THE UPPER TRIBUNAL **Appeal No. GIA 4281 2012**
ADMINISTRATIVE APPEALS CHAMBER

Cabinet Office v Information Commissioner and Gavin Aitchison

DECISION

Appeal dismissed.

Directions concerning publication of the closed information are set out at the end of the decision.

A closed annex to this decision is issued separately. As noted below, it does not affect the formal decision given in this appeal.

REASONS FOR DECISION

1 Gavin Aitchison is a senior journalist with *The Press* newspaper in York (previously *The Yorkshire Evening Press*). In 2008 he decided to revisit the takeover in 1988 by the Nestlé group of companies of the business activities of Rowntree Mackintosh and in particular the business previously known as Rowntree and based in York. This had been covered in detail by *The Press* as it happened. He sought further information from the Cabinet Office about the takeover, but was met with a refusal. He applied to the Information Commissioner, who secured the release of some information and ordered that further information be provided. The Cabinet Office appealed against that decision to the First-tier Tribunal. The First-tier Tribunal confirmed the decision of the Information Commissioner. The Cabinet Office applied for permission to appeal against that decision and was granted permission by a First-tier Tribunal judge.

2 I held an oral hearing of the appeal on 14 June 2013 at Field House, London. The Cabinet Office was represented by James Cornwell of counsel, instructed by the Treasury Solicitor. The Information Commissioner was represented by Robin Hopkins of counsel. Mr Aitchison attended the open session of the hearing and represented himself. Following the hearing I prepared a draft decision. This was circulated to the Appellant and the Commissioner (in part to ensure no unintended release of closed information) and then to Mr Aitchison. I am grateful to all for their comments and have taken account of all of them in issuing this final decision.

The nature of this appeal

3 Mr Cornwell for the Cabinet Office pressed upon me a series of reasons why the decision of the First-tier Tribunal was wrong in law. Mr Hopkins for the Information Commissioner urged restraint in scrutinising the reasoning of the First-tier Tribunal (referred to in this decision as the Tribunal). As part of that submission he took me to statements from the highest courts about the extent to which appellate courts and tribunals should interfere with the decisions of the First-tier Tribunal. This case is one that illustrates the problems of balancing the extent of the appellate function as it involves consideration of constitutional conventions and government and public policy. It is not merely an exercise in fact finding and statutory interpretation.

4 In the light of those submissions and factors, I emphasise that my task in this appeal is not to re-evaluate the policy decisions of the Commissioner and the Tribunal. It is to

ensure that the Tribunal did not err in law in its detailed consideration of the policy issues it considered relevant in assessing the public interests for and against requiring the Cabinet Office to release certain documents and either to confirm or to deny that there were Cabinet discussions about the Nestlé takeover of Rowntree.

5 I was taken to the recent comments of the Supreme Court about my task as a judge of a specialist appellate tribunal. At paragraph [46] of the decision of the Supreme Court in *R(Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19, [2013] 2 WLR 1012 Lord Carnwath cited a passage from a paper of his published extra-judicially. While it can be argued that this was not part of the core decision of the Court in that case, it is in my view of considerable significance that Baroness Hale, Lord Sumption and Lord Walker all expressly agreed with the judgement of Lord Carnwath.

6 Lord Carnwath repeated comments from an article of his published at [2009] Public Law 48 on the constant problem for a tribunal such as the Upper Tribunal on distinguishing an issue of law from a matter of fact:

> "… what if there is an intermediate appeal on law only to a specialist appellate tribunal? Logically, if expediency and the competency of the tribunal are relevant, the dividing line between law and fact may vary at each stage. Reverting to Hale LJ's comments in *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, [5] – [17], an expert appellate tribunal, such as the Social Security Commissioners, is peculiarly fitted to determine, or provide guidance, on categorisation issues within the social security scheme. Accordingly, such a tribunal, even though its jurisdiction is limited to "errors of law" should be permitted to venture more freely into the "grey area" separating law from fact, than an ordinary court."

7 Mr Hopkins also took me to remarks to similar effect about restraint in criticising specialist tribunals by Lord Neuberger in *BBC v Sugar* [2010] EWHC Civ 715 (affirmed on other grounds in the Supreme Court at [2012] UKSC 4) and by Toulson LJ in *HM Revenue and Customs v Procter & Gamble Ltd* [2009] EWCA Civ 405, both reflecting the comments of Baroness Hale in *Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49, [2008] 1 AC 678.

8 In this case I am asked to venture into an area that is arguably neither law nor fact, namely the specific weighing of conflicting public policy factors. That raises the question how far the weighing exercise is an issue of law. I do not accept that the entire exercise of identifying and then weighing policy considerations is an exercise in law. At the same time, it is a question of law whether something is or is not relevant, and there is some authority for the argument that to some extent the weighing of individual relevant factors is a question of law. The extent to which this is a question of law, or at least one within the somewhat wider scope suggested by Lord Carnwath, is directly in issue here. I approach this decision from that perspective.

9 I take from this that I should approach the arguments presented by Mr Cornwell and Mr Hopkins (and, at the general level Mr Aitchison) taking into account, first, any binding authority together with any relevant decisions of the Administrative Court. While technically such decisions are not binding, I would normally expect to follow any decisions of that Court where relevant. I take that approach to both the decision of Blake J in the *Law Officers case* and that of Wyn Williams J in the *DBERR case* both noted below.

10 Second, and equally, it is in my view proper that I look at whether the reasoning of the Tribunal in this case is consistent with the reasoning of the First-tier Tribunal in similar

cases. The First-tier Tribunal sits in information cases as a panel of three members and to that extent exercises what might be termed a jury function as well as a judicial function. Further, as Blake J illustrates in the *Law Officers case*, it is also useful to see the approach of the Commissioner to such decisions. That is particularly important where a tribunal has conducted its own balancing exercise in the light of previous decisions of that tribunal and in doing so has reached a similar decision to that of the Commissioner when he also has issued a decision consistent with his previous decisions. That is precisely the position here. If the Upper Tribunal has, as above, a guidance function in cases such as this, I take that function to be one of seeing how the tribunals below – and the Commissioner - are performing these functions and of commending or criticising, where appropriate, the approaches being taken. Where it is clear that both have adopted consistent approaches in a series of similar cases without being challenged on appeal, then that is itself of relevance to my task. That must, however, be read subject to the warning rightly given in the Upper Tribunal in *London Borough of Camden v Information Commissioner and YV* [2012] UKUT 190 (AAC). While consistency is to be valued, "there are dangers in paying too close a regard to previous decisions. It can elevate issues of fact into issues of law or principle."

11 Subject to that proviso (noted by the Tribunal in this case), the parties were right to take me not only to the authority provided by the courts but also to the directly relevant decisions of the First-tier Tribunal and its predecessor on the policy issues relevant to section 35(1)(a) and (b) and section 35(3). And it is of value to hear the views of the Commissioner about his decision in those contexts.

Mr Aitchison's requests for information

12 As part of his investigations, Mr Aitchison made a request in 2008 under the Freedom of Information Act 2000 (FOIA) to the Cabinet Office for:

> "Copies of any and all documentation held … dated between 1 April 1988 and 1 August 1988 relating to the takeover of Rowntree chocolatiers. This should include, but not be limited to, minutes of meetings; copies of letters sent/received by the then Prime Minister and other ministers; copies of any memos or speeches which were either drafted or issued; and copies of any other decisions made."

The Cabinet Office confirmed that it held information about the takeover, and disclosed some of it to Mr Aitchison. But it refused to disclose other information held, and relied on section 35(1)(a) and (b) of FOIA. I was shown press coverage of that released information but at that time the application was not pursued.

13 In 2010 Mr Aitchison decided to take his application further. His further request was as follows:

> "As you will be aware, the Government recently complied with a ruling by the Information Rights Tribunal and disclosed minutes from a 1986 Cabinet meeting, regarding the Westland affair. In light of this decision, I request that the Cabinet Office looks again at my original request, as I believe the cabinet minutes and other previously withheld documents should now be released."

14 He received a prompt reply from the Cabinet Office Knowledge and Information Management Unit. This repeated the refusal to disclose further information previously requested, again relying on section 35(1)(a) and (b). The response with regard to Cabinet minutes was that: "I can neither confirm nor deny that the Cabinet discussed the takeover of Rowntree in 1988."

15 Mr Aitchison asked for an internal review of that decision. This specifically renewed the request for release of any relevant Cabinet minutes. The review took place, but Mr Aitchison was informed that it was considered that the exemptions under section 35 were correctly applied. The letter giving the result of the review did not mention the "neither confirm nor deny" aspect of the previous decision. That response was made on 28 October 2010. An internal review was conducted, and the result of the review was given to Mr Aitchison by email on 18 November 2010. I take that to be the date by which the merits of the refusal to confirm or deny the existence of information or the application of exemptions to the information that the Cabinet Office confirms that it holds is to be judged as that is for these purposes the operative date of the refusal by the Cabinet Office.

The Information Commissioner's decision

16 Mr Aitchison then raised the matter with the Information Commissioner (the Commissioner). The Commissioner accepted the complaint as being both against the use of the section 35 exemptions and the "neither confirm nor deny" decision.

17 During the investigation by the Commissioner, the Cabinet Office realised that it should have released an excerpt from a speech by Lord Howe, and it was released. So was a copy of an article from the Financial Times (which was obviously a previously published document). Other documents were identified during the investigation by the roman numerals (i) to (v). They were not released.

18 The Commissioner issued a full decision notice on 3 10 2011 under reference FS50362049. In summary the decision of the Commissioner was that the Cabinet Office should release documents (i) to (v). He also decided that the Cabinet Office was not entitled to rely on section 35(3) of FOIA in refusing to confirm or deny whether the Cabinet discussed the takeover of Rowntree in 1988.

The First-tier Tribunal decision

19 There are both open and closed elements to the consideration of the appeal beyond the decision of the Commissioner. Reference is made to the closed element of the appeal only at the end of this decision and in the closed annex to it.

20 The Treasury Solicitor appealed against the Commissioner's decision on behalf of the Cabinet Office to the First-tier Tribunal. The Commissioner did not accept the criticisms of the Commissioner's decision by the Treasury Solicitor and invited the First-tier Tribunal to dismiss the appeal. Mr Aitchison also asked the First-tier Tribunal to dismiss the appeal, supporting his arguments with detailed comments that referred back to the Westland case. His submission was supported by letters from Members of Parliament. These letters deal in part with one argument made for the withholding of the information, namely that there was no public interest in the specific issues being raised beyond the general public interest in openness.

21 The Tribunal (consisting of Judge Angel sitting with two expert members) held a hearing of the appeal on 6 09 2012. Its decision was issued with full reasons on 15 10 2012. James Cornwell of counsel represented the Cabinet Office, and Robin Hopkins of counsel represented the Commissioner. Mr Aitchison represented himself. The Tribunal decision suggests that he also gave evidence and could have been cross-examined. I am told, and accept, that this is an error on the part of the Tribunal. He did not specifically give evidence. I briefly discussed with the parties the problems faced by individuals representing themselves before tribunals while seeking to ensure an accurate factual statement of their concerns. It is a continuing problem for tribunals, but I do not consider that anything turns on it in this decision. The only evidence in that sense which he produced consisted of the two letters from the Members of Parliament. Evidence was given by a senior member of

staff of the Cabinet Office, Jeremy Pocklington. The Tribunal decision confirmed the decision of the Commissioner on 3 10 2011.

22 The Cabinet Office asked for permission to appeal against that decision. This was granted by a First-tier Tribunal judge as the grounds of appeal raised important points of law. Following standard practice, the specific information requested was not publicly identified by the Tribunal and remained closed pending any appeal. That was confirmed by the First-tier Tribunal when granting permission to appeal and again by the Upper Tribunal when the Cabinet Office asked for permission to appeal. I emphasise that the decision to disclose does not take effect until I or another Upper Tribunal judge directs that this is to happen.

The grounds of appeal

23 Mr Cornwell put forward four grounds of appeal against the Tribunal decision. First, it had erred in the way it considered what is usually called the "30 year rule". This is the general rule about withholding public information for a period that was for many years a period of 30 years under the authority of the Public Records Act 1958. I must consider that in detail below.

24 The second and third grounds were both challenges to the decision of the Tribunal about the balance of factors for and against disclosure under section 35(1). I deal with what I might term the balancing aspects of the decision below. Before me it was common ground between all parties that the information sought by Mr Aitchison was such as properly to engage either section 35(1)(a) or section 35(1)(b) of FOIA. Consequently the balancing issue was decisive in respect of these aspects of the application.

25 The fourth ground of appeal was that the Tribunal erred in law in its decision that the Cabinet Office could not rely on its "neither confirm nor deny" approach with regard to Cabinet minutes (if any).

26 Mr Hopkins resisted each of these grounds of appeal, while confirming that the Commissioner now agreed with the Cabinet Office that all five of the documents I have referred to as documents (i) to (v) were within the scope of section 35(1)(a) of FOIA and that four of the five documents were within section 35(1)(b). He also resisted reliance on section 35(3) as a basis for refusing either to confirm or deny any discussion of the issue in Cabinet. He therefore opposed all the grounds of appeal.

27 Mr Aitchison maintained his argument that it was in the public interest that the information be disclosed. The matter was one that still carried great emotional and sentimental weight in York and the surrounding area. It was in his view plainly a significant public interest that deserved to be considered. At the same time he, modestly and courteously, denied any legal expertise while asking that the arguments for the Commissioner be accepted.

The scope of this appeal

28 I am asked to consider the decision of the Tribunal confirming the decision of the Commissioner. However, unlike the Tribunal, it is not within my jurisdiction to re-evaluate the decision of the Commissioner. My function is only to consider any point of law in the decision of the Tribunal that is challenged before me or which I consider should be examined further. If making the Tribunal decision involved an error of law, then I may, but am not required to, set aside the decision of the Tribunal: Tribunals, Courts and Enforcement Act 2007, section 12.

29 The issues raised by the grounds of appeal should be approached with a focus on that limited remit, together with recognition that some of the issues raised in the appeal have been the subject of little judicial debate beyond the level of the First-tier Tribunal and its predecessor the Information Tribunal. That is in particular true of the release of Cabinet papers. Other aspects of the case are of more limited general importance, while plainly remaining of importance to Mr Aitchison and those in the region for which he writes, and more generally to those interested in the processes of government and in particular its interaction with commercial entities.

30 I therefore examine the arguments about the release of Cabinet papers before turning to the question of the release of all or any of documents (i) to (v). In so doing I emphasise that I approach this argument on the basis that I approached the hearing, as I informed the parties at the time. It is in my view irrelevant to this discussion whether any such discussion by Cabinet (or any committee, official or otherwise, of Cabinet) did or did not occur within the time frame set by Mr Aitchison. What are sometimes referred to as the "neither confirm nor deny" ("NCND") arguments must be engaged before any question arises about releasing any papers that exist. These arguments reflect the more general proposition, adopted by Mr Cornwell, that the existence of any relevant discussion by Cabinet of any issue was a matter that itself should remain withheld from the public record save where Cabinet itself made the matter public or the general rules in the Public Records Act 1958 apply. It is convenient to set the scene by dealing with that Act first.

The Public Records Act

31 The Public Record Office proudly claims to hold official records extending back 1,000 years, although it is now somewhat hidden behind the electronic "face" of the National Archives. The relevance of that Office to this and any similar case is that it is the repository of any government document that is selected for permanent preservation under section 5 of the 1958 Act. It was not disputed in this appeal that the documents sought by Mr Aitchison would (if they exist) be documents of a kind that would be selected for permanent preservation. Section 3(4) of the 1958 Act imposes a duty on all those responsible for preserving public records for permanent preservation to ensure that they are "transferred not later than thirty years after their creation" to the Public Record Office or some other safe deposit. Once a document is held in the Public Record Office, any member of the public may consult it. Indeed, they are now held in electronic form and may be searched on the National Archives website at http://www.nationalarchives.gov.uk/cabinetpapers/default.htm. This accesses all relevant papers from 1915 to 1982 – the latest documents currently available by reason of section 3(4).

32 This provision was reaffirmed in Part 6 of the Freedom of Information Act 2000. Section 62(1) defines a record as becoming a historical record at the end of the period of 30 years beginning with the year in which it, or where it is part of a file including several records, the last of those records, was created. Section 63 prevents several of the exemptions in FOIA from applying to information in historical records, including the exemptions in section 35 of FOIA, so removing the exemptions invoked in this appeal.

33 Section 3 of the 1958 Act was amended by section 45 of the Constitutional Reform and Governance Act 2010. This replaced the reference to thirty years in section 3(4) with a reference to 20 years. It also added a new section 3(4A). This provided for a transitional regime to be put in place for the ten years following the coming into force of the section. The Minister of State, Ministry of Justice, announced on 13 July 2012 in the House of Lords that the government was moving towards the 20 year rule, but needed to do so in a manageable and affordable way. It was therefore adopting a phased approach. The Constitutional Reform and Governance Act (Commencement No 7) Order 2012 (SI

2012/3001) brought the whole of section 45 into effect from 1 January 2013. Consequently a transitional arrangement operates until 1 January 2023. That arrangement is set out in the Freedom of Information (Definition of Historical Records)(Transitional and Saving Provisions) Order 2012. Under the Schedule to that Order, records created in 1988 become historical records (and so subject to the duty to transfer to the Public Record Office) at the end of 2015. The Commencement No 7 Order was made on 29 November 2012. The Transitional and Saving Provisions order was made on 5 December 2012.

34 Schedule 7 to the 2010 Act makes amendments to FOIA to align it with these provisions, including the reduction of the period of 30 years to 20 years together with the phased introduction of the new time limit under which documents become historic documents.

35 The position now is that the records sought by Mr Aitchison, if any exist, will be available to him and any other member of the public in effect from 1 January 2016. Release before that date can be made only as a result of a successful application under FOIA.

36 The decision of the Tribunal was made on 15 October 2012. The 2010 Act had been passed at that date, but it was not in effect although government ministers had made it clear that the new provisions were to be put into effect in a phased way. That, at the time of the Tribunal decision, was a policy decision to reduce the 30 year rule to a 20 year rule but was not the law.

37 It was not in dispute that the documents (i) to (v) and any other documents that might exist within the scope of Mr Aitchison's request were not historic documents either when he made the request or at the hearing before me. What was considered relevant by him, by the Information Commissioner and by the Tribunal was that it was now more than 20 years since any relevant document had been issued and that under the terms of the government policy adopted since 2010 (and given effect in law as indicated) a period of 20 years was now an appropriate period to have in mind. To be specific, the period for which information was sought ended at 1 August 1988 while the refusal on review by the Cabinet Office was made on 18 November 2010, an interval of over 22 years.

38 No direct reliance is placed by the Commissioner on either the concept of historic documents or the 1958 and 2010 Acts. The Commissioner (at paragraph [22]) noted more generally that the information was 22 years old and cited his own decision in FS 50350458 about the Hillsborough disaster in referring to the 30 year rule and what was there termed "a diminishing case for withholding information over 20 years old." And it has to be said that it is difficult now to consider that decision without being aware of subsequent developments about the Hillsborough events.

39 In the grounds of appeal to the Tribunal the Cabinet Office sought to play down the significance both of the period and of the ruling in FS 50350458 as one "centred on a very particular set of circumstances". The Commissioner did not agree with that attempt to distinguish the decision. Mr Aitchison specifically referred to government policy in reducing the 30 years to 20 years. So the point was put in issue before the Tribunal both as a general point about the time that had elapsed between the information being generated and the request and as a point about shifting government policy about the 30 year rule.

40 At paragraph [33] of its decision the Tribunal summarised the enactment of the 2010 Act and its staged introduction. It returned to the issue of the 20 year rule and the 22 years involved between information and request in considering the public interest balance to be applied under section 35. Its key consideration of this is as follows:

> "[68] We consider that the convention in relation Cabinet collective responsibility is a very weighty public interest factor for maintaining the Ministerial Communications exemption (s.35(1)(b)). However at the time of the request the disputed information was 22 years old which in our view diminishes the weight to be given to this public interest in the circumstances of this case. The fact that the historic records provision will be changed only after the time period is something we cannot take into account. However we note that the policy decision to reduce the 30 year rule to 20 years was taken before the time period although not implemented. The new Coalition Government reconfirmed the policy in early 2011 and subsequently gave details of how they intended to implement the change but after the time we need to be considering the public interest test. Although we cannot take into account later factors we believe we can look at later events which shed light on the weight we might give to a factor existing at the time of the request. The fact that there are intended to be transitional provisions again sheds light on the factor existing at the time, and we note these seem to be for cost and operational reasons rather than relating to the type or content of the information.
>
> [69] At the time of the request the policy decision had been taken to reduce the 30 year rule. This did not change despite a new government. The government (in its various guises) had, in effect, decided that the public interest in keeping historic records secret for 30 years would reduce to 20 years."

The Tribunal then went on to consider more generally "the need for a safe space" for this information and the interval that had occurred between information and request in this case.

41 Mr Cornwell sought to persuade me that the Tribunal had erred in law in three ways in this reasoning. First, he argued, it erred in law because the prospectively amended legislation was not in force at the time. I see nothing in that argument. The Tribunal knew this and said so in its decision. Second, the Tribunal erred in relation to what he terms the "supposed" policy behind legislation not in force. The relevant policy considerations are those behind the (unamended) 1958 Act. I do not accept that either. It was not "supposed" policy – the Tribunal had the record of the statement in the House of Lords and a speech by the Deputy Prime Minister both precisely on the point before it. And, as Mr Cornwell impliedly concedes in this argument, it was policy not law. Third, he argued, the Tribunal failed to take into account how the new law was to be implemented. I find nothing in that argument either. The Tribunal had before it evidence about the policy with regard to the phased introduction of the new law. I can see no "relevant considerations" about this that the Tribunal did not take into account when considering the government policy behind the reduction of the 30 year rule to a 20 year rule.

42 Further, despite Mr Cornwell's submissions, I fail to see any important point of principle in this. The Tribunal had been asked by Mr Aitchison to take into account announced government policy on this issue as part of its assessment of the public interest in releasing or not releasing the relevant information. That is precisely what the Tribunal did. In taking its view on this I cannot see that it made any error about the then substantive law or the facts relevant to announced government policy as applied to this appeal.

43 That being so, I see no error of law, and certainly no error about any issue of general principle, in the Tribunal decision. It was entitled to take into account as aspects of the factors to be taken into account in balancing the public interests arguments in this appeal both the interval of over 22 years between the information and the effective date of the refusal to release it and the general views expressed on behalf of the government about the reduction of the 30 year rule to a 20 year rule.

"Neither confirm nor deny"

44 The Cabinet Office, as noted, adopted the stance that it would neither confirm nor deny whether there was any information held about any discussions in Cabinet (or, by implication, in any committee or sub-committee of Cabinet for which that ministry was the administrative authority) about the events in 1988. Both the Commissioner and the First-tier Tribunal rejected that approach and directed that the Cabinet Office disclose whether it holds information about Cabinet discussion of the Rowntree takeover. Again, I deal with this without in any way assuming that there was, if there was, anything to disclose.

45 I accept the argument put by Mr Cornwell that a denial that there is any relevant information about Cabinet or Ministerial minutes itself opens up public discussion. Indeed, there may be cases where information that there had been no such discussions might be more significant than details of discussions in so far as details are minuted for such meetings. And I accept that the contrary position about any discussions is also an important disclosure of information of itself even if the details of those discussions can be withheld under the authority of an exemption in FOIA.

46 The right to decline what would otherwise be a duty to confirm or deny arises under section 35, which may conveniently be noted in full:

> "35 Formulation of government policy, etc.
>
> (1) Information held by a government department or by the Welsh Assembly Government 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.
>
> (2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—
> (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
> (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.
>
> (3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).
>
> (4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.
>
> (5)In this section—
> "government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the Welsh Assembly Government;
> "the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland, the Counsel General to the Welsh Assembly Government and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications—
(a) between Ministers of the Crown,
(b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
(c) between members of the Welsh Assembly Government
and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the Cabinet or any committee of the Cabinet of the Welsh Assembly Government;
"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the Welsh Assembly Government providing personal administrative support to the members of the Welsh Assembly Government;
"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998.

47 It is clear from this that information about proceedings of the Cabinet or any committee of the Cabinet held by the Cabinet Office is exempt information under section 35, subject of course to the records becoming historical records. It follows that the Cabinet Office is entitled in the first instance to adopt the stance of "neither confirm nor deny" with regard to any request for information about such proceedings.

48 Section 2 of the Act then applies:

2 Effect of the exemptions in Part II.

(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—
(a) the provision confers absolute exemption, or
(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, section 1(1)(a) does not apply.

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
(a) the information is exempt information by virtue of a provision conferring absolute exemption, or
(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(3)For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—
(a)section 21,
(b)section 23,
(c)section 32,
(d)section 34,
(e)section 36 so far as relating to information held by the House of Commons or the House of Lords,
(ea)in section 37, paragraphs (a) to (ab) of subsection (1), and subsection (2) so far as relating to those paragraphs,
(f)in section 40—
(i)subsection (1), and
(ii)subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,

(g)section 41, and
(h)section 44.

49 Section 35 does not under this provision carry absolute exemption. A request for information about Cabinet proceedings is subject to the evaluation required under section 2(1)(b) unless an absolute exemption also applies (as it could in several situations).

50 It follows from this that in so far as Mr Cornwell couched his arguments in terms that suggest that such information should only be released in the most exceptional circumstances (for example, where ministerial discipline has broken down and a Cabinet Minister resigns in the middle of a Cabinet meeting and then airs his or her views publicly) he is putting forward a policy argument about the policy balance, and not a proposition based on any express provision in FOIA. Any proposition of law he seeks to derive from authority about the operation of section 35 is therefore by way of interpretation of the exemptions in their context in FOIA and, where relevant, the Public Records Act.

The Law Officers case

51 I was helpfully taken by the parties to the judgment of Blake J *in HM Treasury v Information Commissioner* [2009] EWHC 1811, [2011] 1 Info LR 815 (the *Law Officers case*). That is a decision of the Administrative Court on the operation of section 35(1)(c), the qualified exemption applying to opinions of the Law Officers. The specific issue under examination was a request for the disclosure by the Treasury of advice by Law Officers to the then Chancellor of the Exchequer about his declaration that the Financial Services and Markets Bill was compatible with the Human Rights Act 1998. The Treasury relied on section 35(1)(c), section 35(3) and section 2(1)(b) and neither confirmed nor denied that the Treasury held any information about any such advice. On considering the matter, the Information Commissioner agreed with the Treasury that section 35(1)(c) was properly relied on, but not section 35(3). On appeal to the Information Tribunal, that decision was confirmed. The appeal then went to the Administrative Court.

52 It was common ground in the appeal that section 35(1)(c) was engaged, but that this was subject to the overriding balance required by section 2. It was also common ground that where the strength of the public interest in disclosure was as strong as the public interest in maintaining the exemption then the consequence would be disclosure. Against that background, counsel for the Treasury submitted three linked errors of law by the Tribunal in its approach to the balancing exercise. It had not reasoned for itself about the balance of factors for and against disclosure. Rather it had adopted the reasoning of the Commissioner. In doing so, it had misdirected itself as to the existence of a weighty matter in favour of maintaining the exemption from disclosure. It had also been materially influenced by an irrelevant consideration, namely that in its view the Ministerial Code had not been updated in light of the obligations under FOIA.

53 Blake J dealt first with the second of those grounds. This was because:

> "[33] …if the Tribunal misunderstood one critical element in the performance of the balance between the maintenance of the exemption and the public interest in disclosure, then this would have affected its whole approach to the case.."

54 He then turned to the decision of Stanley Burnton J in *Office of Government Commerce v Information Commissioner and HM Attorney General on behalf of the Speaker of the House of Commons* [2008] EWHC 737 (Admin) (the *OGC case*). He adopted from the judgment in that decision (at paragraph [79]):

> "… if it is interpreted literally, I do not think that section 35 creates a presumption of a public interest in non-disclosure. It is true that section 2 refers to "the public interest in maintaining that exemption", which suggests that there is a public interest in retaining the confidentiality of all information within the scope of the exemption. However, section 35 is in very wide terms and interpreted literally it covers information that could not possibly be confidential… it would therefore be unreasonable to attribute to parliament an intention to create a presumption of public interest against disclosure."

Nonetheless, Blake J then distinguished that reasoning as applied to the appeal before him. The exemption under section 35(1)(c) "is very specific. Parliament has precisely identified as exempt the issue as to whether or not the Law officers have given their advice."

55 Blake J then accepted that there was substance in the criticism of the tribunal's view that the convention that the advice of Law Officers was not disclosed, and the Ministerial Code more generally, had been "somewhat" displaced by FOIA. In his judgment:

> "[40] … the operation of the FOIA with its concomitant public interest in disclosure fell to be applied against the structure of the various classes of exemption set out elsewhere in the statute. In other words, in certain areas where a specific public interest against disclosure had been identified the change brought about by the FOIA might best be described as rendering the decision on which hitherto government had the last word, [as] being capable of being outweighed by other consideration on which it does not. However, that does not suggest that the Law Officers' convention or equivalent principles of good government set out in the Ministerial Code cease to have substantial relevance or automatically have less weight the day after the passage of the FOIA."

Against that background, he went on to decide that the tribunal's approach to two policy considerations was flawed. It had erred in not giving appropriate weight to the evidence of witnesses with special experience in the matter, and it had not given weight to general considerations in the absence of actual damage.

56 Blake J also reviewed other authority, including the guidance of Wyn Williams J in the Administrative Court in *Department of Business Enterprise and Regulatory Reform v Information Commissioner* [2009] EWHC 168 (the *DBERR case*). That case concerned the qualified exemption under section 42 of FOIA for legal professional privilege. In that case Wyn Williams J decided that the tribunal had failed to attach appropriate weight to the exemption, as it was one acknowledged to command significant weight Blake J acknowledged that the reasoning in that case could not be transported across to all classes of section 35 claims, but that it could be applied to advice by Law Officers.

57 After then noting guidance of the Commissioner in a similar case to the one before him, Blake J concluded:

> "… although mere deficiencies in the reasoning process or even isolated errors of law will not suffice to set aside a determination by the Information Tribunal, I am satisfied that this Tribunal has erred in considering how to approach the strength of the public interest in maintaining the exemption…"

He then tabulated five separate misdirections and allowed the appeal.

58 While the general guidance in those decisions is plainly helpful here, I regard both those cases as similar special cases where the courts respected and upheld the

considerable importance of different forms of legal professional privilege – the right of a lawyer and client to deal with advice about problems without any fear that others may become privy to those discussions. Further, both parties to legal communications are entitled to and are protected by the privilege, the lawyer and the client, and they are protected from the courts as well as others without the assistance of FOIA. It is also, in my view, difficult to imagine anything other than the rarest case where legal professional privilege should be waived in favour of public disclosure without the consent of the two parties to it. As the drafting of FOIA reflects, those are specific concerns with specific justifications. At the same time there are other ways for third parties to challenge any action taken on legal advice that is seen as having adverse consequences, including in the case of actions of government the process of judicial review.

59 While I have no hesitation in agreeing with the views expressed in these cases about those exemptions, I do not consider that it follows that the same approach is to be followed in the wider exemptions in issue in this case not least because of both the specific importance of legal privilege and the point about other remedies. These were matters considered by the First-tier Tribunal in *The All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and Foreign and Commonwealth Office*, EA 2011 0049 and 0051, [2012] Info LR 258 (the *APPGER case*). This was the case concerning requests by APPGER for information about rendition involving the United Kingdom authorities. Most of the appeals before the First-tier Tribunal were dismissed. There were plainly security issues involved in that case involving section 23 of FOIA which do not arise here, and that part of the decision need not be referred to further.

60 The tribunal examined the decision in the *Law Officer's case* and was pressed to apply the same weight as that indicated in that tribunal to consideration of section 35(1)(b) and (d). The tribunal answered that submission as follows:

> "[145] Ms Steyn argued that Blake J's reasoning applies, by analogy, to section 35(1)(b) and (d). As Blake J said, where the ground of exemption is very specific, and no prejudice is required to be proved, it "naturally fits into a regime where there is an assumption of a good reason against disclosure". Ms Steyn continues that the section 35(1)(b) exemption for ministerial communications is very specific, unlike the broad section 35(1)(a) exemption. So too is the exemption in respect of the operation of any Ministerial private office. The Tribunal, she argues, acknowledges the strength of the general public interest in enabling Ministers to communicate confidentially with each other and to operate their private offices on a confidential basis.
>
> [146] We can agree with the latter proposition but should we elevate section 35 (1) (b) and (d) to having the same inherent weight in favour of maintaining an exemption as that of section 35(1)(c) which reflects a long standing convention? We consider Blake J was referring to the combination of specificity and convention as establishing a strong weight in favour of maintaining the Law Officer exemption and both of these factors are not present together for subsections (b) and (d). However we are prepared to accept that the weight we should attribute to the section 35(1)(b) and (d) exemptions because of their specificity is higher than that for section 35(1)(a), but not as weighty as that for section 35(1)(c)."

61 Mr Cornwell put a parallel argument to that to me in this case, arguing that while the basis of the exemption under section 35(1)(b) was less weighty than that applying under section 35(1)(c) it was of more weight than that under section 35(1)(a). Mr Hopkins reminded me that my task was to ensure that the Tribunal had considered these arguments about weight and taken them into account in balancing interests. None of the exemptions in

issue were absolute exemptions so a balance taking into account the specific facts was required in each case.

62 I agree with Mr Hopkins and resist the temptation to put into the jurisprudence any sort of sliding scale of relative weights of the factors behind one of the exemptions in FOIA as compared with others, even in the context of those in section 35(1). I agree that specificity is important but, as the tribunal in the *APPGER case* itself accepted, there were external factors in operation with regard to both section 35(1)(c) and section 42, both of which are exemptions confined to two aspects of the lawyer-client relationship. The exemption in section 35(1)(d) is not in issue here so I say nothing further about it. The exemption in section 35(1)(b) is focussed but covers a variety of widely different situations from those where discussion is about wide government policy decisions and others where a task is given, and given only, to a single minister and where it is at least arguable that there should be no ministerial communications outside the private office of the minister charged with the task. That being so, I do not consider that as a matter of law it can be said that there is "a" weight to be attached to the public interest favouring maintaining the exemption under section 35(1)(b) as a matter of law. Similarly, I see no basis for establishing as a matter of law – which must be as an interpretation of the relevant language in FOIA – that "a" weight applies to the maintenance of the exemption for Cabinet and Ministerial committee minutes or other information.

The Westland decision

63 I next consider the decision on which Mr Aitchison relied in making his second application, *Cabinet Office v Information Commissioner*, EA /2010/0031, [2011] 1 Info LR 838. This is often referred to as the *Westland* decision as it refers to information about the Cabinet meeting when, following discussion of the question of a takeover of the Westland helicopter business by a US company in Cabinet, Michael Heseltine resigned from Cabinet office.

64 The context of that decision was a request by BBC staff in 2005 for the minutes of the Cabinet meeting on 9 January 1986 which, as a matter of existing public record, was when Mr Heseltine resigned. When that was refused by the Cabinet Office citing section 35(1)(a) and (b) it was referred to the Commissioner. After a four year process that the Tribunal referred to as making "a mockery of the right to information", the Commissioner decided in 2009 that the relevant Cabinet minutes should be published as the public interest favoured disclosure. The Cabinet Office promptly appealed on a series of grounds some of which directly parallel grounds put forward in this appeal.

65 The Information Tribunal, consisting as usual of a judge (David Farrar QC) and two expert members, unanimously dismissed the appeal. Its conclusion, which was accepted by the Cabinet Office without further appeal, was:

> "[58] Balancing the interests for and against disclosure we have no doubt that this is one of the few cases in which the maintenance of the exemption is not shown to outweigh the public interest in disclosure, mainly due to the weakening of the requirement of confidentiality on the particular facts of this case but also to the specific positive factors favouring disclosure that we have noted."
>
> [59] We repeat, however, that this decision does not mean that the public interest will commonly require the disclosure of Cabinet minutes. We foresee that disclosure will be a rare event and that the interest in maintaining the exemption will be particularly strong when the meeting was held in the recent past."

The context of the final remark was that the decision of the tribunal ordering disclosure took place 24 years after the relevant Cabinet meeting. I add in the light of discussion above in this decision that no reliance was placed by the tribunal on the 30 year rule, to which the tribunal referred in order to exclude it from its considerations. At the same time, its comments (at paragraph [40]) show that it was aware that the 30 year rule was to be replaced by a 20 year rule. Its comment at [59] is also to be read with its comment at paragraph [39]:

> "… the passage of time does not necessarily weaken the case for maintaining the exemption under section 35(1)(b) where the convention is engaged, or may not do so as rapidly."

66 The conclusions of principle on which the tribunal did rely are set out at paragraph [48]:

> "By reason of the convention of collective responsibility, Cabinet minutes are always information of great sensitivity, which will usually outlive the particular administration, often by many years. The general interest in maintaining the exemption in respect of them is therefore always substantial, Disclosure within 30 years will very rarely be ordered and then only in circumstances where it involves no apparent threat to the cohesive working of Cabinet government, whether now or in the future. Such circumstances may include the passage of time, whereby the ministers involved have left the public stage and they and their present and future successors know that such disclosure will not embarrass them during the critical phase of an active political career. Publication of memoirs and ministerial statements describing the meeting(s) concerned may weaken the case for withholding the information, especially where versions conflict, either factually (which is not the case here) or in their interpretation of what took place. The fact that the issues discussed in Cabinet have no continuing significance may weaken to a slight degree the interest in maintaining the exemption but the importance of the exemption is not dependent upon the nature of the issue which provoked debate. There is always a significant public interest in reading the impartial record of what was transacted in Cabinet, no matter what other accounts of it have reached the public domain. Where the usual interest in maintaining confidentiality has been significantly weakened, that interest may justify disclosure.
> The public interest in disclosure will be strengthened where the Cabinet meeting has a particular political or historical significance, for example the discussion of the invasion of Iraq at the meeting under consideration in *Cabinet Office v Information Commissioner (Lamb)*."

The tribunal applied those principles to the case before it with the conclusion (strengthened by two short points in the closed annex) set out above.

67 The *Lamb case* was the decision of the Information Tribunal in *Cabinet Office v Information Commissioner*, EA 2008 0024 and 0029, [2011] 1 Info LR 782. This attracted wide public attention at the time. The request that gave rise to the refusal by the Cabinet Office, and the subsequent appeals, concerned the release of Cabinet papers about the United Kingdom's involvement in the invasion of Iraq. Despite an order by the tribunal based on its view of the public interest, the relevant documents were not released because a Secretary of State used the power in section 53(2) of FOIA: see EA 2010 0108, a decision of the First-tier Tribunal referring to the certificate issued in that case and the effect of that certificate. The Tribunal cited the decision of the tribunal in that case at paragraph 25 of its decision as the Commissioner relied on it to emphasise identified policy factors,

including the passage of time and the importance of confining the decision to the specific facts.

The Commissioner's guidance

68 Although I was not taken to it, it is for the sake of completeness useful to note the Commissioner's own published guidance on the policy issues that arise when considering the disclosure of Cabinet papers. This was cited in a recent decision of the Commissioner in FS50417514 (among others) in the following terms:

> "The Commissioner would also comment that the public interest in maintaining the convention of collective Cabinet responsibility may diminish with changes to the Cabinet, Government restructures or the formation of a new Parliament (a new Parliament is formed following a general election). This would be on the basis that there may be less potential harm (of the kind detailed above) from revealing that a Cabinet that no longer exists were in disagreement, than there might be in revealing that the current Cabinet has divergent views."

The balance of public interests in this appeal

69 The Tribunal dealt with the balancing of the public interest policies in an appropriately ordered way. The questions posed for the Tribunal are clarified in paragraphs [35] and [36]. The background to the question is set out in paragraphs [37] to [49]. No specific criticism was raised by Mr Cornwell against those paragraphs. The Tribunal then discussed the public interest factors for maintaining the exemptions in paragraphs [50] to [62], and the factors for disclosure at paragraphs [63] to [65]. The final aspect, the balance, is discussed from paragraph [66] to [75]. It was in that part of the decision that the Tribunal dealt with the 30 year rule and its reduction to 20 years already discussed above. That final paragraph refers to a closed annex.

70 The discussion of public interests favouring disclosure is, as the above suggests, brief. This was in part because it accepted the analysis already conducted by the Commissioner, although it did not repeat the error of not considering the matters afresh itself. Even so, Mr Cornwell argued that it made several errors of law in its analysis when that analysis was read together with the Tribunals' background findings. He linked the Tribunal's surmise (at paragraph [39]) that the changes in York "are likely to have resulted in redundancies" with its general conclusion in paragraph [75] that "there is a very significant public interest … in reading the impartial record … regarding a matter of widespread concern both nationally and locally." The link is in paragraph [73] where the Tribunal adds to the reasons for disclosure "the likely continuing consequences for employment in the confectionary (which I assume means confectionery) industry in York." He contended that this finding was made without proper evidence. Mr Hopkins responded by disputing that and pointing out that there was evidence before the Tribunal on the point and that the Cabinet Office did not challenge it before the Tribunal. Without seeking to resolve who was right on that, I see the finding at [39] as being no more than one element in the thinking at [75]. I do not see "this factor" being further identified by the Tribunal nor do I infer that from its decision. If this is an error of law then, as Mr Hopkins suggested, it is not such as to affect the outcome materially. It is but one reason for local continuing concern and perhaps more general concern.

71 The second issue related to the evidence (or non-evidence) of Mr Aitchison. I have already mentioned that and stated that in my view nothing turns on it in terms of establishing a material error of law by the Tribunal.

72 The third argument is that the Tribunal confused the public interest with what he termed public curiosity. The finding with which Mr Cornwell took issue is as follows:

> "[62] The Cabinet Office also claimed that a factor for maintaining the exemption was the lack of "… evidence of urgent or wide public concern with the circumstances of the acquisition…" , this lack being assessed solely by a media search undertaken at the time of the request. The Tribunal considers this approach to be misconceived. The Freedom of Information Act is based on an entitlement for an applicant to have disclosed to them information held by a public authority, subject to the exemptions provided in the Act. "Evidence of public concern" is not necessarily material to this entitlement. However we do have before us articles written by Mr Aitchison which seem to show a continuing concern of the people of York."

73 I agree with the Tribunal that the approach of the Cabinet Office as summarised there is wrong. It appears in part to be arguing quantity rather than quality. The logic of that position is that if there is widely expressed comment then the matter is of public interest but not otherwise. In modern terms, that is inviting the kind of mass lobbying that has been used successfully on a number of occasions recently to generate 100,000 signatures to seek debate in the House of Commons (see http://epetitions.direct.gov.uk/how-it-works). The Tribunal was right to reject that approach. A matter may be of public interest even though it is confined, say, to the York region and is accordingly much less susceptible to mass lobbying or concern in the mass media. Evaluating public interest is precisely what the Commissioner and tribunals are directed to do by evaluating all relevant factors.

74 Mr Cornwell introduced an additional element in talking about "public curiosity". It is not entirely clear what he meant by that. Mr Hopkins put one meaning to the words by referring to "mere public curiosity" when resisting this argument. That carries an obvious additional element to the word "curiosity" suggesting triviality of motive. Without that express or implied addition the term means in my view no more than being curious for whatever reason. As such it is something that may be entirely appropriate where there is a failure to disclose something of public interest. I see no basis for adding a test distinguishing one sort of curiosity from another in considering the public interest in applying FOIA.

75 More fundamentally, the public interest is a matter for the judgment of the Commissioner or a tribunal in the light of the background facts. It is not a subject for "proper evidence", which I take to mean some sort of trawl through the views of others either in the published media (perhaps using the established media search techniques used by journalists) or electronic media (such as Twitter) or perhaps general trawls of the internet. In any event, in the current context that approach carries touches of "Catch 22" style reasoning. You cannot have the information released because there is no public interest in it (in a quantitative sense). The evidence that there is no public interest is that you cannot find it or comments about it published to any significant extent. But you cannot find it published anywhere because it has not been released.

76 Bringing those strands together, I find nothing of substance in any of these criticisms of the Tribunal decision about the interests favouring disclosure.

77 Mr Cornwell's submissions about the Tribunal's approach to policy factors in favour of maintaining the exemptions involve, as noted above, the argument that the Tribunal erred in law in the weight it gave to the reasons behind the section 35(1)(b) exemption because it failed to recognise the basis for it and because, whatever it said, it did not actually give weight to the issue. That I take as a criticism of the balancing exercise as much as of the identification of relevant policies. I have examined the relevant law and practice above and must now turn to what I take to be a central thrust of Mr Cornwell's argument. The Tribunal did not give the key reasons for maintaining the section 35(1)(b) exemption enough relative weight. It is implicit in his argument, as I understood it at any rate, that any tribunal that had

failed to uphold that exemption in this case would have failed to give those consideration what he considered the proper weight. By contrast, Mr Hopkins pointed out that the Tribunal had given the factor considerable weight and that in arguing as he did Mr Cornwell was trying to step round what the Tribunal had actually said or alternatively was implying that the Tribunal did not mean what it said. These were assertions not arguments of law.

78 The Tribunal set out the Cabinet Office statement of its case, which emphasised the key issues it saw to be involved, at paragraph [8]. It then examined relevant caselaw about section 35(1)(a) and (b). In its discussion about maintaining the exemption, the Tribunal set out an extensive part of the reasoning of the tribunal in the *Westland case* to which I have referred at length above. This included quotations from the Ministerial Code, which was put in evidence before the Tribunal as well. This is followed by express reference to the evidence of Mr Pocklington and the acceptance of some of this by the Commissioner. After discussion, the Tribunal formulated its view on that evidence as follows:

> [72] The concern expressed by Mr Pocklington that Cabinet discussions and minutes if routinely disclosed would have a chilling effect and, in effect, make it difficult to maintain the convention on collective responsibility should be treated with a certain amount of circumspection. We would state, as have other tribunals faced with similar requests, that such information will be rarely disclosed because of the strong weight of the public interest in maintaining the exemptions. However, we are required by law to consider the circumstances of each case and undertake a public interest test, so there will be occasions when the public interest balance favours disclosure. This does not mean, in Mr Pockington's words, that it will "become routine".

79 The focus of the Tribunal is plainly on section 35(1)(b) - ministerial communications - and the express inclusion within that by section 35(5) of proceedings of the Cabinet or its committees. I have set out above what authority there is on the proper weight to be given to such matters. But the core issue is the balance to be struck under section 2(1)(b) of FOIA in the case of a refusal neither to confirm nor deny or under section 2(2)(b) in the case of an exemption that is not an absolute exemption. Under these provisions the Tribunal must establish whether:

> "in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny [or the exemption] outweighs the public interest in disclosing whether the public authority holds the information [or in disclosing the information]."

80 What is the weight to be attributed to the public interest in maintaining the exclusion for Cabinet and Ministerial meetings? The immediate response must be to add "in this case". But there is clearly a common basis to any claim for exclusion for Cabinet matters.

81 The foundation for Cabinet secrecy, which is what the Cabinet Office is understandably anxious to protect here, is conventional. That presents the usual difficulties in the United Kingdom where the constitution is not a single written document. What is the convention? I take it to be as set out as part of the Ministerial Code in recent years. The 2010 form of the Code (which may or may not be the same as in 1988 – that was not considered in the appeal) was before the Tribunal. The relevant passages in the 2010 Code are:

> "General principle

> **2.1 The principle of collective responsibility, save where it is explicitly set aside, requires that Ministers should be able to express their views frankly in the expectation that the can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained**
> …
>
> Collective responsibility
>
> 2.3 The internal process through which a decision has been made, or the level of Committee by which it was taken should not be disclosed. Decisions reached by the Cabinet or Ministerial Committees are binding on all members of the Government. They are, however, normally announced and explained as the decision of the Minister concerned. On occasion, it may be desirable to emphasise the importance of a decision by stating specifically that it is the decision of Her Majesty's Government. This, however, is the exception rather than the rule.
>
> 2.4 Matters wholly within the responsibility of a single Minister and which do not significantly engage collective responsibility need not be brought to the Cabinet or to a Ministerial Committee unless the Minister wishes to inform his colleagues or to have their advice. No definitive criteria can be given for issues which engage collective responsibility … Where there is a difference between departments, it should not be referred to the Cabinet until other means of resolving it have been exhausted…"

82 Although this was not argued in this appeal or in the other appeals to which I have referred, a fuller analysis of the Ministerial Code might draw on other relevant passages in the Code. For instance, at paragraph 1.2 all ministers are expected to observe the Seven Principles of Public Life set out in the Annex to the Code, two of which are accountability and openness. Further, paragraph 1.2.d. adds the following principle of ministerial conduct:

> "d. Ministers should be as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest which should be decided in accordance with the relevant statutes and the *Freedom of Information Act 2000;"*

83 It is not clear whether Blake J had this aspect of the Ministerial Code before him when he made his comments in the Law Officers' case about the interaction of FOIA and the Ministerial Code. In my view the Commissioner and tribunals are entitled to have in mind that general guidance as to principle and the express recognition in the current Code of FOIA as well as the specific convention on Cabinet and Ministerial secrecy. (FOIA will I assume not have been mentioned in the version of the Code in operation in 1988 for obvious reasons, but that was not put in evidence.) It is also to be noted that the terms of the guidance about collective responsibility is in advisory terms ("should not"). The guidance that would be of direct concern to Blake J about not disclosing whether or not there has been advice from Law Officers in paragraph 2.13 is mandatory ("must not").

84 Returning to paragraph [72] of the Tribunal decision, it is not entirely clear what the Tribunal meant in this case by "circumspection". If it means that the Tribunal should look at the specific context of the Cabinet Office "neither confirm nor deny" decision, then in my view that is correct. If it means that the Tribunal is required to look for itself at the balance of

public interest factors and is required not to accept the Cabinet Office concerns without question, then it is also correct.

85 Full appreciation of the public interest in disclosing or not disclosing discussion in Cabinet (or other committee) must include that guidance and the interests protected by it. That will in every case be issue specific. For example, where as here a decision which is known to be one for a Minister exercising a specific statutory duty or power rather than for government more generally is, or is part of, the information sought then that is relevant to the balance. So it is if the matter is plainly one for Cabinet discussion across ministries. And in both contexts, there may be a separate importance in the right to adopt a "neither confirm nor deny" decision as compared with that of the specific disclosure of individual items of information.

86 For those reasons I see no error of law in paragraph [72], read with the rest of the decision. And I see nothing in the decision that causes me to consider that the Tribunal did not mean what it said.

87 Mr Cornwell renewed his criticisms of the balancing exercise conducted by the Tribunal in the way it handled the issue of the quasi-judicial decision that lay at the heart of the information sought. The decision was identified in brief detail in paragraph [2] of the Tribunal decision. It would have been of assistance had the Tribunal or the Commissioner recorded rather more about the nature and context of the decision and the way it was announced, for example by way of giving a specific date.

88 The decision was the decision of the Secretary of State not to refer the takeover bid to the Monopolies and Mergers Commission. The detail of that decision was not argued by any party before the Tribunal or before me, but I consider that the issue is of importance if any sustained reasoning is to be put on the significance of the decision at the heart of this request being a quasi-judicial decision. I take it, without looking into the matter further, that it was probably a decision taken under the provisions of the Fair Trading Act 1973, sections 63 to 75 of which make specific provision for merger references by the Secretary of State. If so it is a conditional power with certain administrative constraints present. The decision itself is a matter of public record as the decision was announced by the Secretary of State for Trade and Industry (Lord Young) to the House of Lords in a ministerial statement on 25 May 1988 as a decision announced that morning. See HL Deb 25 May 1988 vol 497 col 898. The decision, taken on advice of the Director General of Fair Trading, was not to refer the matter to the Monopolies and Mergers Commission. The debate in the House of Lords that followed that announcement reflected clear public interest in the decision at the time. Indeed, that could in my view usefully have been put in evidence on the point. [I add on this point in particular that the parties have seen this reasoning in draft and have commented on accuracy where they thought it appropriate.]

89 The reference in paragraph [72] was to "strong weight". Mr Cornwell contrasted that with the wording in paragraph [73]:

> "[73] In contrast the public interest in transparency and openness in this case seems to us to be very weighty indeed. This is not only for the reasons given by the Commissioner and Mr Aitchison, and the likely continuing consequences in the confectionary industry in York. There is also the weighty public interest in knowing that when a Minister of the Crown is charged with exercising a quasi-judicial function (as was the case with the decision which fell to Lord Young to take about the takeover of Rowntree), the quasi-judicial role of the decision maker was not compromised by improper political pressure. Although the regime for taking decisions on takeovers has altered so as to remove Ministers from the process, there

remain a quasi-confidential

other areas in which controversial decisions have been taken by Ministers on judicial, rather than a political, basis. We discuss this more fully in the annex."

I have already noted that at paragraph [57] the Tribunal referred to the convention of collective responsibility as a "very weighty public interest factor", which description is to be read with this.

90 I agree with the Tribunal that there is plainly a public interest in the proper exercise by Ministers of what are termed quasi-judicial functions. It is seen as fundamental to any true judicial decision that those involved are entitled to make representations and present arguments about a decision while those who are not do not. Further, the judge would expect, and be expected to, publish details of those representations.

91 There are different public interest factors once a decision has been taken in considering both immediate reactions to the decision and the consequences of the decision. In this case Mr Aitchison asked for any relevant information for the period from 1 April 1988 to 1 August 1988. It is not clear to me why that particular period was picked. I have noted from the public record that the decision in question was announced on 25 May 1988. Any disclosable information relating to the period before that date might be expected to be about the decision to be made (and at that time not announced and therefore unknown) while any disclosable information after that date might be expected to be related to the decision after it was made and announced.

92 This suggests that in individual cases there could be significantly different views about the balance of public interests in disclosing discussion before a decision is made public as compared with discussion after a decision is made public. However, no point was taken in open session on the handling of the timing issue by the Tribunal before me. Mr Cornwell's submission was the broader one that the quasi-judicial role of a Minister serves to increase the public interest factors behind exemption under section 35(1)(a) and (b) because the Minister needs a safe space and because collective responsibility should be maintained once the decision is taken. That reflects the separate factors I have noted.

93 I see no "very weighty" need for a safe space to be protected in such a context to the extent that it overrides all other interests under section 35(1)(a) (government policy) or (b) (ministerial communications) before a decision is taken while the opposite is likely to be true of section 35(1)(c) (Law Officers' advice) and (d) (operation of the Minister's private office).
The argument about "chilling effect" is also one that again requires specific consideration in the context of a quasi-judicial decision by an individual minister rather than in the context of more general government policy decisions and having regard to the period in question. It is open to argument at least in some contexts that the chilling effect is a positive, not a negative, point. If a minister is taking a decision properly then those who are not involved should, as noted, stay not involved. The prospect that improper interference could come on to the public record could be regarded as a factor in favour of revealing such information rather than concealing it. The reverse could also be true in some circumstances. A statement that there is nothing to disclose is a statement that may in a particular context confirm proper process. The Ministerial Code sets out guidance on what should not go to Cabinet as well as what should go to Cabinet. I see weight in Mr Pocklington's point that the Cabinet Office does not wish to be subject to routine enquiries about whether, in effect, things are done properly. But I am satisfied that the established approach of the Commissioner and the First-tier Tribunal prevent that on the existing approaches taken. And, in any event, the considerable importance rightly attached to the time that has occurred between the information and the application for it to be published would stop that

happening in the way Mr Pocklington fears. Indeed, the published record of the Commissioner's decisions about applications made to the Cabinet Office shows that they are far from routine.

94 It may follow in some cases that a "neither confirm nor deny" decision could be justified for parts of a period for which information is sought but not for other parts of the period. That is, however, likely to be an issue-specific matter that will be within the scope of a closed discussion rather than an open discussion.

95 Bringing these grounds of appeal together, I therefore conclude that the Tribunal did not err in law in handling the policy involved in reducing the 30 year period under the 1958 Act to a 20 year period. It was entitled to put weight on the fact that the refusal to confirm or deny was made over 22 years after any events giving rise to the information sought (if there were such events and is such information). It did not err in law in the view it took with regard to the assessment of the public interest in maintaining the exemptions in section 35(1) or the assessment of the public interest in disclosure or (though this was not at such specifically argued) the balance between them. And it did not err in law with regard to the application of those issues to the Cabinet office decision neither to confirm nor deny the existence of any relevant Cabinet or Ministerial committee minutes or other records.

96 I add by way of broader guidance that it would have assisted me (and other readers) If the Tribunal had asked for and used more contextual information about the decision at the heart of this application and the public debate about it at the time and since. Even a cursory look at the internet shows there is still considerable public information available about the decision and surrounding events in 1988, including as I have specifically noted an announcement and debate in the House of Lords as the decision was announced. It therefore would have helped if Mr Aitchison or someone else had produced evidence about the decision and factual aspects of the public interest. And it would have helped if any such evidence was open to challenge by those representing the Cabinet Office. I agree with Mr Cornwell on this to the extent that he pointed to the absence of evidence about public interest. But I do not agree with him on the conclusions he draws from that absence and I do not consider those issues to represent material errors of law by the Tribunal. It may also have helped if consideration had been given to the specific details of the context of the quasi-judicial decision had been identified rather than the matter being considered somewhat in the abstract. I say "may" because no particular point was taken before me on that issue. Indeed, Mr Cornwell repeated the conflation of concerns about what happened before the decision and what happened after the decision in his argument.

Conclusion on the "neither confirm nor deny" issue

97 In summary, I find none of Mr Cornwell's arguments about the rejection by the Tribunal of the "neither confirm nor deny" decision by the Cabinet Office to be persuasive on open grounds. I am concerned, as Mr Hopkins reminded me, with errors of law material to the outcome decision not with my own views of the policy issues. I see no such material errors in that aspect of the case.

98 I do not attempt either here or in the closed annex to go beyond the decision of the Tribunal that the Cabinet Office cannot rely on the "neither confirm nor deny" decision for the whole period in question without more. It may be – I do not speculate – that a decision reflecting the different factors in play during different parts of the period for which Mr Aitchison sought information, or which invoked specific exemption for specific information while noting that there was such information, would be appropriate. It would reveal if there was, or was not, any relevant discussion without involving precise disclosure of the discussion. That information may be of value in itself.

Documents (i) to (v)

99 The arguments set out above focus on the "neither confirm nor deny" decision and the scope of sections 35(1)(a) and (b) in that context. The Tribunal identified five documents, listed as (i) to (v), as being within the scope of Mr Aitchison's request but were accepted as not being within the scope of the "neither confirm nor deny" decision. These documents were also identified as relevant by the Commissioner in his decision. The Cabinet Office took the view that all five documents were subject to exemption under section 35(1)(a) and that four (ii) to (v) were also within section 35(1)(b). The Commissioner accepted that documents (ii), (iii) (iv) and (v) were within section 35(1)(b). But the Commissioner found that the public interest in disclosure outweighed the public interest in maintaining confidentiality under both provisions for all documents.

100 The Cabinet Office and the Commissioner agreed before the Tribunal that section 35(1)(a) was engaged for all five documents and that section 35(1)(b) was also engaged for four of the documents. The Tribunal took the same approach as the Commissioner in considering the public interest factors together for all documents and both paragraphs. Both then adopted the same approach with regard to the "neither confirm nor deny" decision.

101 I regard that approach as entirely appropriate and have adopted it myself save that I considered the more important issue at this stage to be the "neither confirm nor deny" decision rather than decisions about individual documents (technically, the information in individual documents).

102 It follows that my analysis of the Tribunal's decision about public interest factors applies both to the "neither confirm nor deny" decision and to its decisions about the individual documents.

103 There is a closed annex to this decision. It does not alter the decision.

Conclusion

104 The appeal is dismissed.

Direction

The directions of Judge Wikeley staying:
(a) the order requiring the Cabinet Office to confirm or deny whether it holds any information about Cabinet or Ministerial Committee meetings or related information, and
(b) the order requiring the disclosure of documents (i) to (v),
remain in force until the earliest of:
(a) the Appellant filing an application for permission to appeal;
(b) the Appellant notifying the Upper Tribunal (with copies to the other parties) that it does not intend to appeal; or
(c) the expiry of the time limit for filing an application for permission to appeal.

If the Appellant files an application for permission to appeal then the direction shall continue in force until the application is determined, and if the application is granted it shall continue further in effect until the final determination of the appeal.

Subject to any application for further direction made within the period set out above, the Appellant shall, within 14 days of the stay being lifted as directed above, comply with the Commissioner's Decision Notice of 3 October 2011.

David Williams
Judge of the Upper Tribunal
21 10 2013