FoI and Ministerial vetoes

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The then Lord Chancellor, Jack Straw, issued the first ministerial veto on 23 February 2009 for the contents of the legal advice on military action against Iraq. Two subsequent vetoes were issued protecting communications on devolution issues and a fourth on. A fourth veto was issued on 8 May 2012 blocking the release of the NHS Transitional Risk Register and a fifth in July 2012 blocking extracts from Cabinet minutes on the military action against Iraq in 2003. A sixth was on 16 October 2012, relating to the release of correspondence from Prince Charles to Government departments. This has prompted a Court of Appeal judgment on 12 March 2014 quashing the veto, which is being appealed. A seventh veto was issued in January 2014 in respect of HS2 documents. This Standard Note traces the history of the veto within FoI legislation and summarises comparative examples abroad.

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1 Background

During the passage of the *Freedom of Information Act 2000*, the need for a ministerial veto to override the decisions of the Information Commissioner was the subject of contention. Government amendments were made to the original bill to limit the veto to information relating to government departments, the National Assembly for Wales and any public authority designated by order, subject to the affirmative resolution.[1] The then Home Secretary, Jack Straw, made a commitment that such a veto or executive override would be a collective Cabinet decision:

> It is neither possible nor necessary to write into the Bill that the decisions made by a Cabinet Minister must be made only after consultation and agreement with all of his or her Cabinet colleagues--not least because some of the decisions are quasi-judicial. In practice, it would be an extremely unwise Cabinet Minister who chose to issue an exemption certificate amounting to a veto of a decision made by the commissioner to order disclosure without consulting his or her Cabinet colleagues. That might lead to that Cabinet Minister's speedy demise and the receipt of his or her P45 by return of post.
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> To reinforce those arrangements, I propose that there should be written into the ministerial code--which is a published document available in the Library of the House and, I believe, on the internet--guidance on how decisions relating to Executive exemption certificates should be made and the way in which other colleagues should be consulted, other than on quasi-judicial decisions. I hope that those two changes, one that will be written into the Bill and one that will be made public, are to the approbation of the House. [2]

In Lords committee stage, there were attempts to examine the possibility of a judicial review challenge against a veto. In response, the then Lord Chancellor, Lord Falconer, said that the exercise of the veto would only occur after consultation within the Cabinet, although this could not be written into the Bill.[3] A minister would be required to inform the applicant of the reasons for the decision to use the veto, and would be accountable to Parliament for the decision. Finally, he said that the courts would need to develop procedures to examine decisions by ministers to use the veto.[4]

At Lords report, Opposition amendments to introduce a serious harm test to the exercise of the veto and to enhance parliamentary scrutiny were not accepted.[5] Lord Falconer said that a minister signing an exemption certificate would have to give public reasons for his decision and the Commissioner would report any shortcomings in the decision-making procedure to Parliament.[6]

Only a Minister of the Crown who is in the Cabinet, or a UK Law Officer, can use the 'ministerial veto' that overrides a relevant decision of the Information Commissioner requiring disclosure. Section 53(2) of the FoI Act requires the accountable person to present a certificate to the Commissioner and to lay a copy before each House, or the Northern Ireland

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1 HL Deb 25 October 2000 c443
2 HC Deb 4 April 2000 c922. See also HL Deb 25 October 2000 c441-443
3 HL Deb 25 October 2000 c441
4 HL Deb 25 October 2000 c445
5 HL Deb 14 November 2000 c258 There were similar debates on Lords third reading HL Deb 22 November 2000 c842
6 HL Deb 14 November 2000 c259

Assembly or National Assembly for Wales where relevant. The accountable person has 20 working days in which to serve the certificate.

The power can be used only when the Commissioner and/or Tribunal has decided in favour of disclosure on public interest grounds; it is not available where a Commissioner has decided that the information is not covered by an exemption. [7]

There has been some academic debate as to the possibility of an executive override being subject to a judicial review. The lawyer, Jeremy Ison, noted as follows in the *Freedom of Information Handbook;*

> The ministerial decision would, however, be subject to judicial review on the application of a party with the requisite standing – the most obvious candidates being the complainant or the Information Commissioner. To succeed in the Administrative Court, however, would generally mean showing that the Minister had acted irrationally or in a way that no one in his position could reasonably have done, which will often be a difficult test to meet.[8]

1.1 Government policy on using the veto

A revised Statement of Government Policy on the use of the executive override as it relates to information falling within the scope of section 35(1) of the Act was issued by the Ministry of Justice in 2009. The policy relates to the use of the veto in respect of information that engages the operation of the principle of collective Cabinet responsibility. This states:

> The Government considers that the veto should only be used in exceptional circumstances and only following a collective decision of the Cabinet. This policy is in line with the commitment made by the previous administration during the passage of the Freedom of Information Bill that the veto power would only be used in exceptional circumstances, and on then following collective Cabinet agreement.[9]

The policy goes on to set out the criteria by which the decision to use the veto should be made:

> Release of the information would damage Cabinet Government; and/or
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> It would damage the constitutional doctrine of collective responsibility; and
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> The public interest in release, taking account as appropriate of information in the public domain, is outweighed by the public interest in good Cabinet government and/or the maintenance of collective responsibility.

In reviewing the exercise of the veto, Cabinet would have reviewed the information in question or in the case of papers of a previous administration the Attorney General would review the documents and brief the Cabinet accordingly.

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7 See Patrick Birkenshaw *Freedom of Information: The Law, the Practice and the Ideal* (3rd ed 2002) p320

8 Chapter 10 in *Freedom of Information Handbook* ed Peter Carey and Marcus Turle p307

9 *Statement of HMG Policy Use of the Executive Override Under FoI as it relates to section 35(1)* this is available as a Deposited Paper in the Commons Library at http://depositedpapers.parliament.uk/depositedpaper/view/2269839

1.2 Justice Committee post-legislative scrutiny report on FoI

The Justice Select Committee issued a post-legislative review of the FoI legislation in July 2012.[10] It reviewed the ministerial certificates issued to date and concluded:

> 179. While we believe the power to exercise the ministerial veto is a necessary backstop to protect highly sensitive material, the use of the word exceptional when applying section 53 is confusing in this context. If the veto is to be used to maintain protection for cabinet discussions or other high-level policy discussions rather than to deal with genuinely exceptional circumstances then it would be better for the Statement of Policy on the use of the ministerial veto to be revised to provide clarity for all concerned. We have considered other solutions to this problem but, given that the Act has provided one of the most open regimes in the world for access to information at the top of Government, we believe that the veto is an appropriate mechanism, where necessary, to protect policy development at the highest levels.[11]

The Government response in November 2012 announced that it was minded to review the veto power:

> The Government is minded to review and, as appropriate, revise the policy on the use of the veto. As part of that review, we propose to consider how the veto policy can be adapted both in terms of the process involved in its use and to offer greater clarity and reassurance on its ability to offer appropriate protection in addition to that which it provides in the context of information relating to collective Cabinet responsibility [12]

No formal consultation has yet been launched.

2 The use of the veto

2.1 Legal advice on hostilities in Iraq 24 February 2009

The FoI Act came into force on 1 January 2005. Jack Straw made the following announcement to Parliament on 24 February 2009, when he explained his decision to use the veto or executive override procedure for the first time:

> In December 2006, the Cabinet Office received a freedom of information request for Cabinet minutes and records relating to the meetings that it held between 7 and 17 March 2003, where the Attorney-General's legal advice concerning military action against Iraq was considered and discussed. There were two such meetings, on 13 and 17 March. Cabinet Office refused the request, citing the Act's exemptions for information relating to policy development and ministerial communications. In keeping with its statutory obligations, the Cabinet Office had considered the public interest in releasing the information, but found twice, on balance, that there was a greater public interest in withholding it.
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> The applicant duly exercised his right to ask the Information Commissioner to investigate the handling of his request. In February 2008 the commissioner reasoned, for the first time, that Cabinet minutes—these ones—should be released. The Cabinet Office appealed the commissioner's decision to the Information Tribunal.
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> On 27 January 2009 the tribunal published its decision. The tribunal was unanimous in deciding that the informal notes of the Cabinet meetings should be withheld. But, by a majority of two to one, it decided that the public interest balance fell in favour of release

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10 Justice Committee Select Committee First Report 2012-13 HC 96

11 Ibid

12 Cm 8505 November 2012

> of the minutes. It therefore upheld the decision of the Information Commissioner ordering information to be disclosed, subject to some minor redactions.
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> Following that decision, and having taken the view of Cabinet, I have today issued a certificate under section 53 of the Act in an appropriate form and consistent with the Act, the effect of which is that these Cabinet minutes will not now be disclosed. The conclusion that I have reached rests on the assessment of the public interest in disclosure and non-disclosure. I have laid a copy of my certificate, and a detailed statement of the reasons for my decision, in the Libraries of both Houses. My decision was made in accordance with the Government's policy criteria, which are annexed to my statement of reasons. Copies of these documents have been sent to the requester and are available in the Vote Office.
>
> To permit the commissioner's and the tribunal's view of the public interest to prevail would, in my judgement, risk serious damage to Cabinet government—an essential principle of British parliamentary democracy.[13]

For the Opposition, Dominic Grieve, agreed with the use of the veto, but continued to press for an independent inquiry into the circumstances leading to the Iraq war in 2003.[14] In response to a question from the Conservative John Greenaway, Mr Straw indicated that a reduction in the number of years that Cabinet papers are closed under public records legislation might lead to changes in FoI legislation:

> **Mr. Straw:** I am very grateful to the hon. Gentleman for what he has said. He has the benefit of being correct and also consistent about this over more than 10 years. So far as an opportunity to look at the Act is concerned, recommendation 8.8 of the Dacre review said, as I indicated in my statement, that if the minimum period for the release of documents generally was reduced, as he recommended, from 30 years to 15, but even if it came down to, say 20, there would need to be consideration of changes to the Freedom of Information Act provision in this respect. We are actively considering that. I am happy to do it in conjunction and co-operation with the Opposition.[15]

David Howarth, for the Liberal Democrats, argued that the exceptional circumstances justified release of the Cabinet minutes:

> Does the Secretary of State accept that the much greater threat to Cabinet government is not the release of the minutes, but any repeat of the collapse of Cabinet decision making in the Government of Mr. Blair? The argument against disclosure is that it might undermine full and frank discussion in Cabinet and mean that discussion will take place informally, outside the meeting. However, is not that precisely what happened under Mr. Blair, with the rise of sofa government? At least the prospect of disclosure in exceptional circumstances—the tribunal made it clear that it is not a matter of disclosing Cabinet minutes all the time, only in exceptional circumstances—might persuade future Cabinets to remember that Cabinet discussion should matter.[16]

The Campaign for Freedom of Information issued a press release which stated:

> The Campaign said the government should have abided by the Information Tribunal's decision on the release of the cabinet minutes - or appealed against it, but not overruled it. It said the UK Freedom of Information Act had one of the most elaborate appeals processes of any in the world, involving the Information Commissioner, the

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13 HC Deb 24 February 2009 c156
14 Ibid c159
15 HC Deb 24 February 2009 c164
16 Ibid c160

> Information Tribunal, the High Court and if necessary the Court of Appeal and House of Lords.
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> The Campaign's director Maurice Frankel said the Campaign *"was concerned that having been used once, the veto might now be used in other cases involving the examination of policy at lower levels in government."*[17]

Professor Robert Hazell at the Constitution Unit, University College London, commented:

> "I am not surprised at the government's decision to use the veto. It follows a series of rulings by the Information Commissioner and Tribunal to order disclosure of policy documents which sent shock waves round Whitehall. Ministers are anxious to preserve a private space for policy discussions, and being ordered to disclose Cabinet minutes proved to be the last straw".[18]

The decision is also discussed in an article by Reuters Institute. [19] Mr Straw's former position as Foreign Secretary at the time of the Iraq war was also the subject of some comment.[20]

Mr Straw placed a copy of the certificate and a paper setting out the reasons for the use of the veto in the Commons Library.[21] The Information Commissioner decision of 18 February 2008 is available online,[22] as well as the Information Tribunal decision of 27 January 2009.[23]

2.2 Devolution Cabinet minutes10 December 2009

Jack Straw, Lord Chancellor, issued a written ministerial statement on 10 December 2009 in which he set out the reasons for issuing a certificate to prevent publication of minutes of the Cabinet Sub-Committee on Devolution Scotland, Wales and the Regions (DSWR). [24] In this statement he set out his reasons for using the veto:

> In accordance with the policy, my conclusion rests on an assessment of the public interest in disclosure and non-disclosure of these Cabinet minutes, and of the exceptional nature of the case. While the convention of collective Cabinet responsibility is only one part of the public interest test, in my view disclosure of the information in this case would put the convention at serious risk of harm. As an integral part of our system of Government the maintenance of the convention is strongly in the public interest and must be given appropriate weight when deciding where the balance of the public interest lies.
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> Having done that, and having taken into account all of the circumstances of this case, I have concluded that the public interest falls in favour of non-disclosure and that this is an exceptional case where release would be damaging to the convention of collective

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17 "Iraq veto decision "extremely retrograde" 24 February 2009 *Campaign for Freedom of Information*

18 "Ministers entitled to veto Information Tribunal decision ordering release of Cabinet documents" 24 February 2009 *Constitution Unit*

19 "FoI: a shock to the system" Jeremy Hayes February 2009http://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/discussion/FOI_A_shock_to_the_system_.pdf

20 See for example Andrew Mackinlay at HC Deb 24 February 2009 c165

21 The certificate is UP/308 2009 They are also available online http://depositedpapers.parliament.uk/depositedpaper/view/2264903

22 http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fs_50165372.pdf

23 Information Tribunal EA/2008/0024 AND EA/2008/0029 27 January 2009 http://www.informationtribunal.gov.uk/DBFiles/Decision/i288/Cabinet%20Office%20v%20IC%20&%20C%20Lamb%20(EA-2008-0024,29)%20-%20Decision%2027-01-09.pdf

24 HC Deb 10 December 2009 c33WS

> responsibility and detrimental to the effective operation of Cabinet Government. Consequently, this case warrants the exercise of the veto.

The Ministry of Justice indicated that it was minded to appeal the Decision Notice by the Information Commissioner and arrangements were made for the Information Tribunal to hear the case. However, Mr Straw subsequently decided to issue the veto.

The Information Commissioner subsequently issued a report to Parliament on this use of the veto, using his powers under s49 of the Act.[25] This referred to the conclusions drawn by the Commissioner on collective responsibility as follows:

> 4.7 Collective Cabinet responsibility is the constitutional convention that members of the Cabinet must publicly support all Government decisions made in Cabinet, even if they do not privately agree with them. The Cabinet Office sought to rely on the convention in arguing against disclosure of the minutes. Whilst the Commissioner accepted that the protection of the convention of collective Cabinet responsibility was in general terms a strong factor favouring the withholding of Cabinet minutes, he did not consider that disclosure of these particular minutes would in itself would be likely to undermine that convention.
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> 4.8 In reaching this conclusion the Commissioner took into account the fact that the policy issues discussed by the Cabinet sub-committee had already resulted in the enactment of legislation some time before.

2.3 Devolution Cabinet minutes 8 February 2012-

The Attorney General, Dominic Grieve issued a certificate on 8 February 2012 which vetoed the disclosure of the minutes of the meetings of the Cabinet Sub Committee on Devolution to Scotland and Wales and the English regions, dating from 1997 and 1998. The applicant made clear that the information sought was not the same as had been the subject of the previous veto in December 2009. The relevant Decision Notices from the Information Commissioner, made in September 2011, are available from the office website.[26] The Attorney General made a decision on the veto before the case was heard by the Information Tribunal, although there had been some preliminary arrangements for the case to be heard there. The Statement of Reasons is also available online.[27] He also published a written ministerial statement on the same day. His statement of reasons was as follows:

> I have considered this case in the light of the Government's published policy on use of the veto, taking particular account of the following factors which I believe to be relevant:
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> The information in this case records considerable discussions on the substance of the Government's policy on devolution. It is not merely concerned with the process of decisions being taken.
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> Devolution was a significant policy at the time, and indeed remains so...
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> A number of individuals have comments attributed to them in the minutes, including where they are not in agreement on certain policy issues. Although the Commissioner decided that content identifying individual ministers should be withheld, I do not

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25 Information Commissioner's report to Parliament HC 218 2009-10 www.official-documents.gov.uk/document/hc0910/hc02/0218/0218.pdf

26 http://www.ico.gov.uk/news/latest_news/2012/statement-ico-response-government-decision-veto-disclosure-devolution-08022012.aspx

27 http://www.scribd.com/doc/81051580/DSWR-Statement-of-Reasons-FINAL

> consider that such an approach significantly alters the public interest considerations in relation to the remainder of the information.
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> Of the large number of Ministers who took part in at least one of the DSWR meetings a significant majority remain active in public life: 12 are currently members of the House of Commons and a further 19 are members of the House of Lords;
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> Of those former Ministers engaged in the Committee the majority favoured withholding this information. I consider this a particularly relevant consideration given that the information constitutes papers of a previous administration with the consequence that I, as the accountable person, am the only current Minister able to view the documents..[28]

The Information Commissioner regretted the veto and subsequently issued a special report to Parliament.[29] In this report, the Commissioner considered that the case was appropriate to be heard by the Tribunal and that by failing to allow the matter to proceed, the Attorney General "could be seen as effectively usurping the role of the Tribunal".[30] The Commissioner did not consider that disclosure would undermine Cabinet collective responsibility.

2.4 NHS risk registers 8 May 2012

The Secretary of State for Health, Andrew Lansley, issued a certificate on 8 May 2012, which blocked the release of the NHS transitional risk register which was a statement of potential risks of NHS changes produced in November 2010. The shadow health spokesman, John Healey had made a FoI request for it. A separate request had also been made by another member of the public for the Strategic Risk Register. The certificate and reasons for its use was formally laid before Parliament on 9 May, the day of the Queen's Speech.

The Information Commissioner had recommended release of both in Decision Notices of 1(Strategic) and 2 (Transitional) November 2011. He required the information to be released within 35 calendar days of the date of the Decision Notice on 2 November'[31] This time limit is suspended if an appeal is made to the Information Tribunal.

The Department of Health appealed both Notices to the Information Tribunal, partly on the grounds that the exemption relating to the formulation of government policy (s35). There was an Opposition day debate on publication of the risk registers on 22 February 2012.[32] In addition the arguments for and against release were extensively debated during Lords committee stage of the *Health and Social Care Bill 2010-12*.[33]The first tier (Information) Tribunal rejected the appeal on 9 March 2012.[34] The second tier tribunal would only have heard an appeal on a point of law from the decision of the first tier tribunal. There was an emergency debate in the Commons under Standing Order 24 on 24 March 2012, where the Government defeated a motion to defer consideration of Lords Amendments to the *Health and Social Care Bill* until after disclosure of the NHS transitional risk register.

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28 http://www.parliament.uk/documents/commons-vote-office/1.Attorney-General-Freedom-of-Information.pdf

29 Information Commissioner's report to Parliament 2012 HC 1860 April 2012 http://www.ico.gov.uk/news/latest_news/2012/information-commissioner-presents-ministerial-veto-report-to-parliament-29022012.aspx

30 Ibid para 6.6

31 Decision Notice FS50390786, Information Commissioner's Office, 2 November 2011 [online] (accessed on 17 November 2011), p12 Decision Notice FS50392064 Information Commissioner's Office 1 November 2012

32 HC Deb 22 February 2012 c970

33 See Standard Note 6252 *Health and Social Care Bill: Summary of Lords Committee and Report stages* http://www.parliament.uk/briefing-papers/SN06252 for more background on the debates

34 "NHS risk register: Ministers lose freedom of information appeal" 9 March 2012 *BBC News*

The Information Tribunal published its decision in full on 5 April.[35] The Department of Health Permanent Secretary, Una O' Brien, and the Cabinet Secretary, Lord O' Donnell gave evidence in support of the Government position. The Tribunal recommended the release of the transitional risk register but not the strategic risk register:

> 89. This is a difficult case. The public interest factors for and against disclosure are particularly strong. The timing of the request is very important. We find the weight we give to the need for transparency and accountability in the circumstances of this case to be very weighty indeed. We find that at the time the TRR was requested and the DOH dealt with the application of the public interest test, the public interest in maintaining the s.35(1)(a) exemption did not outweigh the public interest in disclosure.
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> 90. In contrast we find that at the time the SRR was requested and the DOH dealt with the application of the public interest test, the public interest in maintaining the exemption did outweigh the public interest in disclosure.

The statement from Mr Lansley on 8 May 2012 indicated that a certificate was being issued which would prevent release of the Transitional Risk Register. Instead, the Department would release key information relating to risk:

> In light of the interest in this case, and in line with the Government's commitment to be more transparent by opening up Government information, the Department of Health has today published a document that sets out key information relating to the areas of risks in the original Risk Register.[36]

The shadow Secretary of State for Health, Andy Burnham, said that the refusal to release the risk register was "a: cover-up of epic proportions".

Initial reaction from commentators in favour of FoI was hostile. According to BBC News, the Campaign for Freedom of Information

> . We think the government should appeal against decisions that it dislikes, not veto them.
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> "The tribunal found that disclosing the register would have helped the public understand the risks and judge whether the government had properly addressed them.
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> "The government has turned that on its head. It has now published a detailed account of the action it has taken to address possible risks, but refused to say what those risks are - that means the public still can't judge."[37]

The Information Commissioner indicated that he would present a report to Parliament on the matter 'next week'.[38]

On 10 May Andrew Lansley made a statement to the House, on the use of the veto:

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35 Case No.s EA/2011/0286 & 287 5 April 2012 http://www.informationtribunal.gov.uk/DBFiles/Decision/i729/2012_04_05;%20DOH%20v%20IC%20%20Healey%20final%20decision.pdf

36 Transition Programme Risks: Review of November 2010 Risk Register Department of Health 8 May 2012 http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_133945

37 "Ministers block release of NHS risk register" 8 May 2012 *BBC News*

38 "ICO statement: NHS Risk Register ministerial veto" 8 May 2012

> I have carefully considered the tribunal's decision and discussed it thoroughly with Cabinet colleagues. Following these discussions, I have decided to exercise the ministerial veto, as allowed by the Freedom of Information Act, in relation to the disclosure of the transition risk register. This decision represents the view of the Cabinet. I have decided to veto rather than appeal the decision to the upper-tier tribunal, because the disagreement is on where the balance of the public interest lies and is a matter of principle and not a matter of law, as would be the focus of any further appeal. I recognise that this is an exceptional step; it is not one that is taken lightly. There is no doubt that reform of the NHS has attracted huge public interest, but my decision to veto, while an exceptional case, is also a matter of wider principle and not just about the specific content of the transition risk register.[39]

Mr Lansley referred to the evidence given by Jack Straw to the Justice Select Committee, which is currently undertaking a post-legislative review of the FoI legislation to the need for space in the decision-making process.[40]

In response, Andy Burnham said:

> Hitherto, the ministerial veto has been used on only three occasions, all related to Cabinet discussions; applying the veto to operational matters of domestic policy breaks that precedent. As such, it is a major step backwards towards secrecy and closed government.[41]

2.5 Hostilities against Iraq 2003

The Attorney General, Dominic Grieve, issued a veto on 31 July 2012 forbidding the disclosure ordered by the Information Commissioner on 4 July 2012 of extracts of Cabinet meeting minutes from 2003 at which military action against Iraq was discussed. The veto covered the same material which had been subject to the first veto issued by Jack Straw in 2009 and discussed above. The Attorney General is the only minister to have access to papers of the previous administration and so the decision on whether to exercise the veto fell to him. The certificate and the statement of reasons are online at the Cabinet Office website and were deposited in the House of Commons Library.[42] The statement argued that this was an exceptional case and that such was the importance of private space for the exercise of Cabinet collective responsibility, that this overrode the public interest in disclosure.[43]

The *Guardian* reported the comments of the Information Commissioner's office, but there was otherwise little media interest at the time."[44] The Commissioner subsequently issued a special report to Parliament in September 2012 which raised concerns that the veto was being used in other than exceptional circumstances in relation to Cabinet minutes:

> 7.3 On the four previous occasions on which the veto has been exercised, the Commissioner has made clear his view that it is vital that a ministerial certificate should only be issued under section 53 FOIA in truly exceptional circumstances.
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> 7.4 Yet if the veto continues to be exercised in response to the majority of orders for the disclosure of Cabinet or Cabinet committee minutes, it is hard to imagine how the most significant proceedings of the Cabinet will ever be made known before the elapse

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39 HC Deb 10 May 2012 c154
40 See uncorrected transcript of evidence 17 April 2012 to Justice Select Committee
41 Ibid
42 Dep 2012/1316
43 http://www.cabinetoffice.gov.uk/sites/default/files/resources/Statement_of_Reasons-31July2012_0.pdf
44 "Tony Blair's Iraq meetings to remain secret after government veto" 31 July 2012 *Guardian*

> of 30 years (to be reduced over time to 20 years under the Constitutional Reform and Governance Act 2010.).[45]

2.6 Correspondence from Prince Charles

The Attorney General issued a certificate on 16 October 2012 vetoing the disclosure of correspondence between HRH the Prince of Wales and ministers in seven government departments. The certificate and statement of reasons accompanied a written ministerial statement on that day. Mr Grieve stated:

> I have taken into account the views of Cabinet, former Ministers and the Information Commissioner, in considering both the balance of the public interest in disclosure and nondisclosure and whether this is an exceptional case. My view is that the public interest favours nondisclosure. I have also concluded that this constitutes an exceptional case and that the exercise of the veto is warranted.
>
> In summary, my decision is based on my view that the correspondence was undertaken as part of the Prince of Wales' preparation for becoming King. The Prince of Wales engaged in this correspondence with Ministers with the expectation that it would be confidential. Disclosure of the correspondence could damage the Prince of Wales' ability to perform his duties when he becomes King. It is a matter of the highest importance within our constitutional framework that the Monarch is a politically neutral figure able to engage in confidence with the Government of the day, whatever its political colour. In my view, there is nothing in the nature or content of this particular correspondence which outweighs that strong public interest against disclosure.
>
> A detailed explanation of the basis on which I arrived at the conclusion that the veto should be used is set out in my statement of reasons.[46]

The use of the veto was to prevent a decision of the Upper Tribunal from taking effect, which would have ordered release of correspondence between Prince Charles and Government departments.[47] The Upper Tribunal found that the correspondence should be disclosed on the basis that it would be 'in the overall public interest for there to be to be transparency as to how and when Prince Charles seeks to influence government'. It considered that 'advocacy correspondence' fell outside of the scope of the so-called education convention:

> 4. For reasons which we explain below, we conclude that under relevant legislative provisions Mr Evans will, in the circumstances of the present case, generally be entitled to disclosure of "advocacy correspondence" falling within his requests. The essential reason is that it will generally be in the overall public interest for there to be transparency as to how and when Prince Charles seeks to influence government. The Departments have urged that it is important that Prince Charles should not be inhibited in encouraging or warning government as to what to do. We have not found it necessary to make a value judgment as to the desirability of Prince Charles encouraging or warning government as to what to do, for even assuming this to have the value claimed by the Departments we do not think the adverse consequences of disclosure will be as great as the Departments fear. In broad terms our ruling is that although there are cogent arguments for non-disclosure, the public interest benefits of

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45 HC 547 2012-13 http://www.official-documents.gov.uk/document/hc1213/hc05/0547/0547.pdf

46 Certificate by Attorney General 16 October 2012 http://depositedpapers.parliament.uk/depositedpaper/view/2271083

47 *Evans v Information Commissioner* [2012] UKUT 313 (AAC). 18 September 2012 http://www.bailii.org/uk/cases/UKUT/AAC/2012/313.html

> disclosure of "advocacy correspondence" falling within Mr Evans's requests will generally outweigh the public interest benefits of non-disclosure.[48]

The decision to use the veto has been criticised by a number of legal commentators. Roger Masterman from Leeds University commented as follows:

> The public interest in non-disclosure seems to have been interpreted by the Attorney-General as a public interest in maintaining the appearance of the political neutrality of the Prince of Wales. Perhaps maintenance of this appearance might have been of some value, had the Prince of Wales' cause advocacy not been so widely commented upon, and had the Prince not been recorded as seeing his constitutional role as 'seeking to make a difference' of some undefined sort It is not the willingness of the Attorney-General to seek to uphold the confidentiality of personal correspondence merely relating to the Prince's 'deeply held personal views and beliefs' that is problematic here. Rather, it is the fact that it is seemingly conceded on all fronts that those 'deeply held personal beliefs ' were deployed in an attempt, or attempts, to influence governmental decision-making. As a result of this ministerial veto, we will perhaps never know whether or not those interventions have had, or will have, any material effects in practice.[49]

The *Constitutional Reform and Governance Act 2010,* passed just before the 2010 general election has created a new absolute exemption for correspondence with the Crown and other members of the royal family, so this type of request will not be considered under FoI in future,[50] gives further background.

2.7 Court of Appeal judgment March 2014

Rob Evans from the *Guardian* sought judicial review of the decision to issue a veto. His application was initially dismissed by the Divisional Court in June 2013[51], but Lord Judge had commented that the ministerial certificate power was 'troubling':

> 10 We all understand that in our constitutional arrangements Parliament is sovereign. Decisions, even of the Supreme Court, may be set aside through the ordinary legislative processes. Thus, in the context of witness anonymity in the criminal courts, the Criminal Evidence (Witness Anonymity) Act 2008 in effect set aside the decision of the House of Lords to the contrary effect in *R v Davis* [2008] 1 AC 1128. That, however, is not what s.53 provides. It simply vests power in a cabinet minister to override the decision of a court without further recourse to the legislature. It is not quite a pernicious "Henry VIII clause", which enables a minister to override statute but, unconstrained, it would have the same damaging effect on the rule of law.
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> 11The provisions of s.53 must therefore be examined with these troublesome concerns in mind. Parliament created a right in members of the public to be granted a great deal of but not all the information held by public authorities. It provided, further, that the decisions of the public authorities adverse to disclosure should be subjected to a number of different methods of independent, and ultimately judicial, examination. Thereafter, on the basis that the final responsibility for deciding the public interest should remain with ministers, they were vested with the power to override the judicial decision. If that were the full extent of this legislative structure, then, while recognising that the relevant minister may have a particular insight into and a major contribution to

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48 Ibid

49 Roger Masterman: The Prince, the Attorney-General, the Section 53 Certificate and the pretence of political neutrality UK Constitutional Law Group blog 23 October 2012

50 Schedule 7, para 1 http://www.legislation.gov.uk/ukpga/2010/25/schedule/7

51 http://www.bailii.org/ew/cases/EWHC/Admin/2013/1960.html

> make to the protection of the public interest, I should entertain the very gravest reservations whether this provision could fall within the constitutionality principle. Unconstrained by the internal legislative structure, rather than by reference to the much vaguer good sense of or wise discretion of any individual minister, we should be addressing a remarkable provision which empowered the minister to set aside the decision of a court after litigation in which the department for which he is responsible was the unsuccessful party

On appeal, the Court of Appeal issued a judgment on 12 March 2014 *(R (Evans) v HM Attorney General)* which quashed the veto in respect of FoI law and concluded that the veto could not be used in respect of information covered by the *Environmental Information Regulations* (EIR). [52]The Master of the Rolls, Lord Dyson, concluded that the Attorney General Grieve did not have reasonable grounds for issuing the veto after the decision of the Upper Tribunal (UT):

> 40 The UT decided that the balance of the section 2(2)(b) FOIA public interests lay in favour of disclosure of the documents. It reached its decision after a six day hearing during which it heard evidence (including expert evidence) and argument at which Mr Evans, the Commissioner and the relevant Departments were all represented by leading counsel. The tribunal considered all the material and even went into closed session during part of the hearing. Its decision was not appealed by the Departments. Mr Swift has not suggested that it contained any errors of fact or law or that its conclusion was not a reasonable conclusion. The arguments originally put forward by the Government Departments before the UT had depended on assertions of fact which were disputed and on which findings were made by the UT which were adverse to the Departments. These findings were not challenged by the Attorney General in his decision. The Attorney General simply disagreed with the evaluation made by the UT. For the reasons that I have already given, this was insufficient to amount to "reasonable grounds".

The Master of the Rolls also concluded that the certificate was also unlawful because it was incompatible with EU law. The Government is planning an appeal to the Supreme Court. BBC News reported:

> Responding to the verdict, a spokesman for Mr Grieve said: "We are very disappointed by the decision of the court.
>
> "We will be pursuing an appeal to the Supreme Court in order to protect the important principles which are at stake in this case."[53]

The Campaign for Freedom of Information commented as follows on the judgment:

> The Campaign's director Maurice Frankel said "the FOI Act has an elaborate appeal process, which the government could have used to challenge a decision it believed was wrong. Instead it has attempted to squash the decision, bypassing the need to argue its case, by use of a veto. The court's ruling will make it much harder for government to override a well argued tribunal case in future. Disagreeing with the decision will not be enough, it will have to show why the decision is flawed or that circumstances have changed since it was reached. That is a major improvement to the public's right to know."

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52 The *Environmental Information Regulations 2004* (EIR) are the UK government's implementation of a European Union Directive

53 "Attorney General's block on Prince Charles' letters ruled unlawful" 12 March 2014 *BBC News*

> The Court of Appeal has also ruled that the veto cannot apply to environmental information at all. "This fundamentally strengthens the public's rights to know what public authorities are doing about environmental issues", Mr Frankel said. [54]

The judgment has sparked comment, for example the *Public Law for Everyone*. *Reasonableness review and the Court of Appeal's decision on the Prince Charles correspondence case* and FoI Man The Defeat of the Mysterious Veto?

2.8 HS2

The Transport Secretary Patrick McLoughlin, used the ministerial certificate procedure to veto the publication of a November 2011 review of HS2 by the Major Projects Authority on 30 January 2014. A Written Ministerial Statement was made that day.[55]This followed an Information Commissioner decision notice of June 2103 which found for disclosure and which found that the FoI request should have been made under the EIR.[56] This Decision Notice was not appealed. The statement of reasons[57] considered that the exceptional circumstances justified the use of the veto.

The Information Commissioner was quoted as saying that the decision was 'disappointing' and that "There's important legal issues to be considered here, and I'll be highlighting our view of them in an open letter to the Justice Committee in due course."[58]

The blog *FoI Man* has drawn attention to the implications of the Court of Appeal judgment in relation to EIR and HS2:

> The implications of that are several. First, many of Prince Charles' letters apparently related to environmental issues, so if the Supreme Court quashes the Court of Appeal's ruling on the FOI veto but upholds the ruling on EIR, then there may still be a significant disclosure of correspondence in this case. Second, there will be implications for another veto decision. Only at the end of January, the Transport Secretary vetoed the disclosure of a report on HS2. The report was viewed to constitute environmental information, so it is likely that if the Supreme Court upholds the Court of Appeal's position on the veto and EIR, then that decision will be viewed as unlawful as well..[59]

3 The use of the veto in other FoI jurisdictions

Many states with FoI regimes also have a ministerial veto. These include:

- Ireland. The Minister of Justice has power to issue certificates to prevent the release of sensitive information such as law enforcement, confidential informants, security, defence, international relations or matters relating to Northern Ireland. Certificates must be reviewed by the Taoiseach within 6-12 months. According to the Constitution Unit, 2 have been served in 2000.[60]

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54 "Court of Appeal ruling strengthens FoI Act 12 March 2014 CFOI

55 HC Deb 30 January 2014 c50WS

56 EIR Decision Notice 6 June 2013 FER0467548 Information Commissioner

57 *In respect of a Decision Notice from the Information Commissioner 6 June 2013 Statement of Reasons* FER0467548 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/276159/mpa-statement-of-reasons.pdf DEP 2014/0125

58 "Transport Secretary blocks HS2 report" 30 January 2014 *Guardian*

59 FoiMan The defeat of the mysterious veto March 2014

60 "Ministers entitled to veto Information Tribunal decision ordering release of Cabinet documents" 24 February 2009

- Australia. Under the Australian Freedom of Information Act, a form of ministerial certificate could be used to prevent certain decisions being questioned by the Administrative Appeals Tribunal (AAT), which deals with appeals. According to the Constitution Unit, there were 14 served by the Howard government between 1996 and 2007.

- The then Prime Minister of Australian, Kevin Rudd, introduced legislation in 2009 to remove the ministerial veto from Australia's Freedom of Information Act. This had been a Labour manifesto commitment at the 2007 Australian election.[61]

- The Freedom of Information (Removal of Conclusive Certificates and other Measures) Act 2009 achieved royal assent in October 2009. It abolished the veto, making some minor changes to ensure that particular weight was given to submission by an agency, Minister or the National Archives that it should make such orders where the proceedings relate to a document or record that is claimed to be exempt under a national security, defence or international relations exemption, or confidential foreign government communication exemption

- New Zealand. The Governor General can issue a "Cabinet veto" directing an agency not to comply with an Ombudsman decision requiring release of information. Since 1987, the veto has to be the subject of a collective Cabinet decision. The veto can be reviewed by the High Court. The power has not been used since 1987, one factor being that a review by the courts is at the financial expense of the Government.[62]

In addition, the *Freedom of Information (Scotland) Act 2002* contains similar veto powers in section 52. There is a requirement to consult the members of the Executive:

> 52(2) A decision notice or enforcement notice to which this section applies ceases to have effect, in so far as it relates to the perceived failure, if, not later than the thirtieth working day following the effective date, the First Minister of the Scottish Executive, after consulting the other members of that Executive, signs and gives the
>
> Commissioner a certificate stating that the First Minister has on reasonable grounds formed, after such consultation, the opinion both that—
>
> (a) there was no such failure; and
>
> (b) the information requested is of exceptional sensitivity

The Scottish Government has recently consulted on changes to the 2002 and there are plans for legislation to be introduced this year. However, the draft bill published in 2011 did not contain plans to remove the veto.[63]

Privacy International's survey of FoI laws in other countries contains further details.[64]

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61 "Iraq veto decision "extremely retrograde" 24 February 2009 CFOI http://www.cfoi.org.uk/foi240209pr.html

62 *Official Information Act 1982* Section 32B (4)

63 Consultation on Proposals for a Freedom of Information (Amendment) (Scotland) Bill December 2011 Scottish Executive

64 *Freedom of Information around the world 2006 report* Privacy International . http://www.freedominfo.org/documents/global_survey2006.pdf