiring release of information. Since 1987, the veto has to be the subject of a collective Cabinet decision. The veto can be reviewed by the High Court.

In addition, the Freedom of Information (Scotland) Act 2002 contains similar veto powers in section 52. There is a requirement to consult the members of the Executive:

52(2) A decision notice or enforcement notice to which this section applies ceases to have effect, in so far as it relates to the perceived failure, if, not later than the thirtieth working day following the effective date, the First Minister of the Scottish Executive, after consulting the other members of that Executive, signs and gives the

¹⁴ “Ministers entitled to veto Information Tribunal decision ordering release of Cabinet documents” 24 February 2009 *Constitution Unit*

¹⁵ “FoI: a shock to the system” Jeremy Hayes February 2009 http://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/discussion/FOI_A_shock_to_the_system_.pdf

¹⁶ See for example Andrew Mackinlay at HC Deb 24 February 2009 c165

¹⁷ The certificate is UP/308 2009 They are also available online <http://www.justice.gov.uk/docs/foi-certificate-section53-foi-act-2000.pdf> and <http://www.justice.gov.uk/docs/foi-statement-reasons.pdf>

¹⁸ http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fs_50165372.pdf

¹⁹ Information Tribunal EA/2008/0024 AND EA/2008/0029 27 January 2009

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

²⁰ “Ministers entitled to veto Information Tribunal decision ordering release of Cabinet documents” 24 February 2009

Commissioner a certificate stating that the First Minister has on reasonable grounds formed, after such consultation, the opinion both that—

(a) there was no such failure; and

(b) the information requested is of exceptional sensitivity

Privacy International's survey of FoI laws in other countries contains further details.²¹

The Campaign for Freedom of Information pointed out that the new Prime Minister of Australian, Kevin Rudd, has introduced a bill to remove the ministerial veto from Australia's Freedom of Information Act. The Campaign note:

Once the bill is law ministers will be lose the right to veto disclosures which they maintain could damage security, defence, international relations or policy formulation. Abolition of the veto was a Labour manifesto commitment at the 2007 Australian election.²²

²¹ *Freedom of Information around the world 2006 report* Privacy International
<http://www.privacyinternational.org/foi/foisurvey2006.pdf>

²² "Iraq veto decision "extremely retrograde" 24 February 2009 CFOI <http://www.cfoi.org.uk/foi240209pr.html>