Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0128
Information Commissioner's Ref: FS50085775

Heard at Procession House, London, EC4
On 1 and 2 July 2008

Decision Promulgated
5 August 2008

BEFORE

CHAIRMAN

ANNABEL PILLING

AND

LAY MEMBERS

SUZANNE COSGRAVE

AND

STEPHEN SHAW

Between

THE SCOTLAND OFFICE

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: ELEANOR GREY
For the Respondent: BEN HOOPER

Decision

The Tribunal allows the Appeal in part and substitutes the following Decision Notice.

Information Tribunal **Appeal Number: EA/2007/0128**

SUBSTITUTED DECISION NOTICE

Dated 5 August 2008

Public authority:

THE SCOTLAND OFFICE

Address of Public authority:

Dover House

Whitehall

London

SW1A 2AU

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that the information ordered to be disclosed in the Decision Notice dated 29 October 2007 shall be varied to the extent that the information identified on Confidential Schedule 1, annexed to this Decision, shall be withheld.

Action Required

The Scotland Office must now disclose to the Requestor the information identified on Confidential Schedule 2, annexed to this Decision to ensure compliance. The authority must do so within 35 calendar days from the date of this Substituted Decision Notice.

Dated this 5 August 2008

Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. This is an Appeal by the Scotland Office against a Decision Notice issued by the Information Commissioner dated 29 October 2007. The Decision Notice relates to a request for information made to the Scotland Office under the Freedom of Information Act 2000 (the 'FOIA'). The Scotland Office had withheld the information on the basis that it was exempt from disclosure, relying on the exemptions in sections 21, 35(1)(a), (b) and (c), 40(2)(a), 41(1)(a) and (b) and 43(2) of FOIA. The Information Commissioner (the 'Commissioner') concluded that, while some of the withheld information was exempt, the Scotland Office had inappropriately withheld other parts of it by reference to sections 35(1)(a) (b) and (c) , 40(2)(a), 41(1)(a) and (b) and 43 (2), and required the authority to disclose the documents listed on an annexed Schedule.

Background

2. This case concerns the witholding of certain documents in response to a request to the Scotland Office for information about Gaelic broadcasting policy.

3. Gaelic is an indigenous language of parts of Scotland.

4. Its promotion and development is devolved to the Scottish Executive, but responsibility for broadcasting is reserved to the UK Government. Financial responsibility for funding Gaelic media has been executively devolved and Scottish Ministers take decisions on levels of expenditure to be made available. The Scotland Office has acted as an intermediary between the relevant Whitehall department, the Department of Culture, Media and Sport (the 'DCMS') and the Scottish Executive as part of its role in promoting and guarding the devolution settlement.

5. In September 2000, the Gaelic Broadcasting Task Force concluded (in the "Milne Report") that "Gaelic is in a precarious, even critical, condition and that, without significant Government support, it will not survive beyond the mid-point of the 21st Century." The Milne Report recommended, amongst other things, the

establishment of a Gaelic Broadcasting Authority to run a new digital Gaelic channel.

6. The Communications Act 2003 made important amendments to the legislative regime under which Gaelic broadcasting is funded and promoted. Prior to this, the Gaelic Broadcasting Committee (referred to in the papers by its Gaelic acronym, the 'CCG') administered a fund to support Gaelic television and radio. The CCG was not itself a broadcaster, and did not itself directly commission programmes. The Communications Act 2003 provided for the renaming of the CCG as Seirbheis nam Meadhanan Gaidhlig, the Gaelic Media Service (the 'GMS') and changed its functions. Its function is now to ensure that a wide and diverse range of high quality programmes in Gaelic are broadcast or otherwise transmitted for viewing in Scotland. The service has up to 12 board members appointed by Ofcom, subject to approval by the Secretary of State. Organisations, including the BBC, Highlands and Islands Enterprise and the Bord Gaidhlig na h-Alba (the Gaelic Development Agency), are able to nominate a member of the board of the new body. The GMS is permitted to make grants out of a Gaelic Broadcasting Fund or to apply for moneys from it or it can, amongst other things, finance or engage in programme making directly.

7. There is also sufficient power for GMS to establish a joint venture. In April 2006 GMS and BBC Scotland announced their intention to work together to launch a dedicated digital service involving television, radio and internet services. Negotiations between the BBC and GMS have been protracted.

8. On the 28 January 2008, the BBC Trust gave their approval for the BBC in partnership with GMS to launch the service, subject to certain conditions. The BBC Trust has approved the service to launch on cable, satellite and broadband but not on Freeview. In order to ensure value for money for licence-fee payers and that the new service meets the needs of the target audience, the Trust decided that the service would be subject to a further review before digital switchover commences in central and northern Scotland in 2010. The review will consider the actual performance of the service in achieving public value, including reaching a wider audience and will consider launch on Freeview at that time. In the meantime the short daily window for GMS programming will remain on Freeview. The new service

is awaiting its channel allocation from SKY. It is hoped that the channel will launch later this year.

The request for information

9. By e-mail dated 24 February 2005, Dr. Wilson McLeod (the 'Requestor') requested under FOIA the following information:

> "any information held by the Scotland Office relating directly or indirectly to any proposals to establish a dedicated Gaelic television channel, including information relating to Gaelic broadcasting in relation to (a) the implementation of Article 11 of the European Charter for Regional or Minority Languages, (b) the establishment of a Gaelic Media Service, (c) the report of the Gaelic Broadcasting Task Force (the Milne report) and (d) the Communications Act 2003."

10. The Scotland Office replied on 24 March 2005. It advised that it was withholding the information and citing the exemptions under sections 21, 35(1)(a), (b) and (c), 40(2)(a), 41(1)(a) and (b) and 43(2) of FOIA.

11. By letter dated 7 April 2005 the Requestor asked for an internal review of the decision to withhold the information, explaining that he found it "impossible to believe that every single pertinent document in the possession or control of the Scotland Office is covered by one or more of these exceptions, and that the public interest test weighs against the disclosure of every single pertinent document in the possession or control of the Scotland Office."

12. The Scotland Office concluded its internal review on 17 June 2005. There had been a significant announcement by Ofcom on 9 June 2005, outlining its intentions for the Programming for the Nations and Regions. As a result of that, the Reviewer found that "now at this time and in light of this announcement" it was in the public interest to release a number of papers documenting meetings and discussions of the Gaelic Broadcasting Working Group, subject to some redactions under section 43 of FOIA. In respect of the remainder of the information it upheld the original decision to withhold.

The complaint to the Information Commissioner

13. On 28 July 2005 the Requestor complained to the Commissioner. He explained that he believed that sections 40(2)(a), 41(1)(a) and 43(2) were, in his opinion, largely irrelevant and few documents would, in his opinion, be covered by sections 35(1)(b) and (c). His main objection was in relation to section 35(1)(a), regarding which he stated:

> "The point of this exemption is surely to allow governments to make decisions and develop their current policies without having to disclose sensitive information at inopportune times. Once definitive decisions have been made, however, the exemption should no longer be operative…There is no way the disclosure of documents relating to discussions and decisions that led to the submission of draft legislation that has [been] enacted six years ago can be considered to involve the formulation of government policy."

14. Meanwhile, work on the development of a Gaelic digital service continued. In April 2006 the GMS and BBC Scotland announced their intention to work together to launch a dedicated digital service involving television, radio and internet services.

15. The Commissioner started his investigation in October 2006. There was a considerable backlog of work at this time and no criticism is levied at the Commissioner for the delay in dealing with this complaint. Various discussions or exchanges of information followed between the Commissioner and the Scotland Office.

16. A Decision Notice was issued on 29 October 2007. In summary, the Commissioner concluded that:

(a) The Scotland Office had breached section 17(3) of FOIA by

(i) failing to explain, in relation to the public interest test, how the general factors identified applied to the specific information requested,

(ii) inadequately weighing up against each other the factors in favour and against disclosure, and

(iii) applying an incorrect balance test.

(b) the information to which the Appellant had applied the s. 35(1)(a) exemption did properly fall within its scope;

(c) s. 35(1)(a) also applied to certain other documents in relation to which the Appellant had erroneously sought to apply s. 35(1)(b), s. 35(1)(c) and s. 41(a) and (b);

(d) as regards documents created prior to the date on which the Communications Act 2003 received Royal Assent (namely, 17 July 2003), the public interest in maintaining the s. 35(1)(a) exemption did not outweigh the public interest in disclosure;

(e) the public interest in maintaining the s. 35(1)(a) exemption did however outweigh the public interest in disclosure in relation to documents generated *after* 17 July 2003;

(f) some, but not all, of the documents that were said by the Appellant to fall within s. 35(1)(b) properly fell within the scope of that exemption;

(g) of the documents which properly fell within the scope of s. 35(1)(b), the public interest in maintaining the s. 35(1)(b) exemption did not outweigh the public interest in disclosure in relation to documents created prior to 17 July 2003, but did do so for documents created after that date;

(h) s. 35(1)(c) did not apply to any of the documents;

(i) s. 21 did render exempt those documents to which the Appellant had applied it;

(j) some, but not all, of the exemptions claimed under s. 40(2)(a) were upheld;

(k) none of the documentation that was said by the Appellant to fall within s. 41(a) or (b) did in fact fall within either of those provisions, although some of fell to be considered under s. 43; and

(l) many, but not all, of the exemptions claimed under s. 43(2) were upheld.

17. The Commissioner required the Scotland Office to disclose the information unjustifiably withheld. This was identified on an Appendixed Schedule.

The Appeal to the Tribunal

18. By Notice of Appeal dated 27 November 2007 the Scotland Office appealed against the Commissioner's decision on the following Ground:

(1) In relation to information that fell within the exemptions under sections 35(1)(a) and (b) of FOIA, the Commissioner was wrong to conclude that the public interest in maintaining the exemption was outweighed by the public interest in disclosing the information.

19. The Scotland Office indicated that due to the volume of the material requested it had not had the opportunity to reassess its position in respect of the other exemptions discussed in the Decision Notice and that an application to amend the Grounds of Appeal may be made.

20. The Scotland Office served Amended Grounds of Appeal dated 3 April 2008. The Amended Grounds appealed against the Commissioner's conclusion that, in relation to some information, the exemptions claimed under sections 40, 41, 42 and 43 were not enaged as well as challenging the Commissioner's exercise of the public interest balancing test.

21. Pursuant to a Direction from the Tribunal, the Scotland Office produced three bundles:

> Bundle A - containing documents that the Commissioner ordered the Scotland Office to disclose and that the Scotland Office did not object to disclosing;
>
> Bundle B - containing documents that the Commissioner accepted could be withheld, and that would therefore not be the subject of this Appeal; and
>
> Bundle C - containing documents that the Commissioner ordered the Scotland Office to disclose and that the Scotland Office objected to disclosing, and which are therefore the subject of this Appeal.

22. The Scotland Office also produced a Schedule identifying which exemptions were relied on in relation to each document in Bundle C.

23. The parties deserve recognition for the hard work undertaken prior to the hearing of this Appeal to reassess the status of each document in dispute. They were able to reach agreement in relation to a large number of documents. The Commissioner conceded that some of the documents which he had ordered be disclosed were, in fact, exempt from disclosure under FOIA. The Scotland Office conceded that some documents it had sought to withhold, should in fact, be disclosed, albeit for reasons other than those relied upon by the Commissioner in his Decision Notice.

24. We particularly commend the Scotland Office for the fair way in which they approached the disclosure exercise at this stage, having regard to the public interest test now rather than limited to the time of the request. While that approach would have been technically correct, it would have been perverse to refuse to disclose information that would not be withheld if a request was made today. We consider this approach to be very much in the spirit of the FOIA regime.

25. In relation to the documents for which the Scotland Office had claimed exemption under section 42 of FOIA, the Commissioner, having had an opportunity to review them, is content to accept that these documents may be withheld. We are satisfied that the documents for which this exemption was claimed do fall within the exemption at section 42 (legal professional privilege), that privilege had not been waived and that, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure.

26. Having reached agreement in relation to a great proportion of the disputed information, there remained some 40 documents which are the subject of this Appeal.

27. The Scotland Office submits that the majority of these documents are exempt under either section 35(1)(a) and (b), one document is exempt under section 41 and two documents are exempt under section 43 of FOIA.

28. The parties are in agreement that almost all the documents in dispute fall within the scope of either section 35(1)(a) or (b) of FOIA and in agreement about which documents fall into which subsection. Section 35 of FOIA is a "qualified" exemption, that is, it is subject to the public interest test in section 2(2)(b) of FOIA. In this Appeal it is the public interest balancing test that falls to be considered by the Tribunal.

29. There are parts of some documents which the Scotland Office argues are exempt under section 40(2) of FOIA and should be redacted before disclosure. Additionally there are some relatively minor redactions proposed to documents which are not substantially in dispute.

30. The Appeal has been determined following a full oral hearing on 1 and 2 July 2008.

31. Because the parties were in agreement that an exemption is engaged, the Tribunal has conducted the Appeal in a way to ensure that the disputed information is kept confidential. In light of this, the reasons for this decision have been drafted so that they intentionally do not disclose the details of the disputed information in order to

continue to provide confidentiality until this decision is complied with or successfully appealed against.

The Powers of the Tribunal

32. The Tribunal's powers in relation to appeals are set out in section 58 of FOIA, as follows:

> *(1) If on an appeal under section 57 the Tribunal considers-*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
>
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
>
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
>
> *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

33. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the applicable statutory framework has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

34. The question of whether the Scotland Office was entitled to withhold each document, either under the exemption in section 35(1)(a) or (b) or section 41 or

section 43 of FOIA, is a question of law based upon the analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion.

The questions for the Tribunal

35. The Tribunal has concluded that the relevant issues in this Appeal are as follows:

    a) Whether, in all the circumstances of the case, the public interest in disclosing the information to which section 35(1)(a) applies is outweighed by the public interest in maintaining that exemption;

    b) Whether, in all the circumstances of the case, the public interest in disclosing the information to which section 35(1)(b) applies is outweighed by the public interest in maintaining that exemption;

    c) Whether the Scotland Office may properly rely on further exemptions under sections 40, 41 and 43 of FOIA.

Evidence

36. We were provided with a lengthy written statement from John Henderson, a Deputy Director at the Scotland Office since November 2007, who has worked at both the former Scottish Office and the Scottish Executive since 1970. He gave further evidence before us and was cross-examined at considerable length, on both matters of general application and, in a closed hearing to maintain confidentiality of the disputed information, with regard to individual documents in Bundle C.

37. Mr. Henderson was particularly well placed to give evidence of sensitive political ramifications that may not have been self-evident from the papers; both within the Gaelic broadcasting community and in the context of the Scottish-UK devolution settlement. We do not propose to repeat his evidence in detail in our Decision but record that we were much assisted by the fullness and frankness of his answers.

38. At the time of the request for information, Mr. Henderson's evidence was that although the Communications Act 2003 had been passed, there were still ongoing negotiations between the relevant parties about how a dedicated digital Gaelic

channel might be achieved. In particular he told us, the funding and structural arrangements had not been agreed and in the opinion of the Scotland Office, information regarding those deliberations should not be placed in the public domain.

39. With regard to advice to Ministers and communications containing Ministerial views, he emphasised the strong public interest in protecting the constitutional relationship between Ministers and the civil service. He considered that "inappropriate" disclosure of the advice of civil servants to Ministers, and communications between officials containing the views of Ministers, has the capacity to undermine the relationship of trust and confidence that exists between Ministers and civil servants and risks compromising both the convention of ministerial accountability and civil service neutrality.

40. An additional concern was the risk that civil servants might become publicly associated with unpopular or controversial Ministerial decisions with the adverse consequences that they might not be able to command confidence of Ministers and that they might no longer be seen as politically neutral. Putting officials' advice to Ministers, and their identities, into the public domain would, in his opinion, not only mean that advice is likely to deteriorate in candour, comprehensiveness and quality, but also inhibit officials from giving advice.

41. With regard to Ministerial communications, Mr. Henderson explained that disclosure of these documents "has the capacity to undermine the constitutional convention of Cabinet collective responsibility", this convention serving very strong public interests concerned with the effective governance of the United Kingdom. The processes of Cabinet government exist to enable Ministers freely and frankly to debate policy and reach collective agreement, with all Ministers collectively accountable for the final decision and bound to promote that position to Parliament and the general public.

Section 35 of FOIA

42. Section 35 of FOIA provides as follows:

(1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to—

(a) the formulation or development of government policy,

(b) Ministerial communications,

(c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or

(d) the operation of any Ministerial private office.

43. The parties had reached agreement over which exemption, section 35(1)(a) or section 35(1)(b), applied to each of the documents in Bundle C. At an earlier stage in the proceedings, the Scotland Office had sought to apply the exemption under section 35(1)(b) to documents it now agrees fall under section 35(1)(a). We do not regard the two categories of information as mutually exclusive as it seems to us that information may relate to a Ministerial communication (section 35(1)(b)) by virtue of who is identified in it and also relate to the formulation or development of government policy (section 35(1)(a)) by virtue of its subject matter. We consider, therefore, that information can properly be regarded as falling within both exemptions and we have concluded that is the case in relation to some of the documents said, by agreement between the parties, to fall within section 35(1)(a) or section 35(1)(b) only.

44. Section 35 of FOIA does not confer an absolute exemption from disclosure but, under section 2(2)(b) of FOIA, the duty to disclose under section 1(1)(b) of FOIA does not apply to the extent that "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

45. The meaning of section 2(2)(b) of FOIA is clear and unambiguous: the information is only exempt from disclosure if the public interest in maintaining the exemption *outweighs* the public interest in disclosing the information. If the scales are level, then the information must be disclosed.

46. The public interest balancing test must always be performed in light of the particular facts at issue.

Section 35(1)(a)

47. Information held by a government department falls within this subsection if it relates to the formulation or development of government policy.

48. This is a class based exemption rather than a "prejudice" based exemption, in other words, it does not have to be shown that harm will result from disclosure nor does it matter that harm will not result from the disclosure of the information, although this may be relevant to a consideration of the public interest.

49. The two leading Tribunal cases on section 35(1)(a) and the public interest balancing test to be performed in relation to material falling within that section, are The Department for Education and Skills v the Information Commissioner (EA/2006/0006) ('DFES') and The Secretary of State for Work and Pensions v The Information Commissioner (EA/2006/0040) ('DWP'). Counsel for the Scotland Office submitted that the principles established by these cases do not form a rigid code or comprehensive set of rules and that their importance should not be overstated. We are, of course, not bound by decisions of differently constituted Panels of this Tribunal, but we endorse the principles set down in DFES at paragraph 75, and approved in DWP. We regard them as guidelines of the matters that we should properly take into account when considering the public interest test but reminding ourselves that each case must be decided on its own facts.

50. Whilst the Government did not seek to appeal against either of these decisions, it did appeal a subsequent decision of the Tribunal on section 35 of FOIA: Office of Government Commerce v The Information Commissioner (EA/2006/0068 and 0080) ('OGC'). Stanley Burnton J gave judgment on the appeal on 11 April 2008: [2008] EWHC 737 (Admin). The High Court appeal was allowed on a basis that does not have direct relevance, although Stanley Burnton J did consider other matters that are of importance to this Appeal.

51. Our attention was drawn particularly to his observation about the "radical change to our law, and the rights of the citizen to be informed about the acts and affairs of

public authorities" introduced by FOIA. We agree with this observation. Unnecessary secrecy in government had long been regarded as undermining good governance and public administration, and FOIA was designed to lead to more open government, laying down for the first time that the public has a right to know about the work of government (and all public authorities), transforming the culture of government from one of secrecy to one of openness, thus raising confidence in government and enhancing the quality of decision making by the Government.

52. In DFES, the Tribunal heard evidence from witnesses, including the head of the civil service, offering "an unrivalled experience of the workings of Government Departments at the most senior levels, specifically of the interaction of civil servants with ministers." Arguments were advanced by the DFES as to the dangers of allowing the disclosure of information falling within section 35(1)(a), including that this would threaten the candour and boldness of advice, might imperil the political neutrality of the civil service (in the sense that a civil servant might become identified by a new minister with a policy that had fallen out of favour or was contrary to the policies of a new administration) and might risk undermining the convention of Ministerial responsibility.

53. Having reflected on the competing arguments and the authorities, the Tribunal in DFES proceeded to set down principles to guide decisions as to disclosure in cases of this nature:

(i) The central question in every case is the content of the particular information in question…. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.

(ii) No information within s.35(1) is exempt from the duty of disclosure simply on account of its status, of its classification as minutes or advice to a minister, nor of the seniority of those whose actions are recorded.

(iii) The purpose of confidentiality, where the exemption is to be maintained, is the protection from compromise or unjust public opprobrium of civil servants, not ministers.

(iv) The timing of a request is of paramount importance to the decision. “We fully accept … that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy.”

(v) When the formulation or development of a particular policy is complete for the purposes of (iv) is a question of fact.

(vi) If the information requested is not in the public domain, we do not regard publication of other information relating to the same topic for consultation, information or other purposes as a significant factor in a decision as to disclosure.

(vii) In judging the likely consequences of disclosure on officials’ future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil service since the Northcote-Trevelyan reforms.

(viii) On the other hand, there may be good reason in some cases for withholding the names of more junior civil servants who would never expect their roles to

be exposed to the public gaze. These are questions to be decided to the particular facts, not by blanket policy.

(ix) Similarly…. we are entitled to expect of our politicians, when they assume power in a government department, a substantial measure of political sophistication and, of course, fair-mindedness.

(x) Likewise, decisions should not assume the worst of the public. The answer to ill-informed criticism of the perceived views of civil servants is to inform and educate the critic, however hard that task may be, not to deny information, simply through fear that it may reflect adversely and unfairly on a particular official.

(xi) A blanket policy of refusing to disclose the names of civil servants wherever they appear in departmental records cannot be justified.

54. The starting point for considering the application of the public interest test is to recognise that there is an "assumption" built into FOIA that "the disclosure of information by public authorities on request is in itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities." [Stanley Burnton J in OGC, agreeing with the statement of the Tribunal.]

55. The fact that the information falls with section 35(1)(a) does not of itself indicate that there is necessarily any public interest in refusing to disclose it.

56. The parties were in agreement that the process begins "with both pans empty". Whether there is any public interest in favour of maintaining the exemption and, if so, how weighty that public interest is, are matters to be determined in light of the particular facts at issue, rather than by reference to the type or status of the information in question.

57. The following factors in favour of disclosure were identified by the Commissioner in the Decision Notice:

(a) encouraging good practice and increasing public confidence that decisions have been taken properly and on the basis of the best available information;

(b) promoting policy-makers' accountability to the public;

(c) facilitating public understanding of how government formulates policy generally;

(d) facilitating a well-informed public debate on the issues;

(e) encouraging public participation in the development and formulation of future government policy;

(f) broadening policy input beyond individuals or groups with an unduly privileged position of influence in policy-making processes.

58. The Scotland Office criticised the Commissioner for applying very general and "formulaic" public interest considerations. The Scotland Office submitted that the Commissioner had placed undue weight on the factors identified as favouring disclosure and that some of the considerations could be regarded as "perverse" in respect of the "historic" material ordered to be disclosed, in that it was not apparent how disclosure could broaden policy input or facilitate well-informed public debate where the policy had already been determined.

59. It is inevitable that the Commissioner will apply the same considerations in many cases but the effect of that is not to weaken their importance in any way. The factors for disclosure will almost always be wide, unlike those for maintaining the exemption. A differently constituted panel of this Tribunal stated in Guardian Newspapers Ltd and Heather Brooke v The Information Commissioner and BBC (EA/2006/0011 and 13)[1]**:**

> "While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure

[1] Approving and adapting what was said in Hogan and Oxford City Council v The Information Commissioner (EA/2005/0026 and 0030)

are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process."

60. There is, in our opinion, considerable public interest in disclosing information about decisions that have already been made. Such information is capable of, *inter alia*, encouraging participation in and debate about future decisions; informing people of which considerations were taken seriously, which were, and, may routinely be, ignored; the weight that is, or appears to be, given to particular factors; which "tactics" are successful and which are not; revealing more about the role of the civil servant and the "negotiations" that take place; and confirmation that the democratic process is working properly.

61. It was submitted by the Scotland Office that the fact that the information falls under section 35(1) is in itself a factor that weighs heavily in the public interest balancing exercise: "The preservation of private thinking space for Ministers and officials in order to facilitate the provision of candid advice and the free and frank exchange of views, and the protection of the fundamentally important constitutional principle of collective Cabinet responsibility, represent important values that further the overall public interest."

62. We recognise the importance of what is referred to as "safe space" or "thinking space" for those involved in the formulation and development of government policy in which frank and candid views can be put forward, exchanged and criticised, sometimes with vigour. However, information created during this process cannot be regarded *per se* as exempt from disclosure otherwise such information would have been protected in FOIA under an absolute exemption. The fact that it is covered by a qualified exemption means that it is potentially disclosable unless the public interest factors in favour of maintaining the exemption outweigh those in favour of disclosure.

63. The Scotland Office submitted that in relation to the rationale behind section 35(1)(a), it is immaterial whether the particular policy issue remains under development or in the process of formulation, or whether it has subsequently been implemented. What matters, it submits, is that the information reflects or in any way relates to the development and/or formulation of government policy, regardless of what happens thereafter.

64. The wording of s35(1)(a) is clear: it applies to the 'formulation' or 'development' of policy. In DFES it was stated that the policy making process normally ends with a parliamentary statement announcing the policy. In this case, the Commissioner considered that once an Act has been passed or has received Royal Assent the policy has moved from the status of formulation or development to being put into effect.

65. While we agree with that decision, we were not persuaded by the reasoning of using the date of Royal Assent as the guiding date for what information should be disclosed. It was apparent to us on examining in detail the documents in Bundle C that even if a document post-dated 17 July 2003, it could still be regarded as relating to the formulation or development of policy.

66. Mr. Henderson's evidence on this point was that regardless of the passing of the Communications Act 2003, aspects of the development of Gaelic broadcasting (notably the development of a dedicated Gaelic channel) were, at the time the initial request was received in February 2005, and continue to be, on-going. The contents of certain documents subject to this appeal should not, in his opinion, be disclosed.

67. The policy making process must reach a point where it can properly be regarded as having come to an end, although how that point is identified or categorised may vary. It seems to us that once an Act has received Royal Assent the policy has been enshrined in an Act of Parliament and that particular policy making period has come to an end. It is inevitable that many policy decisions, particularly if they are controversial or effecting a dramatic change, will be subject to further debates and perhaps development of a new policy to amend the existing one, but that does not mean that the policy itself is still being formulated or developed.

68. We do not, therefore, accept Mr. Henderson's evidence that, in his opinion, the Communications Act 2003 has not settled the policy as far as Gaelic broadcasting is concerned. The fact that there may be some ancillary matters relating to the implementation of that policy does not mean that the policy process itself is ongoing.

69. Other public interest factors for maintaining the exemption were identified as protecting the candour and advice of civil servants, the fact that in Mr. Henderson's opinion the issue of funding had not yet been finalised, and that disclosure of some of the documents might threaten the emerging coalition with the BBC.

70. In relation to the suggestion that officials would no longer feel able to express themselves in a frank and candid way, with a resulting adverse impact on the quality of debate and of advice tendered, Mr. Henderson identified the impact on candour as having two effects; civil servants being less keen to record their views on paper and more ambiguity in the language they used.

71. There is, unsurprisingly, no evidence that since FOIA has come into force, or since DFES, that this has been the case. We share the scepticism expressed by other Panels of this Tribunal[2]as to the extent of the "chilling" effects predicted in relation to the impact of disclosure in relation to internal governmental deliberations. Mr Henderson was quick to refute the suggestion that civil servants would act in a way incompatible with the Civil Service Code, but he did say that in his view neither he nor his colleagues would act *more* candidly or professionally because they were aware their advice could become public, in fact he thought the opposite could be the case. We believe that senior civil servants have sufficient courage and independence to continue to give the robust and independent advice they have given in the past, even in the face of potential public scrutiny.

72. We do, however, consider that there may be instances where particular care should be taken when balancing the public interest in relation to disclosing the names of more junior civil servants who would not normally expect the advice that they have given to be open to wide public scrutiny.

[2] For example, in DFES and The Department for Business, Enterprise and Regulatory Reform v The Information Commissioner and Friends of the Earth (EA/2007/0072)

73. Despite the Commissioner submitting that there is "value and importance" in looking for sensitivity within the documents in Bundle C, we have had regard to the decision of Mitting J in Export Credits Guarantee Department v Friends of the Earth [2008] EWHC 638 (Admin) and in particular his conclusion that the Tribunal in their consideration of the case, had wrongly set up a "hurdle or threshold of proof of actual particular harm", although he did not consider that error was central to the decision in the case. He went on to say, at paragraph 38,

> "Likewise, the reference to the principled statements of Lord Turnbull and Mr Britton as "ulterior considerations" was at least unfortunate. The considerations are not ulterior: they are at the heart of the debate which these cases raise. There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case…. I can state with confidence that the cases in which it will not be appropriate to give any weight to those consideration, will, if they exist at all, be few and far between."

Section 35(1)(b)

74. Information held by a government department falls within this subsection if it *relates to* Ministerial communications.

75. Mr. Henderson assisted us with the status to be accorded to letters written by one Private Secretary to another. Such letters would contain the views of the relevant Ministers and so would, in our opinion, properly fall to be considered under section 35(1)(b). They may fall to be considered under section 35(1)(a) additionally, depending on content, as discussed at paragraph 43 *supra*.

76. The Scotland Office submitted that in relation to section 35(1)(b) the Commissioner should have accepted:

    (a) that disclosure of the Ministerial communications information was inconsistent with the notion of collective Cabinet responsibility that is a key

principle of the system of cabinet government in operation within the United Kingdom;

(b) that the public interest in maintaining and protecting the operation of collective responsibility is specifically recognised by the exemption provided under section 35(1)(b) of FOIA; and

(c) that disclosure of such information should not be required pursuant to FOIA unless a compelling public interest in disclosure is found to exist.

77. While it is said not to be the submission that the public interest balance will favour disclosing in every case, the Scotland Office submit that "where section 35 is engaged there is an inherent public interest in withholding the information." Having conceded in relation to section 35(1)(a) that the process begins "with both pans empty", it does seem that the Scotland Office is attempting to somehow tilt the balance in favour of non-disclosure in advance.

78. It is not possible to raise the exemption to a *de facto* absolute one simply because the information relates to, or is, ministerial communications. There may be material within this category that will, by virtue of its nature not just content, always have a strong public interest in withholding. According to Philip Coppel, in Information Rights, 2nd Edition, "[t]his will be particularly compelling in relation to information that reveals the actual deliberations within Cabinet, but may be less compelling in relation to reports or submissions prepared for the assistance of the Cabinet. Otherwise the public interest in maintaining the exemption is not readily divined." We do see some force however in the argument advanced by the Scotland Office that the factors in favour of maintaining the exemption for *some* types of information in this category will, almost always, be strong and that "very cogent and compelling" reasons for disclosure would need to be advanced before the balance tips in favour of disclosure in those situations. This is not to turn the public interest test around, or to say that just because the exemption is engaged that is a factor weighing against disclosure, but recognises the weight that should be given to the public interest factors for maintaining the exemption.

79. We consider that the principles established in DFES have considerable relevance in the case of information falling within section 35(1)(b) as well as section 35(1)(a).

80. The exemptions in section 35 are closely linked and there is some overlap between the sub-sections.

81. Counsel for the Scotland Office went to some lengths to illustrate and stress the weight to be given to maintaining the exemption where the notion of collective Cabinet responsibility applied, rather than the candour factor that had been urged on us in relation to 35(1)(a) and the conduct of civil servants.

82. Mr. Henderson's evidence, as outlined already, was that preserving frankness and candour in the collective deliberation of policy necessarily depends on a high level of confidentiality attaching to such deliberation. The disclosure of individual Ministerial views (whether they be contained in direct correspondence or in communications between officials), in his opinion, "would" mean that the Government "would" be unable convincingly to put forward a united front in relation to any policy decision reached.

83. He told us that Ministers would, in his opinion, be more likely to be concerned about letters written while they retained the same position in Government and that risks would be diminished by movement of individuals or a change in administration. There was a long standing practice by which papers would be released to the public at a time when the matters referred to therein would be considered historic and not relating to recent issues.

84. We were referred to a number of authorities[3], all of which were decided many years before the inception of FOIA. Like the Tribunal in DFES and in Guardian Newspapers Ltd (supra), we consider that we should apply caution when invited to apply dicta of these distinguished senior judges in these cases to questions we have to answer under the FOIA regime. There has been the "radical change to our law" that we have already recognised, and, in our view, the Government must accept that it now operates in a different climate, subject to accountability to the public and transparency.

85. However, we do consider that there is a strong public interest in maintaining the confidentiality of Ministerial communications in supporting the principle of collective

[3] Conway v Rimmer [1968] 1 AC 910, Balfour v Foreign & Commonwealth Office [1993] 1 ICR 663, Attorney-General v Jonathan Cape [1976] 1 QB 752

responsibility where the disclosure of the information would reveal no more than the name of the individual who expressed a particular view, rather than revealing a novel or unusual view that was being considered. We do not regard this as establishing a principle that there is a class of documents which from their very character ought to be inherently exempt.

86. Mr Henderson suggested that Ministers were currently acting in the belief that section 35(1)(b) of FOIA affords a level of "protection" which the Ministerial Code assumes. With respect to this view, FOIA was widely debated before it received Royal Assent and there was a further period, over 4 years, before it came into force. We consider it very likely that Ministers, and others involved in the development of government policy, would be well aware of fact that the political landscape was due to change, for the better, and we do not consider that they would act differently, in a more circumspect manner, because of it.

87. The Commissioner appeared to argue that the confidentiality of collective cabinet responsibility had been waived or eroded by letters being sent to Jack McConnell, the Scottish First Minister. We do not accept this. It may be that if such letters are sent to a wide variety of individuals that *could* mean that confidentiality has been implicitly waived and the weight to be attached to this factor in favour of maintaining the exemption has been weakened. However, we consider that it is essential to have regard to who has been copied in and why. Communications with Scottish Ministers do not fall within the definition of "Ministerial communications" in section 35(5) of FOIA, although Northern Ireland Ministers and Assembly Secretaries are included. Having regard to Mr. McConnell's role and responsibilities we do not consider the fact that copies of letters were sent to him has resulted in the confidentiality of these documents being "waived".

88. Taking account of these matters, and those identified with regard to section 35(1)(a) of FOIA, our task, in respect of each exemption, is to weigh up these competing interests and to decide where the public interest lies, that is, whether the public interest in maintaining the exemption outweighs the public interest in disclosure in respect of each document in Bundle C. We have applied this test to each of the documents in Bundle C and our conclusions are recorded on the Confidential Schedules annexed to this Decision. In relation to a number of documents that are

direct communications between ministers we have decided that the public interest in maintaining the exemption, having particular regard to the convention of collective Cabinet responsibility, outweighs the public interest in disclosure.

Section 40

89. Two redactions suggested by the Scotland Office have not been accepted by the Commissioner. These relate to two business telephone numbers that appear on Document 424 (the list containing the names and contact details for members of the CCG in 2001). We accept the arguments advanced by the Scotland Office and conclude that disclosure of this information would breach the first data protection principle and is therefore exempt under section 40(2) of FOIA.

Section 41

90. This exemption was claimed in relation to part of Document 519.

91. For the reasons given on the Confidential Schedule we have concluded that this public interest in maintaining this exemption does not outweigh the public interest in disclosure and that this document should be disclosed in full.

Section 43

92. During the course of the Appeal, further agreement was reached between the parties. In relation to section 43 of FOIA, the Scotland Office maintained that this exemption applied to one sentence within Document 203. This was conceded by the Commissioner.

93. There was no agreement over a second sentence that the Scotland Office sought to withhold, under the exemption at section 35(1)(a). For the reasons given on the Confidential Schedule we have concluded that this public interest in maintaining this exemption does not outweigh the public interest in disclosure and that this document should be disclosed, with only the sentence the parties reached agreement about redacted.

Conclusion and remedy

94. Our findings in relation to each document in Bundle C are contained in the Confidential Schedules annexed to this decision: Schedule 1 identifies the documents to be withheld and Schedule 2 identifies the documents to be disclosed.

95. We have allowed the Appeal in part and in part upheld the Commissioner's conclusions containing in the Decision Notice of 29 October 2007. We have substituted a new Decision Notice.

96. Our decision is unanimous.

Annabel Pilling
Deputy Chairman
Date 5 August 2008