Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0090
Information Commissioner's Ref: FS50177136

Heard at Procession House, London, EC4 and Audit House, London EC4 on 16 and 17 June 2009

Decision Promulgated 26 August 2009

BEFORE

CHAIRMAN

DAVID MARKS QC

and

LAY MEMBERS

MARION SAUNDERS
GARETH JONES

Between

D BOWDEN CONSULTING LIMITED

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

THE CABINET OFFICE

Additional Party

Subject matter: **Cabinet Committee Minutes - Sections 35(1)(a) and 35(1)(b) Freedom of Information Act 2000: Content of Minutes**

Cases: **Corporate Officer of the House of Commons v Information Commissioner and others (EA/2007/0060)**

DfES v Information Commissioner (EA/2006/0006)

Attorney-General v Jonathan Cape Ltd [1976] QB 752

O'Brien v Information Commissioner (EA/2006/0011)

DBERR v O'Brien [2009] EWHC 164 (QB)

Cabinet Office v Information Commissioner (EA/2008/0026 and 0029)

Representation:

For the Appellant: D Bowden Esq
For the Respondent: Timothy Pitt-Payne, Counsel
For the Additional Party: Martin Chamberlain, Counsel

Decision

The Tribunal dismisses the appeal by the Appellant.

Reasons for Decision

General

1. This Appeal concerns the activities of a Cabinet Office Committee known as the MISC31 Committee (MISC31) which was set up to examine and provide advice in relation to how to improve information sharing between Government Departments. MISC31 is no longer in existence, having been abolished in early to mid 2008. Its remit is now administered by other committees.

2. The original request in this case sought the disclosure of a variety of matters relating to MISC31 and in particular details of minutes of MISC31 since its formation as well as the identities of its members. Some information was duly provided by the Cabinet Office which is the Additional Party in this Appeal. The minutes were withheld as were the names and identities of junior staff members. Reliance was placed by the Additional Party predominantly on the provisions of sections 35(1)(a) and (1)(b) of the Freedom of Information Act 2000 (FOIA). Section 35(1) provides in relevant part a qualified exemption under FOIA in respect of a request for information which relates to the formulation or development of Government policy and Ministerial communications. Reliance was also placed on section 40(2) which, when read together with the relevant provisions of the Data Protection Act 1998 (DPA) provides an absolute exemption if personal data is involved. In the event as at the date of the hearing of this Appeal and during the Appeal the arguments raised by the Appellant concerned only the scope and operation of section 35.

3. The Appellant is a company which trades or operates under the name of Lobby and Law. By its website it claims to offer a wide range of legal services in relation to a number of separate areas involving data protection issues. It describes itself as "headed" by a Mr David Bowden who is a qualified practising solicitor and who appeared for the Appellant on this Appeal. On being questioned by the Tribunal he

said that the Appeal was being prosecuted in effect on behalf of what he called a "commercial client".

4. Although the Tribunal is grateful to Mr Bowden for his submissions, matters were not helped by the excessive non legal and legal documentary materials which Mr Bowden put before the Tribunal. There may be exceptional cases where allowance can be made for such occurrences particularly where litigants in person appear before the Tribunal. However, qualified advocates such as Mr Bowden who appear before this Tribunal should expect that blanket references to documents which do not on further examination relate in any meaningful way to the specific issues on the Appeal and which are not properly distilled and cogently set out in written submissions, risk not being considered at all by the Tribunal. It is for advocates succinctly and clearly to set out their case. It is not for the Tribunal to divine it. In certain cases where irresponsible actions are taken before the Tribunal the penalty may well be one which sounds in costs: see generally the Tribunal's Enforcement (Appeals) Rules 2005 particularly at Rule 29.

The request for information

5. On 17 April 2007 the Appellant made a request for the following information, namely:

   (1) Minutes of all meetings held since the Cabinet Committee MISC31 was formed,

   (2) the Agenda(s) of all the forthcoming meetings of MISC31,

   (3) the Calendar(s) for future meetings of MISC31;

   (4) the name, address, telephone number and email address of the Secretary to Cabinet Committee MISC31,

   (5) the names, ranks and job titles of all members of Cabinet Committee MISC31, and

   (6) the Strategy Document(s) produced (formal and drafts) by of [sic] for consideration by Cabinet Committee MISC31.

6. There then followed various exchanges in the wake of that request. For present purposes it is enough to summarise the upshot as follows, namely:

(a) request (5) was answered by the provision of an internet link which published the membership including job titles of the membership of the MISC31 Committee;

(b) request (6) was also answered by the provision of an internet link regarding an Information Sharing Vision Statement published in September 2006 to which further reference will be made below;

(c) the information requested under requests (2) and (3) were in due course the subject of a statement that such information was not held;

(d) as for request (4), the Additional Party disclosed the names of the Director General and the Director of the Economic and Domestic Affairs Secretariat and the Senior Civil Servant who was a member of the Secretariat for MISC31;

(e) as for three sets of Minutes of MISC31 and the names of the other members of the Secretariat (together initially described as "the disputed information") which information now, as explained above, comprises the Minutes, the same information was withheld on the basis of the applicability of all three exceptions listed above at paragraph 2: in other words that part of the disputed information forming part of request (1) which comprised the Minutes of MISC31 and a record of ministerial discussions attracted the applicability of section 35(1)(a) and section 35(1)(b);

(f) apart from any inferences to be drawn from the matters set-out in (a) the Additional Party did not hold information regarding requests (2) to (3) since the Committee was generally convened on an ad hoc basis, there being no advance agendae for its meetings; moreover as at the date of the request, no further meetings of MISC31 had been arranged.

7. Insofar as the competing public interests were concerned with regard to the qualified exemption or exemptions in section 35, the Additional Party maintained that overall the desirability of maintaining collective responsibility with regard to matters which related to ministerial activities outweighed any public interest in disclosure such as transparency and accountability. This basic contention was developed in far more detail during the Appeal as will appear below.

The Decision Notice: the Appellant's contentions

8. The Decision Notice of the Information Commissioner (the Commissioner) is dated 14 October 2008. After setting out details of the request it related the various exchanges between the parties including a description of the principal contentions made by the Appellant. Given the way in which these submissions were developed and expanded upon on appeal, the Tribunal feels it is necessary only briefly to set out the reasons then advanced by the Appellant as to why it believed the Cabinet Office as the public authority was wrong to refuse the request. The Appellant claimed that:

(a) the exemptions in FOIA are "discretionary" and therefore did not have to be applied by the public authority;

(b) the public interest that had been referred to by the Public Authority was not defined in FOIA: the Appellant therefore suggested that "a commonsense approach" should be taken by the public authority, the Appellant suggesting in that regard that the public interest was and/is one which furthers or benefits the interests of the community;

(c) the Appellant also referred to guidance published by the Commissioner with regard to interpreting the public interest: taking this into account, the Appellant contended that the public interest relating to the scrutiny of the decision making process of MISC31 led to the opposite conclusion to the one in fact reached in refusing to disclose all the requested information:

(d) again with reference to the Commissioners' guidance, the Appellant argued that the public authority had taken irrelevant factors into consideration when carrying out the public interest test resulting in its refusal notice being flawed;

(e) FOIA contained a presumption in favour of disclosure;

(f) with regard to the qualified exemption or exemptions in section 35, the Appellant referred to a speech reported in Hansard by the Secretary of State for Constitutional Affairs in which the latter had said that "the Government believed that factual information used to provide an informed background to decision-

taking will normally be disclosed" in support of the Appellant's contention that the information it was seeking was factual only and should therefore be disclosed; and

(g) the Appellant stated that statistical information was not exempt under section 35 and therefore should be disclosed to the Appellant.

Decision Notice: the exchanges between the Commissioner and the Cabinet Office

9. After May 2008 when the Commissioner communicated details of the complaint to the Cabinet Office, the Commissioner was informed that details of MISC31 were no longer available on the Cabinet Office website. In early to mid 2008 the Cabinet Office confirmed that MISC31 no longer existed. It also explained that MISC Cabinet Committees are generally set up to deal with issues that are likely to be "time limited". It also confirmed that the issues formerly dealt with by MISC31 would subsequently be dealt with by another broader ranging committee. As was explained in evidence on the appeal, the Cabinet Committee structure invariably underwent a wholescale revision with every fresh administration such as the arrival of a new Prime Minister.

10. The Tribunal notes that in paragraph 25 of the Decision Notice the Commissioner in turn noted that although the Appellant had asked the Commissioner to consider the Cabinet Office's decision to withhold the information sought with regard to request (1), he had not asked the Commissioner to investigate whether the Cabinet Office was correct in having maintained that it did not hold the information in requests (2) to (3). In any event the Commissioner in that paragraph specifically confirmed that he was satisfied that such information was not held at the time of the request.

11. The Commissioner then turned to address the applicability of sections 35(1)(a) and 35(1)(b). The Commissioner had, of course, seen the three sets of Minutes to which reference has been made. In observing that the Tribunal had previously determined its earlier decisions that the two sub sections in question were not mutually exclusive he listed the following relevant factors, namely:

(a) Cabinet Committees provide a framework for the Government to consider major policy decisions;

(b) the minutes in question record suggestions and various proposals to improve data sharing within Government; at the time of the request no firm policy had been reached as a result of the three meetings and in particular no policy had been implemented;

(c) the minutes only dealt with ministerial discussions and were recorded to provide in particular Ministers and Ministries with an accurate account of the meetings; and

(d) section 35(5) of the Act specifically provided that the term "Ministerial communications" included "proceedings of the Cabinet or of any committee of the Cabinet".

The Commissioner was also satisfied that no statistical information of the type suggested by the Appellant was held.

Decision Notice: Public Interest Test: sections 35 and 40

12. With regard to the arguments set out above and advanced by the Appellant, the Commissioner determined that:

(a) the Cabinet Office had not taken any irrelevant factors into account in addressing the relevant public interests;

(b) further, the fact that the public authority could have released the information was and is not a relevant consideration;

(c) although there was a public interest in greater accountability in respect of policy making (particularly in the light of recent well-publicised incidents involving data loss) great weight was attached to the protection of the convention of collective responsibility which would be at risk of being undermined by disclosure in the present case since:

(i) disclosure would reveal inter-ministerial exchanges as well as any differences of opinion;

(ii) the issues being considered in MISC31 were still "live" at the time of the request, Government policy on data sharing within the public sector being

still at that time in the "formulation stage", no policy decision having been taken at that point, and

(iii) the timing point referred to in (ii) was of paramount importance in relation to both section 35(1)(a) as well as section 35(1)(b) constituting a reference to what has been called in other Tribunal decisions, and elsewhere the need to preserve "a safe space".

In the light of the fact that the requested personal data was not pursued at the hearing of the Appeal, no further reference will be made to the remaining contents of the Decision Notice.

Grounds of Appeal

13. The Grounds of Appeal are appended to the Appellant's Notice of Appeal dated 18 November 2008. There are 25 separate grounds. There is a great deal of overlap between many of these grounds and they repeat the matters already set out above. Nonetheless the Tribunal feels that it is important at this point at least to summarise them even if there is much repetition of the matters already recounted above.

14. Ground 1 maintains that the exemptions in FOIA are "discretionary and not mandatory". Grounds 2, 3 and 4 are clearly linked. They address the commonsense approach already referred to with regard to the public interest as well as to the Commissioner's published "Guidances" on FOIA. Ground 5 maintains that FOIA contains a presumption of disclosure. Ground 6 refers to the factual nature of the information sought thereby justifying the disclosure of the decision taking process. Ground 7 deals with the alleged content of the information sought as being predominantly, if not wholly "statistical": no doubt a repeated reference to requests (2) and (3). Grounds 8-13 are also clearly connected. In essence they refer to the perception held by the Appellant as to the number of times requests made to the Cabinet Office were disclosed or the number of times the Cabinet Office has been ordered to release information by virtue of the Commissioner finding as much. Reference is also made in particular to this Tribunal's decision in *Corporate Officer of the House of Commons v Information Commissioner* (EA/2006/0060) even though as is clear from the title of that case the Cabinet Office was not itself involved as a party. Ground 14 alleges that in cases involving data protection issues the Commissioner

was not "sufficiently independent or objective" in giving his rulings, reliance being placed on Article 6 of the European Convention on Human Rights. Ground 15 refers to a matter which the Additional Party's sole witness, Dr Fellgett, addresses in his written evidence, namely that in this case the Additional Party has tried, in the words of the Appellant, "to cook up behind closed doors" a scheme which ultimately would be illegal under EU law, being a reference to Article 7 of the Data Protection Directive (95/46/EC) a matter again to be referred to below. Ground 16 recites section 2(2) of FOIA in support of the proposition that whenever a "prima facie case of wrong-doing" is made out, in this case on the part of the Cabinet Office, then the public interest must always favour this disclosure. Grounds 17-22 inclusive are also linked, dealing largely with the notion and applicability of a "safe space". In this regard the Appellant claimed that:-

(a) the said determination justifying the need for a safe space in this case was or represented a "gloss" on FOIA and did not represent a result "mandated" by the Act;

(b) in this case the "safe space time" for the Cabinet Office "had long since expired" reliance being placed on a reference to the existence of MISC31 in a July 2006 Home Office Green Paper entitled "New Powers Against Organised Crime" (Cm 6875) in which Green Paper it was said led "straight" to the Bill which was then subsequently enacted as the Serious and Organised Crime Act 2007 (SOCA). The above arguments constitute in effect Ground 18.

Grounds 19 and 20 then listed 6 organisations described as being anti fraud organisations under the SOCA which organisations had to handle data in accordance with a Code of Practice drawn up by the Home Office, the Commissioner and the said organisations. Ground 21, in the wake of this, therefore maintained that the "scheme envisaged by the 2007 Act" was that there would necessarily be a wider sharing of fraud data between the public and private sectors. Ground 22 in turn alleged the following, namely:

"So the "safe space time" - if it exists as a matter of law under [FOIA] - has long since expired here as it has already led to legislation which is now in force and directly affects every citizen of the UK".

Grounds 23 and 24 also appear to be connected. Ground 23 alleges that the Commissioner failed to consider the question of redaction with regard to the information requested. It coupled that allegation with a repetition of the claim that the Appellant was entitled to know what the Cabinet Office was seeking to "cook up" very much in the vein of the complaint made and referred to earlier. Finally Ground 25 claims that the Appellant was denied natural justice as it was not sent a copy of the response made by the Cabinet Office to the Commissioner during the course of the Commissioner's investigation.

Evidence

15. The Tribunal heard evidence from Dr Robin Fellgett CB to whom reference has already been made. He is currently the Director and Deputy Head of the Economic and Domestic Affairs Secretariat (EDS). He has held that post since March 2003. Prior to that he was Director of Financial Services at HM Treasury. The EDS supports the Prime Minister and the Cabinet in all aspects of domestic policy other than the work of the National Economic Council.

16. Dr Fellgett did not attend meetings of MISC31 which according to his oral evidence was set up "at least" by the end of 2005 although its first meeting took place in April 2006. He admitted to having been involved in discussions with the former Department for Constitutional Affairs (DCA) which he said was a "normal" part of his role as well as in the manner in which the Appellant's request was responded to.

17. The witness statement which he produced was provided principally to address the "public interest detriment" were the information requested to be disclosed. The statement did, however, discuss generally how Cabinet Committees operated. He also produced a closed witness statement which was an unredacted version of his open statement. The Tribunal is satisfied that the redactions properly represented or reflected information which otherwise comprised or reflected in turn the disputed information.

18. As head of the Government, the Prime Minister not only chairs Cabinet meetings but also determines the membership and terms of reference of all Cabinet Committees and sub committees. MISC31 was set up while Tony Blair was Prime Minister before the end of 2005. When Gordon Brown became Prime Minister in June 2007 a new

structure of Cabinet Committees was announced. There was, however, no direct replacement for MISC31. Dr Fellgett produced a list of 39 current Cabinet Committees. He confirmed that any decision taken by a Cabinet Committee or sub committee has "equal value" to any decision taken in full Cabinet. In his words:

"The Cabinet and Cabinet Committees provide a forum for collective consideration of, and decisions on, major policy issues and question of significant public interest. They ensure that issues that are of interest to more than one Department are properly discussed and that the views of all relevant Ministers are considered" (paragraph 7).

19. During a meeting of a Cabinet Committee or sub committee members of the secretariat take detailed manuscript notes. The secretariat comprises civil servants employed by the Cabinet Office who work for the Cabinet Secretary and Prime Minister. On occasion the chair may bring in a private secretary and a representative of the Prime Minister's Office may also attend a committee. Minutes might be subject to factual comments by the members. Quite often it would be clear from the Minutes in question which Minister would have said what.

20. Dr Fellgett also stressed the importance of frankness and candour attendant upon the entire process. If disclosure were to occur, in his words, Ministers:

"… are likely to be more reluctant to put forward openly and candidly dissenting views and would tend to express their views with an eye to eventual publication" (paragraph 15).

21. He also confirmed that the principle of Cabinet confidentiality "may carry additional weight" when policy formulation was at an early stage or still ongoing.

22. The principle of collective responsibility and its links with confidentiality Dr Fellgett claimed were properly enshrined in the Ministerial Code (2005 edition) being the version in force at the relevant time. The relevant provisions are in Part 1 which deals with a ministerial code of ethics and in particular in sub paragraphs 1.1 and 1.5 which stress the need, indeed the obligation, upon Ministers to uphold the principle of collective responsibility. Part 2 and section 6, paragraph 6.2 and following relate to the way in which Cabinet and Ministerial Committee business is carried on. In

particular paragraph 6.16 sets out with some care the content of the principles relating to collective responsibility. Without reciting the same in full the Tribunal feels it is sufficient to say, as is perhaps well known, that the principle of collective responsibility means that decisions reached by Cabinet or Ministerial Committees are not only binding on all members but are published as being in effect as if each decision was a decision taken by the Minister concerned.

23. The upshot of this was that Ministers in whatever meeting was applicable should be able to express their views "frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached". This in turn led to the privacy of opinions expressed in Cabinet and Ministerial Committees. Paragraph 6.17 ended with the following passage, namely:

"Moreover Cabinet and Committee documents will often contain information which needs to be protected in the public interest. It is therefore essential that, subject to the requirements on the disclosure of information set out in the Freedom of Information Act 2000, Ministers take the necessary steps to ensure that they and their staff preserve the privacy of Cabinet business and protect the security of Government documents."

24. In his statement Dr Fellgett maintained, however, that the fact that Cabinet Committee Minutes were normally kept confidential did not represent "a lack of accountability or transparency". He pointed to Part 7 of the 2005 Ministerial Code which stipulates that "the most important announcements of Government policy should be made in the first instance in Parliament …": see Part 7.1. Disclosure would signal a narrowing of the circle of persons involved in policy decisions with a resultant increase in informality in relation to decision making itself. In relation to the principle of collective responsibility he referred to various commentaries in that regard made by a number of well known political and public figures in the recent and not so recent past, eg Clement Attlee who had underlined the overriding importance of confidentiality.

25. As indicated earlier, MISC31 was set up towards the end of 2005 to "develop the Government's strategy in data sharing across the public sector". It had no "forward programme" of meetings: rather meetings were held as and when required. Dr

Fellgett, therefore, confirmed that since the abolition of MISC31 the issues previously dealt by it "would now be covered by other broader ranging Committees but, in any event, data-sharing would now be placed more strongly within the context of ensuring data security". (See paragraph 43 of his witness statement).

26. Dr Fellgett dealt with a number of individual issues which had been raised prior to, and indeed, during the appeal. First, the Appellant had contended that the work of MISC31 was contrary to EU law, in particular, the Data Protection Directive (see above at para 14). The Appellant contended that as a result of the Directive there was, in particular, a public interest in disclosure of the Minutes. Dr Fellgett responded by stating that the work of MISC31 "proceeded on an understanding that any data-sharing had to be in accordance with the Data Protection Act" ie, the DPA (paragraph 49). He also stated that it would have been understood by the Committee that some other forms of data-sharing would only have been possible with legislation.

27. Dr Fellgett confirmed that since the date of the request, there had been a "a great deal" of Parliamentary scrutiny of data-sharing issues through the work of the House of Commons Select Committee on Home Affairs together with the House of Lords Select Committee on the Constitution (paragraph 51).

28. Dr Fellgett explained that the Minutes sought to be disclosed in the request were classified as "Restricted". Circulation of minutes would have been effected, not via email, but only via a dedicated electronic database to which only named Departmental officials had access. Dr Fellgett confirmed that no-one other than a Minister on the particular Committee or Committees concerned, has an automatic right of access to a Cabinet Committee document. Such documents must not be shown to anyone within a department except on the specific instructions of a Minister or his or her Private Secretary. Moreover, only the Cabinet Office is and was permitted to retain copies.

29. Exhibited to Dr Fellgett's witness statement was the Information Sharing Vision Statement dated September 2007, already referred to above. Baroness Ashton, as the then Parliamentary Under Secretary of State at the DCA presented a Forward in which she explained that as at the date of the Statement, the Government was

"committed to more information sharing between public sector organisations and service providers". The Report then set out a number of perceived benefits of information sharing, as well as emphasising the need to maintain effective safeguards and a suitable degree of transparency. In particular, it stated at paragraph 11 the DCA would work with the Commissioner's Office to ensure that personal information would be kept safe and secure. Specific reference was also made to the then recent proposals for allowing public sector membership of CIFAS, the United Kingdom Fraud Prevention Service.

30. In the course of giving oral evidence, Dr Fellgett also produced a Home Office document dated November 2006 entitled "New Powers Against Organised Financial Crime: a summary of responses". At pages 6 and 7, there is a discussion about the implications of data-sharing in relation to preventing fraud. Reference is again made to the need to work closely with the Commissioner in that respect. Reference is also made in a subsequent paragraph to what had been Green Paper proposals made in relation to serious organised crime and assistance given with regard to such crimes. These proposals eventually took legislative form in the shape of SOCA.

31. Again, in his oral evidence, Dr Fellgett entirely refuted any suggestion that MISC31 and indeed any Cabinet Committee was asked in some way to "rationalise" policy decisions. He contended that it would be surprising if it did, if by rationalisation it was meant that the views of a Cabinet Committee or sub-committee were themselves advanced as a reason for or behind a given policy.

32. In cross examination, Dr Fellgett was asked about how FOIA requests were processed by the Cabinet Office and more particularly how in the past they had been answered. With respect to Mr Bowden and to the careful and considered manner in which the Additional Party's representative answered that query, the Tribunal entirely fails to see the relevance of what was in effect a poll on the extent to which the Cabinet Office has been FOIA-compliant.

33. Dr Fellgett was also asked about the constitution of MISC31's attendance at any one time. Not surprisingly, he declined to give details of these matters. The Tribunal respectfully agrees with his reaction. Not only would any such answer have been irrelevant to the sole request in issue before the Tribunal on this appeal, but any such

answer would in addition have risked revealing the very information which was sought by that request.

34. During his cross examination of Dr Fellgett, Mr Bowden enquired whether what he called a strategy-related document or documents had been produced. This was an echo of request (5). As indicated above, the Commissioner had been satisfied with the Cabinet Office's response that no information fell within that request and was therefore not held. Nothing that the Tribunal heard or saw indicated anything else.

35. Dr Fellgett was also asked at length about the way in which Cabinet Minutes were compiled involving such issues as the attribution of particular observations to individual attendees and the manner in which notes of meetings were taken and the way in which minutes were written up. Again, the Tribunal finds it impossible to see the relevance of any of these matters to the key issues on the appeal which involved consideration of the competing public interests in the various applications of subsections of section 35 of FOIA, in particular the effect and extent of the effect of the principle of collective responsibility.

The Appellant's materials

36. As indicated above at paragraph 4, the Appellant felt it appropriate to provide a substantial number of additional documents regarding the appeal. The documents in question filled a binder which consisted of some 326 pages. The nature of these documents ranged from newspaper articles, newsletters from various organisations to an assortment of government publications issued from various sources as well as from printed materials via the variety of other, sometimes unspecified, documentary materials.

37. The Tribunal received little, if any, real assistance from Mr Bowden in seeing the significance of any of these extensive materials to the case advanced by the Appellant. This was despite inviting him on more than one occasion to concentrate on what he regarded as the more essential elements in this documentary material. On the other hand, Mr Pitt-Payne, on behalf of the Commissioner was able to point to at least three documents in the binder, apart from the Vision Statement which showed that the fact of the existence and general purposes of MISC31 were together in some general way put into the public domain.

38. The first such document was an article in The Guardian published on its website dated 24 August 2006 which reported that Ministers were then preparing to overturn a fundamental principle of data protection in government leading to an announcement "next month", that public bodies could assume that they were free to share citizens' personal data with other arms of the State as long as the same was in the public interest. The article went on to say that the policy was agreed upon by a Cabinet Committee "set up by the Prime Minister" and was said to reverse the "current default position – which requires public bodies to find a legal justification each time they want to share data about individuals".

39. The second document was produced by an organisation called FAME (Framework for Multi-Agency Environments). The document is undated but contains a fairly detailed description of the functions and purposes of MISC31. It refers to MISC31 as being "newly established" and states that its creation had prompted FAME to help in and influence MISC31's objectives which related to information sharing in the public sector.

40. The third document is another undated document headed merely "Transformational Government". This appears to be series of pages downloaded from a government website, one of which is headed "What are we doing?". There then follows a series of bullet points referring specifically to MISC31 being established, it was said "to develop the Government's strategy on data-sharing across the public sector", further referring to the Vision Statement in September 2006 and finally referring to a plan to be published in April 2007 setting out a number of items including the barriers to be overcome and development of the relevant safeguards.

41. On the basis of these materials alone, there is no doubt in the Tribunal's view that the public was sufficiently well informed not only about the fact of MISC31's existence, but also of its aims and functions. Although this matter was not explained further in the course of the Appeal, it is at least an open question as to whether the same could be said about other Cabinet Committees and sub-committees.

Section 35 of FOIA

42. Section 35(1) 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 …".

43. Section 35(5) defines: "Ministerial communications" as:

"… any communications –

(a) between Ministers of the Crown … and includes, in particular proceedings of the Cabinet or any committees of the Cabinet …".

There is no dispute that section 35 applies to the information requested, nor could there be, in the Tribunal's view. The critical question therefore is whether as the Commissioner determined in his Decision Notice, the public interest in maintaining the exemptions outweighs or outweighed the public interest in disclosure.

44. As has been seen, both the Cabinet Office and the Commissioner relied on the two exemptions set out above. Although the Tribunal accepts that the interests promoted by both exemptions overlap, it will address, as did the public authority and the Commissioner in this case, each in turn separately.

<u>The interests in issue</u>

45. Counsel for the Cabinet Office (Mr Martin Chamberlain) submitted both in writing and orally that there were at least 3 interests served by ensuring that communications which took place in Cabinet or in Cabinet Committees remain confidential. They were essentially:

(a) the encouragement of full and frank discussion likely to lead in turn to better quality decision making;

(b) respect for the principle of collective responsibility; and

(c) the benefits of good record keeping which insofar as it did not also generate the type of decision referred to in (a) itself both promoted and enhanced better decision making and the overall quality of discussion leading to such decisions.

Legal submissions and analysis

46. As to the first, the Additional Party maintained that the risk of exposure would inhibit free and unhindered discussion. This factor was articulated by Dr Fellgett. This issue has been regularly addressed and respected in the Tribunal see, eg *DfES v Information Commissioner* (EA/2006/006) especially at 75 (Ministers entitled to "time and space").

47. As for collective responsibility, the basis and rationale of this principle has frequently been recognised and endorsed by the courts. See eg *Attorney-General v Jonathan Cape Ltd* [1976] QB 752 especially at 771 per Lord Widgery CJ (a reference to "joint responsibility" within the Cabinet likely to be prejudiced by the premature disclosure of views of individual ministers). The Ministerial Code makes ample reference to this principle in its 2005 version which is the relevant version in the present appeal especially at 6.2, 6.16 and 6.17. Again the Tribunal has had occasion to recognise the importance of this principle specifically in the context of section 35(1) of FOIA: see *O'Brien v Information Commissioner* (EA/2006/0011) especially at paragraph 27.

48. In this regard, Mr Chamberlain in his written submissions quite rightly issued the reminder that section 35(5) of FOIA included a definition of "Ministerial communications" as including "in particular" proceedings of the Cabinet or of any Cabinet committees. The subsequent High Court Appeal in no way detracts from the relevant finding in the Tribunal's decision: see generally *DBERR v O'Brien* [2009] EWHC 164 (QB). See and compare *Cabinet Office v Information Commissioner* (EA/2008/0026 and 0029) especially at paragraphs 38-57.

49. As for the third element noted above, the arguments in favour of improved record-keeping are almost self evident. The point was again extremely well articulated by Dr Fellgett.

50. The next issue raised by the Additional Party was to set out the reasons it contended were applicable in support of its contention that the information in the present case be withheld. Apart from that raised by Dr Fellgett in his oral evidence with regard to the role played by MISC 31 in respect of the formulation of policy in the realm of data-sharing as not providing any rationale for policies adopted, the Additional Party

stressed the general need for Government to "be able to consider and develop policy issues internally unhindered by the risk of possible disclosure".

51. As noted above the Appellant throughout the Appeal has claimed not only that MISC31 took policy decisions but also that any such decisions violated EC law. The Tribunal rejects that contention for the two reasons advanced by the Additional Party. First any challenge to the compatibility of any statute, whether it be SOCA or any other legislative enactment would be by a number of means including but not limited to the seeking of a declaration of incompatibility, none of which would of themselves in any way entail the need to take into account or consider minutes sought to be disclosed in this case. Such an attack would be mounted solely as against the allegedly offending legislation. Second, as shown by the evidence presented to the Tribunal, SOCA had itself been the subject of an earlier Home Office Consultation Paper. The Tribunal has not been addressed in any detail as to the legislative history of the enactment and understandably so. The time for impeaching the draft legislation on the grounds of incompatibility would have been during that phase of the legislative history.

52. The Tribunal accepts that there is some public interest in the disclosure of the requested information. As the Commissioner pointed out, data sharing is an important area and the subject of considerable public discussion and debate. The Tribunal, however, was quite properly reminded that the requisite balance in play is the balance of public interest as it relates to the disclosure of the disputed information in issue and not with regard to some wider class of information of which the disputed information is merely part.

53. As indicated above, and as has been made clear by earlier Tribunal decisions, timing is often all important. In the instant case, policy discussions were ongoing when the request was received. When coupled with the overall importance of the practical considerations inherent to the principle of collective responsibility, the Tribunal is entirely satisfied that the balance in this case clearly militates against disclosure.

54. It follows that the 25 grounds of appeal put forward by the Appellant are rejected and the Appeal dismissed. Insofar as not covered by what has been said above the Tribunal would add the following reasons for its decision, namely:

(i) Ground 6 states that statistical information was here involved. The Tribunal has inspected the minutes in closed session. A word will be said about that below. It is entirely clear to the Tribunal that the information is not simply factual information. Discussion of policy does not constitute such information for present purposes.

(ii) Contrary to what is stated or suggested in Ground 14, compliance with FOIA does not entail the determination of civil rights and obligations for the purposes of Article 6 of the European Convention on Human Rights. Even if a Decision Notice or any finding by the Commissioner exhibited any degree of partiality or absence of independence, appeals to this Tribunal clearly involve a full merits appeal coupled, as any such appeals would be, with an appellate procedure should any decision in this Tribunal be disputed.

Requested information

55. The Tribunal considered the requested information in closed session. Having studied the information with care, as indicated above the Tribunal is entirely satisfied that the minutes addressed the evolutionary stages of the policy and policies referred to in such minutes. Moreover, as it was put at one stage by Mr Pitt-Payne on behalf of the Commissioner, the nature and content of the requested information represented a "classic" illustration of the so called safe space principle already referred to. Much the same contention was made by Mr Chamberlain and the Tribunal gratefully and respectfully adopts their submissions.

56. Mr Chamberlain also quite rightly in the Tribunal's judgment pointed out that nothing in the requested material in any way constituted anything remotely resembling the implementation of any form of strategy.

Section 35: aggregation

57. The Tribunal accepts the submissions made by the Additional Party and by the Commissioner that there is a clear overlap between the subject matter of section 35(1)(a) and that of section 35(1)(b) of FOIA. It follows from what is said above and from the determination made by this Tribunal that it is entirely satisfied that the public interest balance involved in each subsection militates in favour of non-disclosure.

Insofar as the Tribunal is bound to address the need to "aggregate" the public interests inherent in all the exemptions which are in issue, the Tribunal hereby determines that even on an aggregated basis the public interests in play in this appeal also justify non-disclosure.

Other jurisdictions

58. At the conclusion of this Appeal the Tribunal made what can be regarded as something of an exceptional direction. Mr Bowden had alleged in the course of his submissions that support for the Appellant's case could be found in the laws and principles of other Commonwealth jurisdictions as well as the Republic of Ireland. The Tribunal therefore granted permission to him to be able to address such submissions in writing.

59. Regrettably the Tribunal was not helped by his further contentions as set out in writing. Nothing in the additional materials he produced constituted or reflected any kind of unequivocal provision or principle which corresponded to the exemption or exemptions in FOIA relating to Ministerial communications. Reliance was sought to be placed on Regulation (EC) No 1049/2001 as well as certain provisions in certain United States statutory materials. Quite apart from the fact that the direction made by the Tribunal did not extend to granting the Appellant leave to produce non Commonwealth materials nothing drawn from such materials provided any form of assistance. The Tribunal therefore proposes to say nothing further on this point.

Conclusion

60. For all the above reasons the Tribunal dismisses this Appeal.

Signed:

David Marks QC
Deputy Chairman
Date: 26 August 2009