

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

***Cabinet Office v Information Commissioner and Dr Lamb***

**EA/2008/0024**

**26<sup>th</sup> January 2009**

**Cases:**

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

**Facts**

The Tribunal considered the formal minutes of two Cabinet meetings in March 2003 at which Ministers had decided to commit forces to military action in Iraq. Disclosure had been resisted on the basis that they fell within the exemption provided by the following parts of FOIA section 35:

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

*(a) the formulation or development of government policy,*

*(b) Ministerial communications...”*

It was accepted on all sides that the exemption was engaged and that it was a qualified exemption, so that disclosure should be ordered unless the public interest in maintaining the privilege outweighed the public interest in disclosure.

The Tribunal reviewed the detailed history of events leading up to the decision to take military action and the various investigations and enquires that had taken place since. It concluded that these should not be regarded as

alternatives or competing means to freedom of information disclosure and that there were issues of public interest that they had not fully examined.

The Cabinet Office argued that disclosure would undermine the long established constitutional convention of collective responsibility. Under the convention members of the Cabinet must publicly support all Government decisions made in Cabinet, even if they do not privately agree with them and may have argued in Cabinet against their adoption. They must also preserve the confidentiality of the Cabinet debate that led to the decision. It stressed the importance of the convention to the effective functioning of a central element of the nation's system of government. It argued that the danger to the convention lay, in particular, in the risk that if Ministers anticipated that Cabinet Minutes would be prematurely disclosed they would disrupt genuine debate by speaking for the official record and/or ensure that sensitive issues were addressed in small group discussions outside the Cabinet. Cabinet collective responsibility protection would only be preserved if the maintenance of confidentiality was the norm, i.e. Ministers would only feel comfortable in participating in a full and open discussion and scrutiny of options if they had an assurance that there would be consistency of approach with regard to disclosure and that, in the normal run of events, their contributions to Cabinet debate would not be disclosed prematurely.

However, the Cabinet Office acknowledged that the exemption was qualified, not absolute, so that there would be occasions when disclosure would be appropriate, but argued that the very cogent reasons that would be needed before disclosure was ordered, did not arise in this case.

On the other side the Information Commissioner conceded that maintenance of Cabinet confidentiality was a strong factor favouring the maintenance of the exemption. He acknowledged, too, that disclosure shortly after any meeting as a matter of routine would damage policy making and collective Cabinet responsibility and that it was relevant to take into account the possible indirect consequences of particular information being disclosed. However, he encouraged the Tribunal to focus on the damage to Cabinet collective responsibility that might be caused by the disclosure of these particular

minutes in the particular circumstances of this case (including the passage of time between the events in question and the date of the original request).

## **Findings**

The Tribunal found itself in the position where one panel member agreed with the Cabinet Office, believing that the degree to which the public interest would be served by disclosure did not justify the harm that disclosure would cause to Cabinet collective responsibility. However, the majority disagreed and believed that the public interest in maintaining the exemption did not outweigh the public interest in disclosure. The majority view was that:

- The convention of collective Cabinet responsibility clearly affords very considerable benefits in terms of good decision making at the highest level of government. Those benefits would be lost or severely reduced if the official records of Cabinet discussions were disclosed prematurely and/or without a thorough examination of the public interest factors for and against such action.
- The convention was not a rigid dogma. It had adapted over the years, reflecting changes in the standards of behaviour in public life, including the appearance of disclosures in politician's memoirs.
- Parliament's decision to categorise the section 35 exemption as qualified, not absolute, was a further very relevant change.
- On the particular facts the undoubtedly strong argument in favour of maintaining the section 35 exemption in respect of Cabinet discussions did not outweigh the public interest factors in favour of disclosure, which the Tribunal considered were very compelling. They included:
  - The decision to commit the nation's armed forces to the invasion of another country, which was momentous in its own right, and had proved to be divisive within the Cabinet and at both national and international level.

- The criticisms that had been made of the general decision making processes in the Cabinet at the time.
- The particular way in which the advice of the Attorney General, on which the decision had been based, had been made available to the Cabinet and the fact that an earlier opinion had been withheld from it.
- The criticisms of the conclusion reached in Attorney General's legal advice.
- Against that background the approach adopted during the Cabinet meetings was of crucial significance to an understanding of a hugely important step in the nation's recent history and the accountability of those who caused it to be taken.

The majority view also stressed that it was the coincidence of all of the identified factors being applied to the particular information in question that generated the impetus for disclosure. This had not been significantly reduced by the investigations and enquiries that had taken place.

The majority concluded:

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

The minority view sought to reach a decision that was most likely to support continued confidence that Cabinets could explore difficult issues in

full and in private, and on the basis of papers where appropriate. It considered that disclosure might in fact encourage a trend towards informality and circumscribed procedures and would add a further degree of doubt to Ministers' confidence that they could hold a full and frank discussion on the basis of fully informative papers in future, without inhibition by the thought that minutes and papers showing internal disagreement could be released prematurely. Release of the papers in this exceptional and prominent case was thought likely to encourage, rather than discourage, any tendency for the real discussion to take place informally, in un-minuted meetings, and without full information.

The Cabinet Office had also argued that, in the event that disclosure was ordered, certain parts should be redacted as disclosure would, or would be likely to, prejudice the relations between the United Kingdom and other States so that the exemption provided for under FOIA section 27 required to be considered. Having heard evidence on the point the Tribunal agreed that certain redactions should be made. The precise scope of the redactions was set out in a confidential schedule.

The original requester had also sought disclosure of the informal notes taken by civil servants during the Cabinet Meetings in question, which formed the basis for the preparation of the formal minutes. In respect of that material the Tribunal decided that the public interest in maintaining confidentiality did outweigh the public interest in their disclosure.

## **Conclusion**

By a majority, that the Information Commissioner had been correct to direct that the Minutes should be disclosed. The Tribunal was unanimous that certain redactions should be made to the disclosed information in order to avoid prejudice to international relations and that the informal notes on which the minutes had been based should not be disclosed.