



**Tribunals Service**  
Information Tribunal

Appeal Number: EA/2006/0006

**Freedom of Information Act 2000 (FOIA)**

Heard at Procession House, London, EC4

Decision Promulgated 19<sup>th</sup> February 2007

**BEFORE**

**DEPUTY CHAIRMAN**

**David Farrer Q.C.**

and

**LAY MEMBERS**

**Roger Creedon**

and

**Michael Hake**

**Between**

**THE DEPARTMENT FOR EDUCATION AND SKILLS**

**Appellant**

and

**INFORMATION COMMISSIONER**

**Respondent**

and

**THE EVENING STANDARD**

**Additional Party**

**Representation:**

For the Appellant:	Jonathan Crow Q.C. and Jason Coppel
For the Commissioner:	Timothy Pitt - Payne
For the Evening Standard:	Antony White QC

## **Decision**

Subject to paragraph 92, the Tribunal upholds the decision notice dated 4<sup>th</sup>. January, 2006 and dismisses the appeal. The appellant must therefore send the information which remained disputed at the hearing,, the subject of the request under section 1(1) FOIA, to the complainant within 30 days of the date of promulgation of this decision.

## **Reasons for Decision**

### **Introduction**

- 1 The appellant (“DFES”) is the central government department responsible, among many other tasks, for central government funding of schools. This is an issue of great public importance hence political sensitivity. The present government gave the highest priority to education when assuming power in 1997. It is therefore to be expected that reports of schools in financial difficulties will attract considerable attention from the media.
- 2 Since the early 1990s schools have acquired much greater responsibility for their own financial management. Over the same period the proportion of central government funding of local authority services, including education has increased. At the time with which this appeal is concerned, all such funding was dealt with by an annual general local authority settlement which was based on stated assumptions by central government as to local authority expenditure on its services and the sources from which it expected them to be funded. The settlement stated for each authority the distribution of assumed expenditure. The element attributed to education was known as the Standard Spending Assessment (the “SSA“ ).
- 3 Authorities were not, however, obliged to adopt the prescribed spending patterns. Subject to the ring – fencing of a minor part of the settlement, authorities were in general free to spend more or less than the SSA on funding their schools and retained the power to set budgets for individual schools.
- 4 Ministers of both the present government and its Conservative predecessor chafed at their inability to enforce their own assessments of schools` needs. Since 1997 the government has put pressure on local authorities to spend at or above the level of the SSA, hence to pass on to schools in full the increase in SSA, a process known as “passporting”.

- 5 April 2003 saw the introduction of a new scheme of assessment and funding of local authority services with a fresh set of names. Provision for schools was made by way of a Schools Formula Spending Share ("SFSS"). However, authorities were still free of any obligation to apply SFSS exclusively to schools. The system of distribution among authorities was revised and there were substantial changes in ring – fenced grants. For some schools these changes resulted in budgets for 2003 – 4 which were lower than they had expected.
- 6 In March, 2003, at a teachers` conference, Charles Clarke, then secretary of state for education, was confronted with protests as to the budgetary difficulties of certain schools. The media reported a "funding crisis" and public concern mounted rapidly. Whether there was indeed such a crisis and, if there was, how far it reached and what caused it, are questions which we are not required to consider.
- 7 Inevitably, these events provoked considerable activity within DFES. It was essential that the scale of any problem be assessed, that its causes be identified, that immediate problems be tackled and that any flaws in the current funding policy be recognised. Further policy proposals must then be developed for future funding. In the months following, a series of internal discussions of these matters took place and were recorded in departmental minutes.
- 8 In May, 2003 Mr. Clarke announced measures designed to mitigate immediate problems, in particular the permitted use of capital funds for revenue expenditure. On 14<sup>th</sup>. July, 2003, he gave evidence regarding these matters to a select committee of the House of Commons and announced to the House fresh funding proposals for the next two financial years. We have been supplied with the text of both. The Select Committee material was received towards the end of the hearing, after oral evidence had been given and at our request. These proposals were elaborated in October, 2003. It will be necessary to touch on later developments at a later stage of this judgment.

The request for information

- 9 Dominic Hayes was and is the education correspondent of the Evening Standard. ("ES"). On 4<sup>th</sup>. January, 2005, in accordance with s. 1 of The Freedom of Information Act, 2000 ("FOIA"), he submitted a request for information to DFES in the following terms:

*"Please send the copies of all minutes of senior management meetings at the Department for Education and Skills from June 2002 to June 2003 regarding the setting of school budgets in England."*

- 10 On 21<sup>st</sup>. January, 2005 DFES requested an extension of time to 8<sup>th</sup>. February, 2005. On 8<sup>th</sup>. February, 2005, DFES refused his request. Its letter indicated that it treated the request as relating to minutes of meetings of the DFES Board, which consists of the Permanent Secretary and the Heads of Directorates and of the Schools Directorate Management Group ( the “SDMG” ), which is the next most senior committee of DFES. It invoked s. 35(1) (a) of FOIA, a provision which this judgment will consider in due course. It then referred to the public interests for and against disclosure and set out the interests which it had considered. It informed him of his right to a review and gave details of the officer to contact. By e mail the same day he requested such a review, challenging the assertion that the requested information fell within s.35 (1) (a).
- 11 By letter dated 15<sup>th</sup>. April, 2005, Paul Wright of the School and LEA Funding division of DFES informed Mr. Hayes that some of the requested information would be disclosed following review but that the reasons given in the letter of 8<sup>th</sup>. February held good for the remainder. He set out the DFES view as to the ambit of s. 35(1) (a) and the relationship between formulation and development of a policy on the one hand and implementation on the other. The information then disclosed was highlighted in green in a document provided for the purposes of the appeal to the Tribunal and the Information Commissioner (“the Commissioner”) but not ES.
- 12 On 22<sup>nd</sup>. November, 2006, shortly before the hearing, DFES conducted a further review which resulted in further disclosure of material. This was highlighted in pink in the document referred to in paragraph 12. The upshot was a considerable reduction in the volume of material directly in issue among the parties. For reasons which will be spelt out later in this judgment, the broader issues which we were required to consider were unaltered.

#### The complaint to the Information Commissioner

- 13 Mr. Hayes` complaint to the Commissioner was dated 5<sup>th</sup>. May, 2005. It embraced all the information which DFES had refused to disclose. It concentrated on DFES` broad interpretation of s.35 (1)(a) and its alleged failure to distinguish policy – making from operational decisions. It emphasised, clearly rightly, the sustained public interest in the issue to which the information related.
- 14 The Commissioner`s Decision Notice was issued on 4<sup>th</sup>. January, 2006. It concluded that, save as to the minutes of one board meeting, the information requested fell within s. 35(1)(a) or, in one case, s. 35(1)(b). That last matter is moot since the information involved was disclosed as part of the “pink disclosure”; we heard no argument and make no ruling upon it. The Commissioner also rejected an argument based on FOIA s.40. In its notice of appeal and before us the DFES disowned any

such argument and denied that it had ever been a matter for the Commissioner `s decision. We deal with the point discretely and briefly at paragraphs 89 - 92.

15 However, as to all the information falling within s 35(1)(a), the Commissioner decided that the public interest in maintaining the exemption did not outweigh the public interest in disclosure. He therefore ruled that DFES had contravened FOIA s. 1 and ordered disclosure within thirty days of all the information requested, therefore including the information later highlighted in pink. Put summarily, the

Commissioner `s reasons were as follows: -

(i) As to the application of s. 35(1)(a) : -

- Most of the information related to the formulation of policy;
- Some related to the refining or amending of existing policy; that amounted to policy development rather than mere implementation of present policies;
- Where minutes relate to the formulation or development of policy, the names of officials identified in the text are also related to such formulation or development ;
- All such material was therefore within the reach of s.35(1)(a) ;
- As to one board meeting, the minutes provided, for the most part, a summary of the background to the perceived funding problem. To that extent they did not attract the qualified exemption.

(ii) As to the public interests in maintaining the exemption or disclosing the information : -

- He recognised the public interest in ensuring frank honest debate and advice in the interests of robust and well – considered policy – making. He did not consider, however, that this information required such protection nor that its disclosure would damage the formulation of policy.
- He accepted the importance of proper record – keeping but thought that the maintenance of standards in the face of publicity was a management issue.
- He was unconvinced by the DFES argument that such disclosure would have a wide – ranging “chilling effect” right across the civil service, stemming from a concern that all policy discussions might now be open to scrutiny. He saw this approach as tending to treat the exemption as absolute.

- He considered that any need to maintain the exemption was weakened by the passage of time.
- He did not believe that the disclosure of the names of officials would compromise their status in the present case.
- On the other side, FOIA signalled a new approach to the release of information in the interests of public debate and informed opinion. If a “chilling effect” resulted, it was the consequence of the Act, not the decisions of the Commissioner or the Tribunal.

The appeal to the Tribunal

- 16 The DFES gave notice of appeal dated 1<sup>st</sup>. February, 2006. The grounds were concisely set out: -
- ❖ The Commissioner was wrong to exclude any part of the minutes from the application of s.35 (1)(a).
  - ❖ He erred in his approach to the application of the public interest test; Parliament `s judgment was that such information was as a class worthy of protection from disclosure. Whether particular information should be disclosed depended on the public interest balancing test. The Commissioner had proceeded on the wrong basis.
  - ❖ He gave too little weight to the impact on candour of policy discussion, record – keeping and the wider effects on government policy – making.
  - ❖ As to factors specific to this information, the minutes directly evidenced the process of formulation or development of policy; much information on these issues had already been published. It related to recent policy – making and contained the names of officials.
  - ❖ He identified no reasons for disclosure.
- 17 In his Reply, dated 3<sup>rd</sup>. March, 2006, the Commissioner refuted these contentions and asserted that he had advanced three broad policy reasons for disclosure. We shall examine his more detailed development of these arguments in written and oral submissions, later in this judgment.

18 On 24<sup>th</sup>. May, 2006, the Tribunal made an order for joinder of ES. ES lodged a written submission dated 25<sup>th</sup>. August, 2006. It suffered the inevitable disadvantage that it had not seen the information in dispute. Nevertheless, as to s.35 (1)(a), it emphasised the distinction between formulation or development on the one hand and implementation or analysis on the other. It asked the Tribunal to form its own judgement as to the application of s.35 (1)(a) as to all the undisclosed material; we have done so. It disputed the Commissioner`s acceptance that the names of civil servants could be covered. On the weighing of public interests ES broadly supported the Commissioner`s position. All three parties lodged further written arguments amplifying their reasoning in accordance with the Tribunal`s directions. The Commissioner`s final submissions on the evidence taken in the absence of ES and the submissions of the DFES in Reply were also, by agreement, made in writing and were received by the Tribunal within seven days of the end of the oral hearing. We have considered all the arguments which they deploy. We shall refer only to some of them when reviewing the competing submissions which were addressed to us at the hearing. That should not be seen as an indication that others were ignored.

The questions for the Tribunal

19 The jurisdiction of this Tribunal is derived from FOIA s. 58, which reads as follows:

**58.** - (1) *If on an appeal under section 57 the Tribunal considers-*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

*(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

20 Certain fundamental matters of law affecting the Tribunal`s jurisdiction were agreed by all parties, namely:

- (i) Whether the public interest in maintaining an exemption outweighs the public interest in disclosure is a matter either of law or of mixed law and fact. We shall refer in this judgment to exemptions to which s.2 (2)(b) applies as "qualified exemptions".

- (ii) The Tribunal must therefore consider the Commissioner`s decision on the public interest and substitute its own if it thinks that he was wrong. [ see *Hogan and Oxford City Council v Information Commissioner ( EA/2005/0026 and EA/2005/0030 )* ]. It is not limited to the equivalent of a judicial review.
- (iii) It is entitled to take account of all the evidence before it, whether or not it was available to the Commissioner when he took the decision under review.
- (iv) The competing public interests must be assessed by reference to the date of the Request or, at least around that time. This is particularly important where considerable time has elapsed and the timing of the disclosure requested may be a significant factor in deciding where the public interest lies.

Those principles correspond closely to those set out at paragraph 14 of the recent judgment of this Tribunal, differently constituted, in *Guardian Newspapers and Brookes v The Information Commissioner EA/2006/0010 and 0013*.

21 The following issues require determination on this appeal -

- (i) How broadly should FOIA s.35 (1)(a) be interpreted ?
- (ii) Does it apply to all or any of the information in dispute?
- (iii) If, or in so far as it does apply, what is the correct approach to the weighing of conflicting public interests in relation to disclosure?
- (iv) If, or in so far as it does apply, what are the public interests for and against
  - (a) maintaining the exemption and
  - (b) disclosing the informationand does (a) outweigh (b) ?
- (v) What, if any, ruling is required on the s.40 point?

### Evidence

22 The DFES called three witnesses :

Andrew, Lord Turnbull, formerly Cabinet Secretary and head of the civil service.

Mr. Paul Britton, Director General of the Domestic Policy Group in the Cabinet Office.

Mr. Dugald Sandeman, a Director in DFES with responsibilities for all aspects of school funding. Though not holding that position at the material time, he was fully familiar with the policy issues involved.

Plainly, these witnesses offered an unrivalled experience of the workings of Government Departments at the most senior levels, specifically of the interaction of civil servants with ministers.

- 23 The Commissioner called no evidence.
- 24 ES called Mr. Hayes, the original complainant.
- 25 In respect of each witness the usual verified statement was served on the Tribunal and other parties before the hearing. Each was cross examined upon it before us. To Mr. Britton`s witness statement were attached four instructive annexes, dealing respectively with the need for frankness and candour, hence confidentiality in ministerial discussions, the same need in relation to Officials, the danger of government by cabal and the effect of disclosure on difficult policy decisions. He quoted authorities, both senior civil servants and cabinet ministers going back to the Attlee administration of 1945 – 51. Mr. Sandeman`s evidence included an addendum which was not disclosed to ES as it dealt specifically with the DFES` case as to the particular documents which it refused to disclose. For the same reason, the Commissioner cross examined Mr. Sandeman and made oral submissions on the particular documents in the absence of ES. This judgment includes a corresponding annexe which will be published only to DFES and the Commissioner unless and until, either it is apparent that no appeal will be brought against our decision, or that decision is upheld in whatever court finally determines any such appeal.
- 26 We wish to acknowledge the assistance that we gained from the candid, fair – minded and constructive approach of all those witnesses to the issues, especially to questions of the public interest.
- 27 Lord Turnbull and Mr. Britton gave evidence principally as to the cardinal importance of preserving the confidentiality of policy discussions in the interests of good government and the perceived threat to candour and boldness in the giving of advice, to the consideration of options and to the exchange of views which possible future disclosure would represent. Disclosure, Lord Turnbull told us, would send two sets of signals to civil servants, the first being those relating to the particular information and its publication, the second – and clearly the more far – reaching – involving a major perceived threat to the role and integrity of the Civil Service which would significantly

alter the way in which the executive conducted its business. Disclosure of minutes of bodies as close to ministers as those involved here had not been foreseen and would strike at the heart of civil service confidentiality, Such a relationship was an important constitutional safeguard and had served all governments well over many years. He strongly rejected the Commissioner`s claim that his position involved or came close to treating s.35(1) as conferring an absolute exemption to the duty to disclose.

- 28 He strongly endorsed the evidence of Mr. Britton, referred to in paragraph 41, especially his analysis of the various and, in some cases linked types of damage to good government which would result from the message conveyed by upholding the Commissioner`s decision. He reminded us of warnings on the effects of exposure of the internal workings of the executive from his distinguished predecessors, Sir William Armstrong (as he was at the material time) and Lord Butler of Brockwell. Lord Butler, giving evidence to a House of Lords Select Committee which was considering the Freedom of Information Bill, emphasised the importance of “frank policy – making” when the balance between open and effective government was being struck.
- 29 He reminded us that the White Paper which preceded the 1996 Code of Practice on Access to Government Information argued that “Governments and public authorities should be able to think in private. . . .”. The White Paper “Your Right to Know” published by the incoming Labour Government in 1997, underlined the damage that could result from “random and premature disclosure of (government) deliberations”. Lord Falconer, speaking on the relevant clause in the Upper House in 2000 referred to a wide consensus that “policy – making should not take place in a goldfish bowl”.
- 30 Lord Turnbull stressed the importance of the political neutrality of the civil service and the possible impact of our decision upon it. He cited the views, from opposite sides of the political divide, of Michael Heseltine and Peter Mandelson as to the risk to such perceived neutrality of public identification of a particular official with specific policy advice. Select Committees over many years had made the same point as had the Fulton Committee on the Future of the Civil Service, reporting in 1968. It is right to observe that, at paragraph 279, that report spoke particularly of the need for secrecy “at the formative stages of policy – making”. Lord Turnbull referred to the suspicion, sometimes exhibited by ministers of an incoming administration or even a new minister of the same administration towards an official apparently identified with a policy which was no longer in favour. He asserted that full identification of officials would make it “that much more difficult”. When asked by the Tribunal whether that did not simply reflect a misconception on the part of the new minister or ministers as to the role of the civil servant, which could and should be corrected, he replied, in effect, that that might be so but “we have to live in the world in which we live”.

- 31 The corollary to a politicised civil service, is “sofa government”, as it was vividly described by Lord Butler in his recent review, that is to say the increase in influence of special political advisors, working independently of senior civil servants and free of public scrutiny, supplanting and undermining the normal processes of policy – making. This danger was forcefully highlighted by both Lord Turnbull and Mr. Britton, supported by quotations from cabinet ministers from the present and former administrations.
- 32 The Franks Report on Section 2 of the Official Secrets Act 1911 accepted ( at Volume 1, Chapter 1, paragraphs 176 – 179 ) “that there are grounds for maintaining a measure of privacy in the conduct of the Government `s business”.
- 33 Disclosure of the role and identity of the civil servant carried the further risk that accountability for decisions might be seen as passing from the minister, the elected representative, answerable to Parliament, to the unelected official. At the same time, it was unfair to the minister that he should be confronted by his opponents with his arguably unwise rejection of an official `s advice. Such was the view of Lord Butler, among others. We were told that, whilst the Civil Service had been fully briefed on the implications of the FOIA, as perceived within Government, it awaited with some uncertainty the decisions of the Commissioner and the Tribunal as to how high the bar of disclosure under s.35(1) would be set. To uphold the Commissioner `s decision on this appeal would set that bar considerably lower than was expected and would therefore be likely to produce the malign consequences of which we were vividly warned.
- 34 In answer to a question from the Tribunal, Lord Turnbull made clear that his opposition to the Commissioner `s stance did not depend on the timing of disclosure.
- 35 Mr. Britton, as indicated in paragraph 32, set out a series of grave adverse effects which, he asserted, would inexorably result from the disclosure requested. These were the “secondary signals”, to adopt Lord Turnbull `s apt expression. They were :
- Loss of frankness and candour ;
  - The danger of government by Cabal ;
  - The damaging effect of disclosure on difficult policy decisions ;
  - The impact on record – keeping ;
  - Damage to relations between civil servants and ministers and to the role of civil servants in the formation of policy.

- 36 These are, essentially, the consequences of which Lord Turnbull warned the Tribunal. Whilst distinct effects, they are, for the most part closely related. Mr. Britton quoted from a 1967 speech of Lord Bridges, another former Cabinet Secretary, warning of the need for “confidence that ( the official `s) advice will not be disclosed prematurely”. He reiterated the perceived danger that identification of a civil servant with a policy may alienate him from a new team of political masters. He warned the Tribunal with particular vigour of the danger of more “ sofa” government.
- 37 Mr. Sandeman related these arguments to DFES specifically and offered justification for a general policy of withholding the names of officials identified in records as performing specific actions. He gave a very helpful and concise background to and history of the funding issue, on which the early part of this judgment has gratefully drawn. Mr. Hayes for ES told the Tribunal of the background to his request and set out particular reasons why the material sought should be disclosed. School funding was always a matter of great and legitimate public interest. The issue had raised great concern in 2003. The lack, if there was a lack, of any mention of possible funding problems at meetings of the relevant groups in the months leading up to March 2003 might, of itself, be highly significant. He was at the obvious disadvantage imposed by exclusion from the documents which he sought. A brief review of his evidence does not imply a lack of weight in the considerations, general and particular to this appeal, which he set out.

Legal submissions

- 38 We intend no disrespect to the careful and detailed written and oral submissions of all parties if we summarise them quite shortly.

The proper construction of FOIA s.35(1)(a)

- 39 Section 35 reads -

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

- (a) the formulation or development of government policy,*
- (b) Ministerial communications,*
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or*
- (d) the operation of any Ministerial private office.*

*(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.*

- 40 For the DFES it was contended that “relates to” in subsection (1) is to be broadly construed, both on account of its natural meaning and of the fact that this exemption is class – based and requires no evidence of prejudice. Over – technical interpretation is to be avoided. The application of the public interest test required by s.2(2)(b) is a sufficient bulwark against the unreasonable protection of trivial information. As to “formulation and development of policy”, those were also wide terms; they embraced information as to the factual background to a problem, giving rise to the need for fresh policy – otherwise there was no need for s.35(4). The development of policy would often be a continuing process – an argument that reflected references during the evidence of Mr. Sandeman to a “seamless web” of policy.
- 41 The Commissioner argued for a rather narrower interpretation of “relates to” but his conclusions as to the application of s.35(1)(a) to the present case differed from the DFES only as regards one set of minutes. He distinguished between the formulation and implementation of policy in principle. He did not accept that background information or the identification of possible future problems were covered by the subsection.
- 42 ES contended that “relates to” was, in this context, to be narrowly construed, so as to give effect to the purpose of FOIA. Mr. White cited the observation of Lord Denning M.R. in *R v Sheffield Crown Court ex parte Brownlow* [1980] 1 Q.B. 530 at 538 – 540 that the words could be construed broadly or narrowly, according to the purpose of the provision. The purpose of FOIA, he argued, was plainly the release of information in the absence of good reason to the contrary. As to such a purpose, he cited decisions of Canadian Courts on the broadly comparable *Access to Information Act, 1983* and an observation of Lord Marnoch to that effect in *The Commons Services Agency v The Scottish Information Commissioner* [2006] CSIH 58 XA89/05. As to “formulation or development”, he accepted that the expression might cover a long process of investigation, discussion, testing, consultation and possible improvement, alteration and recording of effects after its initial formulation. (as proposed by the Scottish Information

Commissioner in two decisions cited to us ). However, he reminded us of the distinction between those processes and implementation of a policy.

What is the correct approach to the weighing of conflicting public interests in relation to disclosure ?

43 FOIA confers the right to information -

*1. - (1) Any person making a request for information to a public authority is entitled-*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him.*

*(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.*

Section 2(2)(b) defines the Nature of a qualified exemption.

**2 . . . . .**

*(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.*

44 There emerged during argument, if not indeed in written submissions, what seemed to us a clear contrast between the approaches of the DFES on the one hand and the Commissioner and ES on the other as to the characterisation of the exemption defined in s.2(2)(b). We do not consider that it is simply a matter of forms of words; it is a difference of principle and substance which coloured argument on the public interest test.

45 Put shortly, the DFES contended that FOIA conferred, not a general right to information but a mixture of rights and restrictions. The absence of a prejudice requirement as a condition for qualified exemption in such categories of information as s.35(1)(a) arose from the acceptance by Parliament that any disclosure of information within this class caused some damage, perhaps very minor, to the public interest. That was the way that Mr. Crow put it, with great clarity, in the course of submissions. That was also the approach of Lord Falconer when speaking to the corresponding clause on 24<sup>th</sup>. October, 2000:

*“ This information is of a sufficiently sensitive nature to warrant a class exemption as its disclosure would almost always entail harm to the formulation of government policy”.*

Such information, as a class was described in evidence as being “worthy of protection”. That would have the practical consequence that inclusion in the class was a factor in the balancing exercise prescribed by s.2(2)(b).

- 46 Both the Commissioner and ES submitted that classification within s.35(1)(a), or any other category of information covered by a s.2(2)(b) exemption, simply lit an “amber light” indicating that the public interests for and against disclosure required scrutiny.

#### The public interest test

- 47 This involves, as observed earlier in this judgment, questions both of law and fact. The evidence identifying the public interests asserted has already been reviewed.

- 48 Mr Crow for the DFES submitted that:

- (i) Some damage is inherent in any disclosure of information of this class. If Parliament had not taken that view, it would have applied to such information the prejudice – based exemption, as we see in s.36.
- (ii) The words “ in all the circumstances of the case” in s.2(2)(b) require the Tribunal to have regard ,not simply to the immediate consequences of disclosing the particular information but further to such wider consequences as are likely, on the evidence, to flow indirectly from disclosure - Lord Turnbull `s “second set of signals”.
- (iii) The particular information requested directly evidences the process of formulation and development of government policy. It is therefore of a class for which maintenance of the exemption is readily justified.
- (iv) The material is fairly recent.
- (v) The evidence called by the DFES established both the essential features of good government that were at stake on this appeal and the threat which disclosure poses. Such evidence was authoritative and uncontradicted. He cited the very recent decision of the High Court of Australia in *McKinnon v Secretary, Department of Treasury [2006] HCA 45*, a decision which dealt with a provision corresponding to FOIA s.36, where the Court confirmed the importance of preserving frankness and candour and the need for good record – keeping. We note in passing that

“a cogent ground” for upholding the minister’s certificate was that “the documents were concerned with matters that were not settled and recommendations that were not adopted” - the issue of “tentativeness”

( p.47, para. 122)

- (vi) Various dicta of Lords of Appeal in *Conway v Rimmer* [1973] A.C. 910 at 957C – D ( Lord Morris, at 985 –6 ( Lord Pearce ) and 992B – C( Lord Upjohn ), *Rogers v Home Secretary* [1973] A.C. 388 at 413E – F ( Lord Salmon ), *Burma Oil v Bank of England* [1980] A.C. 1090 at 1132 G – H ( Lord Keith ) were to be treated with caution since the issues raised by claims to public interest immunity differed significantly from those raised in balancing the public interests on the facts of this appeal.
- (vii) The arguments for disclosure were weak or non – existent. They were weakened by generous disclosure by the DFES of related information, such as that exhibited to Mr. Sandeman’s evidence.
- (viii) There is no public interest favouring the disclosure of names of officials, whether in these documents or in general.

49 There was, unsurprisingly, much common ground between the Commissioner and ES. That we merge their submissions in this review is not intended to devalue the clarity and vigour with which they were advanced, both in writing and orally. In short they submitted that :

- (i) There is no intrinsic damage in the disclosure of information which enjoys a qualified exemption.
- (ii) The DFES stance effectively treats a qualified as an absolute exemption from disclosure.
- (iii) The policy which might have been discussed at the material period had been superseded by 2004.
- (iv) There is, in general, a public interest in examining the workings of central government, not least to ensure that the public is able to make a constructive contribution to important policy debates.
- (v) The amount and distribution of funding of schools is an issue of great public importance and always attracts keen and legitimate interest.
- (vi) The information requested might show whether the DFES had foreseen the funding crisis, if such it was.

- (vii) It would show how any crisis was tackled in 2003, what options were considered and whether the DFES acted appropriately and effectively.
- (viii) FOIA ss. 35(2) and 19(3)(b) both indicate that information is to be regarded as less sensitive, hence more readily disclosable, once a policy has been formulated.
- (ix) The publication of other information relating to the subject matter of the Request is irrelevant to the public interest in additional information sought by ES. A decision of the Scottish Information Commissioner, *Williams v Scottish Executive 166/2006 para. 51* was cited.
- (x) The incremental or cumulative impact of a series of disclosures – Lord Turnbull `s secondary signals – should be disregarded, given the words “*in all the circumstances of the case*” in s. 2(2)(b). ( This was an ES submission.)
- (xi) The disclosure of the names of officials might be important and could very rarely be harmful.

### The Tribunal `s Conclusions

#### The interpretation of FOIA s. 35(1)(a)

50 This provision has not hitherto been interpreted in any decision of the Tribunal. We think it helpful therefore to offer some broad guidance as to its application.

51 Those who formulate and develop policy, whether in Government or other public bodies identified in FOIA, need to have a clear idea, at least when answering requests for information, whether business which they are conducting either may or will be disclosed to the public on request. We acknowledge that, even if the qualified exemption applies, they may still, in some cases, be faced with uncertainty as to whether the public interest in maintaining that exemption will prevail. That, however, is the test to be applied.

52 The facts that:

- s.36 creates a further qualified exemption, inter alia, for government information, disclosure of which would inhibit the giving of advice and the free and frank exchange of views for the purposes of deliberation and
- information falling within s.35 is excluded from s.36,

may be some indication that s.35 should not be too liberally construed.

- 53 Nevertheless, we consider that the approach of the DFES is broadly correct, mainly because this is a class of information enjoying a qualified, not an absolute exemption. That fact, of itself, enables, indeed requires a public authority to adopt a commonsense approach to the disclosure of information, which will cause no or no significant damage to the public interest. For that reason alone, we conclude that “relates to” and “formulation and development of policy” can safely be given a reasonably broad interpretation, notwithstanding the broad thrust of FOIA to which we shall return.
- 54 Such an approach is consistent with the wide reach of the terms themselves.
- 55 We agree that the immediate factual background to policy discussions is itself information caught by s.35(1)(a), an inference which, we believe, is readily drawn from the wording of s.35(4). That said, s.35(4) expressly and apparently uniquely, so far as FOIA is concerned, spells out the public interest in its disclosure, even before a policy is fully formulated.
- 56 The distinction between formulation/development on the one hand and implementation on the other will prove to be a very fine one in some cases since implementation itself usually spawns policies. There will, however, be many instances where the latter rather than the former is clearly involved. Such cases will be more readily recognised when confronted than defined in advance.
- 57 The wording of s.35(2) seems to envisage policy formulation as a series of decisions rather than a continuing process of evolution. That has little significance in the interpretation of s.35(1)(a) since that applies to information whether it relates to the formulation and development of one policy or its successor. It may be more significant, however, when we consider questions of the public interest.
- 58 Bearing these limited principles in mind, we are firmly of the view that, when asking the question, whether the minutes of a particular meeting or part of one, a memorandum to a superior or a minister or a note of advice fall within s.35(1)(a), a broad approach should be adopted. If the meeting or discussion of a particular topic within it, was, as a whole, concerned with s.35(1)(a) activities, then everything that was said and done is covered. Minute dissection of each sentence for signs of deviation from its main purpose is not required nor desirable. As acknowledged already, that reassurance is of limited value since the question of the public interest remains.
- 59 Translating those principles to the disputed information in this appeal, we rule that the DFES correctly asserted that s. 35(1)(a) applied to all the outstanding material ( and probably some of the material disclosed before the hearing of this appeal ). So we turn to the question: what is the correct approach to a class of documents to which Parliament has applied a qualified exemption ?

What is the correct approach to a class of documents to which Parliament has applied a qualified exemption ?

- 60 We reject the inherent damage argument advanced by the DFES as the rationale underlying qualified exemptions applicable to information caught by such provisions as s.35(1)(a).
- 61 FOIA, in s.1, conferred an important new fundamental right to information held by public bodies. It is a right subject to exceptions, or conditions as they were termed by Lord Turnbull. Where such an exception is relied on by a public authority, it is for that authority to justify such reliance. If it says there is an absolute exemption, it must demonstrate it. If prejudice is a requisite factor, it must prove it.
- 62 We do not accept that the inclusion of information within such a class as s.35(1)(a) reflects the inevitability of damage to the public interest, in some degree, if it is disclosed. On the contrary, the wider such a provision as s.35(1)(a) is drawn, in accordance with the DFES argument which we have accepted, the more unreal such a contention becomes. The ready and entirely proper acceptance by the DFES that much of such material can be and is disclosed by the Department demonstrates the, at best, hypothetical nature of this argument.
- 63 In our judgement, inclusion within such a class of information simply indicates the need and the right of the public authority to examine the question of the balance of public interests when a request under s.1 is received. Often such examination will be very brief because disclosure poses no possible threat to good government.
- 64 Section 2(2)(b) is clear : the authority must disclose unless the public interest in withholding the information outweighs the public interest in disclosure. If the scales are level, it must disclose. Such an equilibrium may not be a purely theoretical result : there may be many cases where the apparent interests in disclosure and in maintaining the exemption are equally slight.
- 65 The weighing exercise begins with both pans empty and therefore level. Disclosure follows if that remains the position.
- 66 We therefore respectfully disagree with the observation of Lord Falconer which immediately followed the quotation set out at paragraph 45 :

*“This being the case, it would be dishonest to have a prejudice test in this clause. Information of this nature should be disclosed only where it is in the public interest to do so, which is already provided for in the Bill”.*

If that was his interpretation of s.2(2)(b), we think that he put the matter the wrong way round. In reaching this conclusion we have further had regard to the observations of this Tribunal, differently constituted, in *Hogan and Oxford City Council v Information Commissioner (EA/2005/0026 and EA/2005/0030) at paragraphs 61 - 67*].

The application of the public interest test

67 We have already ruled that s. 35(1)(a) applies to all the information in issue. We now turn to the question of applying the test of s.2(2)(b) in accordance with the approach indicated at paragraphs 60 - 66. Since it is for the DFES to demonstrate that the exemption should be maintained, that the interest in withholding the requested information should on balance prevail, we shall first examine the arguments against disclosure.

68 Looked at without regard either to the status of the minutes concerned or to the “secondary signals” which disclosure would give, according to the DFES, we have no doubt that disclosure early in 2005 of the information now in issue would have caused little, if any, damage to the current or future work, including formulation of policy, of the DFES. Viewed on the same very limited basis, we do not consider that the identification of individual civil servants in those minutes would prejudice them or their future role in the department. So, if we were required to look no further than the text of these minutes, we should uphold the Commissioner’s decision, for slightly different reasons, so far as they relate to the application of s.35(1)(a) to this information.

69 Is the very status of these minutes, the fact that they record meetings of the most senior officials discussing the funding issue, a factor which supports the maintenance of the exemption? In our view, it is not. It may, in some or many cases, increase the sensitivity of the matters minuted, disclosing, for example, whilst policy is being reviewed, that radical options are being discussed at a very high level. If it does, that will be a factor which can properly be taken into consideration when a government department is confronted with an FOIA request. To treat such status as automatically conferring exemption would be tantamount to inventing within s. 35(1) a class of absolutely exempt information, for which the subsection gives no warrant and is a stance which the DFES quite rightly disclaimed.

70 However, we do not consider that the matter ends there. We agree with the DFES submission that the weighing of the public interests involves in this case a consideration of any evidence of a wider impact on the conduct of government which might result from the Commissioner’s decision – Lord Turnbull `s “secondary signals”. That conclusion seems to us to flow from the introductory words of s.2(2)(b) quoted above, “*in all the circumstances of the case*”. They include indirect consequences, We note that such a conclusion is consistent with the approach of the Scottish Information

Commissioner, to judge from decisions to which our attention was drawn (see *Hutcheon v Scottish Executive 075/2006* and *Williams v Scottish Executive 166/2006*). It is, furthermore, at least implicit in the Commissioner's submissions on this appeal.

- 71 We have identified the wider effects of disclosure predicted by the DFES witnesses in some detail already. The issue for us is not whether frank debate, fearless advice, impartial officials, full record – keeping and ministerial accountability are worth preserving. All agree that they are. We have to decide whether or to what extent they would be imperilled by disclosure in this case.
- 72 Mr. Crow argued, in effect, that the Tribunal had no real alternative to accepting the evidence of the eminent witnesses that he called on these matters, in the absence of any evidence to refute them. We accept without question their assertions as to the vital importance of the principles listed in the last paragraph and others which they cited. Indeed, as we have already said, nobody cast doubt upon them. When it comes to the effects of disclosure, however, we have listened with care and respect to their warnings but remain entitled, indeed under a duty, to reach our own conclusions, applying our commonsense and, as to the lay members, our experience to our decision. We also have some regard to the fact that government departments have for six years been aware of and briefed on the potential changes to working practices which FOIA has introduced. There was no evidence of any loss of candour in discussion and advice in the upper echelons of the Civil Service in that period. That might be because officials have hitherto expected a high degree of protection for meetings and policy memoranda, as Lord Turnbull suggested. Alternatively, it could be that concerns at disclosure are not quite as acute or widespread as supposed.
- 73 We were told by Mr. Crow that FOIA was not intended to change the way that government was conducted as a matter of substance, If that means that it was not intended to destroy the role of an impartial Civil Service, we unhesitatingly agree. It was, however, intended to change it fundamentally by replacing a Parliamentary Code with a statutory right to government information, imposing a degree of transparency, subject, of course, to exceptions, to which it had never previously been exposed and for which it sought to prepare as confirmed by Lord Turnbull.
- 74 We agree that there is a need for some caution when invited to apply dicta of distinguished senior judges dealing with questions of public interest immunity to the question whether the warnings of Lord Turnbull and Mr. Britton are unduly alarmist. Several considerations demand circumspection:
- (i) They do not all speak with one voice. Mr. Crow highlighted further passages in the speeches in *Conway v Rimmer* and

*Burmah Oil v Bank of England* which express more qualified and even contrary views of the risk to candour.

- (ii) However distinguished the judge, he is expressing his view, indeed his forecast on an issue of fact, not of law.
- (iii) The result of a refusal to disclose documents in private litigation will often be an irredeemable denial of justice. Such a drastic consequence does not inevitably flow from withholding information under FOIA.
- (iv) The very slight chance that an official's words might one day be revealed in litigation probably does not cross his mind at the time. Whether the chance is perceived as greater in the context of FOIA and whether that is likely to affect candour is discussed below.
- (v) Disclosure in private litigation is subject to strict undertakings as to restricted use (see C.P.R. Rule 31.22 ). Disclosure under FOIA is to all the world, to be used for whatever purpose the world wishes.

That said, we do not entirely ignore the fact that similar claims to those made to us have met with a degree of scepticism in much less transparent times than ours.

75 Having reflected on the competing arguments and the wealth of authorities with which we have been assisted, we conclude that the following principles should guide decisions as to disclosure in such a case as this. :

- (i) The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.
- (ii) No information within s.35(1) is exempt from the duty of disclosure simply on account of its status, of its classification as minutes or advice to a minister nor of the seniority of those whose actions are recorded.
- (iii) Subject to principle (iv), which we regard as fundamental, the purpose of confidentiality, where the exemption is to be

maintained, is the protection from compromise or unjust public opprobrium of civil servants, not ministers. Despite impressive evidence against this view, we were unable to discern the unfairness in exposing an elected politician, after the event, to challenge for having rejected a possible policy option in favour of a policy which is alleged to have failed.

- (iv) The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy. We note that many of the most emphatic pronouncements on the need for confidentiality to which we were referred, are predicated on the risk of premature publicity. In this case it was a highly relevant factor in June 2003 but of little, if any, weight in January 2005.
- (v) When the formulation or development of a particular policy is complete for the purposes of (iv) is a question of fact. However, s. 35(2) and to a lesser extent 35(4), clearly assume that a policy is formulated, announced and, in many cases, superseded in due course. We think that a parliamentary statement announcing the policy, of which there are examples in this case, will normally mark the end of the process of formulation. There may be some interval before development.. We do not imply by that that any public interest in maintaining the exemption disappears the moment that a minister rises to his or her feet in the House. We repeat – each case must be decided in the light of all the circumstances. As is plain however, we do not regard a “seamless web” approach to policy as a helpful guide to the question whether discussions on formulation are over.
- (vi) If the information requested is not in the public domain, we do not regard publication of other information relating to the same

topic for consultation, information or other purposes as a significant factor in a decision as to disclosure.

- (vii) In judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote - Trevelyan reforms. These are highly – educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions. The most senior officials are frequently identified before select committees, putting forward their department's position, whether or not it is their own.
- (viii) On the other hand, there may be good reason in some cases for withholding the names of more junior civil servants who would never expect their roles to be exposed to public gaze. These are questions to be decided on the particular facts, not by blanket policy.
- (ix) Similarly, notwithstanding past experiences which were recounted to us with a proper anonymity, we are entitled to expect of our politicians, when they assume power in a government department, a substantial measure of political sophistication and, of course, fair – mindedness. To reject or remove a senior official because he or she is identified, thanks to FOIA or for any other reason, with a policy which has now lost favour, whether through a change of administration or simply of minister, would plainly betray a serious misunderstanding of the way the executive should work. It would, moreover, be wholly unjust. We should therefore proceed on the assumption that ministers will behave reasonably and fairly towards officials who promoted – or are believed to have promoted policies which the new incumbent rejects, policies which may not, anyway, reflect the official's private view. By the same token, new ministers can expect from that official the same level of engagement with the policies which they now wish to pursue.
- (x) Likewise, decisions should not assume the worst of the public. The answer to ill – informed criticism of the perceived views of civil servants is to inform and educate the critic, however hard

that task may be, not to deny information, simply through fear that it may reflect adversely and unfairly on a particular official.

- (xi) A blanket policy of refusing to disclose the names of civil servants wherever they appear in departmental records cannot be justified because, in many cases disclosure will do no harm to anyone, even if it does little good. Quite apart from cases falling within (iv) above, there will plainly be instances where an individual has advanced particularly sensitive or controversial advice which for whatever reason should not be attributed. It might be appropriate to disclose the advice with the name redacted. Again, each decision will depend on the facts of the case. There must, however, be a specific reason for omitting the name of the official where the document is otherwise disclosable. That reason may not need to be utterly compelling where, as will often be the case, there is little or no public interest in learning the name.

- 76 Applying such principles to the disputed information here, we regard the interest in maintaining the exemption, taking account of all the circumstances, as tenuous, at best. By early 2005, the policy changes under consideration had resulted in a ministerial statement in the Commons in July, 2003, announcing a new policy framework for the two following financial years. In July, 2004, the School Standards Minister announced details of the funding settlement for 2005 – 6. It is clear that the time and space needed had been available and put to good effect.
- 77 We do not believe that disclosure of these minutes, having regard to both the general principles, we have sought to formulate, some of which are only marginally engaged here, and the content of this particular material would damage the public interest to any measurable degree.
- 78 Before passing to a very brief review of the arguments for disclosure, we wish to add a few observations on the arguments advanced on both sides as to the wider effects of disclosure.
- 79 We accept that the DFES is, of course, fully conversant with the distinction between absolute and qualified exemptions. Nevertheless, the effect of much of its evidence, if accepted, would be practically to ignore that distinction in relation to wide classes of policy information covered by s. 35(1).

- 80 Equally it would generally exclude the public from access to information as to how policy was agreed and developed, even where that policy had long been discarded, subject to the application of the thirty year rule.
- 81 As to protection of ministers from premature or unfair criticism based on disclosed communications with senior officials, confidentiality as to such communications is not always, we think, treated by ministers as sacrosanct. It is not unknown for a minister to announce, in the face of public clamour, what information or advice he or she was or was not given by his or her officials, perhaps in order to protect his or her personal position and career. If that is so, it is hard to see why, in an appropriate case, political opponents should not have access, after the event, to material of a similar nature which might expose the minister to challenge.
- 82 We recognise the dangers of increasing “sofa government” or “government by cabal” as it was termed by Mr. Britton. The use of political advisors rather than career civil servants goes back at least to Churchill and represents a growing trend, lamented by oppositions of whichever political complexion. Whether it is likely to accelerate if there is a greater risk of disclosure of the dealings of civil servants with each other and with ministers, we do not feel confident to predict. It will certainly not be curbed by any decision of ours.
- 83 As to record – keeping, we were told that standards were hard to maintain already. Certainly, the minutes which we are considering are fairly skeletal. Whether or not this is, as the Commissioner contends, a management issue, we do not consider that we should be deflected from ordering disclosure by the possibility that minutes will become still less informative. This is not a problem unique to central government. In any case, minutes are unlikely to be disclosed in the heat of battle, for reasons discussed at paragraph 75(iv). Good practice should prevail over any traditional sensitivity as we move into an era of greater transparency.
- 84 We recognise the importance of maintaining the constitutional position that Ministers, not civil servants, are answerable to Parliament and the public for the actions of their department. We also recognise that officials should be able to have robust and honest discussions with their ministers without fear that such frank discussions will make them a political ‘football’ with possible adverse consequences for their careers. As we have said already, that is not, of itself, an argument for withholding the names of civil servants but the wider impact point may require consideration in some cases.
- 85 Finally, we read and heard evidence relating to cabinet discussions and the consequences for the principle of collective responsibility which disclosure may pose. We are not directly concerned with such information on this appeal. It may be that further considerations, not debated here, are material to issues of the public interest

should information of that character be requested. Those involved in such discussions are elected politicians or peers who have willingly accepted a political role. Certain principles which we have attempted to propose may be relevant in that context also but we restrict our observations to the conduct of business within government departments with which this appeal is concerned.

The arguments for disclosure

- 86 We think there is force in the point that there is a general public interest in transparency and a better understanding of how the government tackles important policy problems. That the “funding crisis” was of great public concern is clearly a factor. The possibility that minutes were silent on this issue in the months leading up to March 2003 could, if true, be of significance, given the central role in the DFES which the two bodies concerned were said to occupy. There is, furthermore, a legitimate interest in seeing how the emerging problem was tackled between March and July, 2003.
- 87 We do not consider that the information in issue is likely to prove of major importance to any public debate on the issue but it may have some. More than that it is not necessary or appropriate to say in this open judgment. There is little interest in the disclosure of the names of the officials involved here but virtually none that we can discern, in their suppression.
- 88 The public interest in maintaining the exemption does not therefore outweigh that favouring disclosure.

FOIA S. 40

- 89 It appears that the DFES raised the possible applicability of s. 40 (the Data Protection exemption) in the course of exchanges with the Commissioner following Mr. Hayes` complaint. It is right to observe that neither in its original refusal nor in the letter following review (see paragraphs 11 and 12 above) did the DFES invoke that provision. Nevertheless, the Commissioner ruled in his Decision Notice that s. 40 was not engaged. The DFES protests that he had no jurisdiction, or at any rate should not have ventured to rule on a matter which the DFES was not raising.
- 90 The Tribunal ruled in *Bowbrick v The Information Commissioner EA 2005/0006* at paragraphs 34 - 56 as to its and the Commissioner`s jurisdiction to consider exemptions not raised by the public authority when refusing the Request. Here the DFES disowns any argument based on s.40 but is concerned, we understand, that the Tribunal should not offer any ruling on the issue, which may arise for consideration in a broadly similar appeal in the future.

91 We shall certainly not do so, not least because we heard no argument on the point. We do not wish to investigate complaints that the Commissioner behaved unfairly in ruling on the point. It is doubtful whether that lies within our jurisdiction. If it does, we do not choose to exercise it. Our task is to rule whether, given all the matters before us, the Commissioner `s decision was right in law. We have done so.

92 If further clarification is needed, we take the view that the application of s.40 to a complaint such as this is to be viewed as free of authority at any level, since the DFES evidently did not pursue the argument at an earlier stage. We make no criticism of any party. This is an issue with which we were not concerned.

The Decision

93 For these reasons we shall uphold the Commissioner `s decision.

Deputy Chairman

David Farrer QC

Dated 19<sup>th</sup>. February, 2007