Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0090
Information Commissioner's Ref: FS50097810

Heard at Field House, London, EC4
On 6th, 7th and 16th May 2008

Decision Promulgated
29th July 2008

BEFORE

CHAIRMAN

CHRIS RYAN

and

LAY MEMBERS

PAUL TAYLOR
ANDREW WHETNALL

Between

THE DEPARTMENT FOR CULTURE MEDIA & SPORT

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Jonathan Swift and Catrin Evans
For the Respondent: Ben Hooper

Decision

The Tribunal allows the appeal and quashes the direction for disclosure contained in the Decision Notice dated 30 July 2007

Reasons for Decision

Introduction

1. On 25 June 1998 the then Secretary of State for Culture, Media and Sport, the Rt. Hon Chris Smith MP, announced the Government's decision on the list of sporting events, considered to be of major importance for society, which should be protected under the Broadcasting Act 1996 from having television rights sold for exclusive viewing by subscription or pay-per-view arrangements. Prior to its election in 1997 the Government had made a manifesto promise to review the existing list of such reserved events and the 1998 decision followed the publication of a consultation paper in July 1997 as to the criteria to be applied in selecting an event for listing and a report in March 1998 from an Advisory Group applying the criteria to specific events considered for listing.

2. Between the date of the report of the Advisory Group and the announcement of the Government's decision on the listing the Secretary of State received a number of submissions from officials within his Department. These covered the issues arising, the options available, the arguments for and against listing particular events in one of the two possible listing categories as well as the process by which his thinking on the subject should be exposed for discussion with his Cabinet colleagues and his final decision promulgated. He also received correspondence from other government Ministers with their thoughts on particular aspects of the proposed listing. These communications from civil servants and Ministers constitute the disputed information, the possible disclosure of which forms the subject matter of this Appeal. There is in fact a degree of overlap between the two categories because some of the civil servant submissions report on, or summarise communications from, Ministers and/or deal with how the Secretary of State might respond to them.

The request for information and the complaint to the Information Commissioner.

3. In January 2005 Mr Bill Batchelor, a partner in the international law firm Baker & McKenzie, requested certain information from the DCMS regarding the decision on listing, relying on the obligation to disclose imposed on all public authorities by section 1 of the Freedom of Information Act 2000 ("FOIA"). In the course of correspondence over subsequent weeks the requests were refined and expanded and a considerable amount of background material was released. However, release of the disputed information was refused on the grounds that the exemption in section 35(1)(a) and (b) of FOIA applied and the public interest in maintaining those exemptions outweighed the public interest in disclosure so that section 2(2)(b) took effect and the information was not required to be disclosed. On 1 December 2005 Mr Batchelor lodged with the Information Commissioner a complaint about that refusal.

4. It has been suggested in the evidence and submissions we have heard that the original request was made on behalf of a particular media organisation which is pursuing legal remedies because it believes that its broadcasting business was detrimentally affected by the listing decision. Neither Mr Batchelor nor the organisation in question took part in the Appeal and we did not hear any information from either of them on this issue. We regard the suggestion as of peripheral interest, in any event, because the identity and/or motives of the person making the original request should not concern us: the test we have to apply is, not whether the DCMS should have disclosed the disputed information to Mr Batchelor or his client, but whether disclosure should have been made to the public at large at the date when it refused the original request.

5. On 30 July 2007 the Information Commissioner issued a Decision Notice in which he concluded that all of the disputed information fell within the qualified exemption to the obligation to disclose set out in FOIA section 35(1)(a) (information relating to the formulation or development of government policy) and that the communications from Ministers also fell within that provided by

section 35(1)(b) (Ministerial communications). However he decided that the public interest in maintaining each of those exemptions did not outweigh the public interest in disclosure. In the course of reaching that decision the Information Commissioner concluded that certain names which appeared on documents comprised in the disputed information should not be redacted. However, because of the decision we have reached, to the effect that none of the disputed information should be disclosed, that issue falls away. So too does an issue which arose for the first time in the course of this Appeal as to whether certain passages should be redacted before disclosure on the grounds that they contained information that was either the confidential information of a third party or should be protected by legal professional privilege.

6. The Information Commissioner considered that the public interest test under section 35(1)(a) was similar to that under section 35(1)(b). His decision on the public interest balance in both respects acknowledged that the main argument in favour of maintaining the exemption was to allow "private thinking space" in order to facilitate frank and robust advice from civil servants to the relevant Minister and a frank exchange of views between them. It was also accepted that retaining confidentiality would also reduce the temptation to keep inaccurate or incomplete records. The Decision Notice set against those factors the fact that disclosure would:

    a. encourage good practice and increase public confidence that decisions had been taken properly and on the basis of the best available information;

    b. promote accountability to the public and facilitate public understanding of how government formulates policy;

    c. encourage public debate and participation in the development and formulation of government policy;

    d. broaden policy input.

The Information Commissioner also took into account that the request for information was made nearly seven years after the date of the disputed information and indicated that in his view the policy-making process which the exemption was intended to protect had ended with the June 1998 announcement, so that the disputed information was "historical" by the time that the information request was made.

<u>The appeal to the Tribunal</u>

7. On 24 August 2007 the DCMS gave Notice of Appeal to this Tribunal. The Grounds of Appeal did not challenge the Information Commissioner's conclusion that the exemptions under sections 35(1)(a) and (b) were engaged. However, they did include some criticism of his reasoning regarding the moment in time when it might be said that the development and implementation of policy came to an end. We understand that this was because it was said to be relevant to the potential impact the passage of time might have in diminishing the value of maintaining confidentiality, an issue which we deal with in more detail later in this decision.

8. At an early stage in the proceedings an application by Mr Batchelor to be joined as a party to the Appeal was rejected on the grounds that insufficient information or argument had been provided to support a conclusion that it was desirable, within the meaning of rule 7(2) of the Information Tribunal (Enforcement Appeals) Rules 2005, for an order of joinder to be made. Following agreed directions the Appeal was heard on 6 and 7 May 2008, with a further half day to complete submissions on 16 May 2008. Three witness statements had been served by DCMS in respect of the evidence of:

   a. Mr Jon Zeff, who described the records management system operated by DCMS and set out the process by which the original request had been dealt with and a body of information disclosed in response to it;

   b. Mr A C B Ramsay, Director General, Partnerships and Programmes at DCMS who related the background to the listing of sports events, the process by which the 1998 decision was made, the identity and content of the documents comprising the disputed information and some of the

public interest factors which he considered were in favour of maintaining the relevant exemptions;

c. Mr A C S Allan, the Chairman of the Joint Intelligence Committee in the Cabinet Office, who explained the constitutional convention of collective Ministerial responsibility in the context of the process of Cabinet government operated within the UK and set out a number of factors which he considered demonstrated the detriment to the public interest that can arise from the disclosure of information concerning the formulation of government policy at Cabinet level.

Mr Ramsay and Mr Allan were cross examined and answered a number of questions put to them by the Tribunal panel. Parts of their evidence were treated as confidential, as were parts of the bundle of documents which the parties assembled (including the disputed information itself), and the hearing went into closed session during certain stages of the cross examination and closing submissions in order to maintain confidentiality pending the outcome of this Appeal.

9. As the engagement of the relevant exemptions has been accepted and the other issues mentioned in paragraph 5 above have fallen away, the only issue which we have had to consider is whether the public interest in maintaining the two exemptions relied on outweighed the public interest in disclosing the disputed information at the date when the request for information was refused by DCMS.

10. The Tribunal's jurisdiction on appeal is governed by FOIA section 58. As it applies to this matter it entitles us to allow the Appeal if we consider that the Decision Notice is not in accordance with the law or, to the extent that it involved an exercise of discretion, the Information Commissioner ought to have exercised his discretion differently. We are entitled, in the process, to review any finding of fact on which the Decision Notice was based.

The relevant statutory provisions

11. FOIA section 1(1)(b) provides, in effect, that any person making a request for information to a public authority is entitled to have communicated to him or her the information which it holds.

12. Section 2(2) provides that if the information falls within one of a number of qualified exemptions set out later in the statute then the public authority's obligation to disclose under section 1 shall not apply:

> *"…if or to the extent that –*
>
> > *(a)…, or*
> >
> > *(b) in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information."*

13. The material parts of FOIA section 35 are as follows:

> *"(1) Information held by a government department…is exempt information if it relates to—*
>
> *(a) the formulation or development of government policy,*
>
> *(b) Ministerial communications,*
>
> *(c) …*
>
> *(d) ….*
>
> *(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.*
>
> *...*
>
> *(4) In making any determination required by section [2(2)(b)] in relation to information which is exempt information by virtue of subsection (1)(a),*

regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.

(5) In this section—

…

'Ministerial communications' means any communications—

(a) between Ministers of the Crown,

…

and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet…;

…"

The Public Interest Balance - Preliminary

14. We start with our conclusion, which is that, in the particular circumstances of this Appeal, the information in dispute should not be disclosed. That decision is unanimous. However members of the panel reached it by different routes. One viewpoint placed considerable weight on factors in favour of maintaining the exemption while the other emphasised the weakness of the factors in favour of disclosure. But both routes led to the same conclusion, namely, that the public interest in maintaining the exemption outweighed the public interest in disclosure at the date when the DCMS refused the original request.

15. As indicated above the Information Commissioner's Decision Notice proceeded on the basis that the exemption in section 35(1)(a) was closely similar to that in section 35(1)(b). He therefore proceeded on the basis that the factors to be taken into account, on both sides of the balance, were largely the same and that case law on section 35(1)(a) applied with equal weight to section 35(1)(b). His counsel, Mr Hooper, supported that decision by drawing attention to similarities in the language of the two subsections and to the structure of section 35 as evidence that Parliament intended them to be closely related. He also suggested that there was scope for overlap between the types of material to which they might be applied. DCMS challenged the Information Commissioner's conclusion and argued that different issues arose, creating greater weight in favour of maintaining confidentiality of

Ministerial communications, because of the convention of collective Cabinet responsibility, which requires all members of the Cabinet to either support a decision, (even if they had argued against it before the decision was made), or resign. Premature disclosure of communications between Ministers debating the issue would, it said, place Ministers in a very difficult position when defending the decision in public or if their department was required to become involved in its implementation. This in turn might deter full debate between Cabinet colleagues and undermine the quality of decision making. The Information Commissioner accepted that the convention might enable Ministers to exchange views, opinions and arguments in a free and frank manner but did not accept that this created any real difference between the approaches that should be adopted to the two exemptions.

16. This was again an area where members of the panel were not in total agreement, with one agreeing with the DCMS that subsection (1)(b) did create a greater hurdle for those seeking information to overcome and others less convinced. However, we were all agreed that it did not constitute a lower hurdle than subsection 1(a) and that, on the basis of the facts before us, it was high enough to justify reversing the Information Commissioner's decision that disclosure should be ordered in respect of information falling within the scope of subsection 1(b) as well as that within 1(a).

17. We will now explain our reasons in more detail.

The Public Interest Balance – General Points

18. The Grounds of Appeal asserted that the fact that information fell within section 35(1) created an inherent public interest in the information being withheld from disclosure, which was a factor that should weigh heavily in the public interest balancing exercise. Mr Hooper, counsel for the Information Commissioner, argued that this suggested that DCMS was arguing that the type or status of the information in question itself created a weighty public interest against disclosure. He said that this was not correct because it went against the principle that the balancing exercise should begin "with both pans empty". However, Mr Swift, counsel for DCMS made it clear in his closing

submissions that he did not assert that there was a good reason for maintaining the exemption just because the information fell within the wide boundaries of section 35. He did, however, argue that the harm which disclosure would cause to the well established process of decision making within government was sufficiently important that it required the Information Commissioner to demonstrate specific advantage in the disclosure of the actual information in question, in the circumstances that existed at the time when the request was refused. He criticised the Decision Notice for failing to identify particular benefits that were said to follow from disclosure of the specific information under consideration. He said that the factors in favour of maintaining the exemption, by contrast, were necessarily general. In particular he criticised part of the Decision Notice in which it was said that "there must be some clear, specific and credible evidence that the formulation or development of policy would be materially altered for the worse by disclosure…"

19. Counsel for the Information Commissioner countered that in reality it was the factors in favour of maintaining the exemption that required the support of evidence of specific harm and that those supporting disclosure could be more generally based. He drew attention to the following statement in the decision of a differently constituted Tribunal in *Guardian Newspapers v The Information Commissioner* (EA/2006/0011):

> *"While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process".*

20. While concerns about the potential effect of disclosure of information regarding the process by which Government reaches decisions are likely to be of a general character, we do not believe that arguments based on

whether a particular factor is general or specific are particularly helpful. Our task is to apply appropriate weight to all the factors that apply in the particular case that is presented to us and then, having aggregated them on each side of the scales, assess where the balance lies. We should avoid any danger of pre-judgment by either applying greater or less weight to a particular factor just because of its category or type. We believe that this approach is consistent with the guidance provided by Mr Justice Mitting in the case of *Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin). In that case he criticised a differently constituted Information Tribunal for characterising arguments based on the possible detrimental impact of disclosure on the general conduct of good government as being "ulterior considerations" and for appearing to "set up a hurdle or threshold of proof of actual particular harm" before such arguments could be taken into the balancing exercise. We have adopted the approach recommended by Mitting J when considering the factors that have effect on both sides of the public interest test.

21. We also bear in mind that where considerations favouring disclosure are equally balanced with those favouring non disclosure FOIA section 2(2)(b) requires us to order disclosure. This is because the sub section provides that a relevant qualified exemption will only be applied to the information in question if the public interest in maintaining the exemption "outweighs" the public interest in disclosure. There have been a number of earlier cases in which the Tribunal tried to characterise in shorthand the language of section 2(2)(b). In *Secretary of State for Work and Pensions v The Information Commissioner* Appeal no. EA/2006/0040 a differently constituted Tribunal suggested that

> *"…there is an assumption built into FOIA that the disclosure of information by public authorities on request is in itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities. What this means is that there is always likely to be some public interest in favour of the disclosure of information under the Act. The strength of that interest, and the strength of the*

> *competing interest in maintaining any relevant exemption, must be assessed on a case by case basis:…"*

That section of the decision was expressly approved by Mr Justice Stanley Burnton in *OGC v Information Commissioner & Anor.* [2008] EWHC 737 (Admin) in which he also spelt out in clear terms the procedure that a public authority (and therefore this Tribunal also) should follow in order to comply with the section. He said:

> *"Once it has been decided that information is subject to section 35, if the information is not already in the public domain the authority will have to weigh up the public interest in disclosure against the public interest in maintaining the exemption. If it is unable to identify a significant public interest in maintaining the exemption, application of the public interest test under section 2(2)(b) will lead to disclosure. If it is able to identify that public interest, and it is substantial, it will consider the public interest in disclosure and decide whether the former outweighs the latter."*

22. We see our task therefore, as following that procedure, without attributing to any factor either more weight or less simply because of its category or type. We must then order disclosure if either the balance is in favour of disclosure or the scales are in equilibrium.

Factors in favour of disclosure

23. We have set out in paragraph 6 above the factors in favour of disclosure which the Information Commissioner took into account when applying the public interest test. Mr Swift, on behalf of the DCMS suggested that we should be cautious in applying undue weight to them. He urged us to consider how each element of the public interest benefit would be served by the disclosure of the specific information with which this case is concerned in the particular circumstances that applied at the relevant time. He also argued that we should consider whether any perceived advantage in disclosure came at a cost and, if it did, we should take that into account when giving appropriate weight to the factor in favour of disclosure.

24. Mr Swift also argued that a great deal of information had already been put into the public domain. There had, he said, been a thorough consultative process, followed by parliamentary debate and considerable media coverage, some of it apparently assisted by the DCMS's own media briefing. Mr Hooper, for the Information Commissioner suggested that, as the final decision by the Secretary of State had been announced in the form of a short written answer to a question from a Member of Parliament from his own party, the disclosure had not been that extensive.

25. In the following paragraphs we will deal in turn with each of the factors on which the Information Commissioner relied.

26. Encouraging good practice. The Information Commissioner argued that the knowledge that disclosure was a possibility under FOIA might improve the quality of contributions made to policy debates and thus improve the debates themselves. In this he relied on the statements made in *Secretary of State for Work and Pensions* quoted in paragraph 21 above. He did not suggest that there was any evidence in the disputed information suggesting that good practice had not been followed (and we certainly saw no evidence of that from our reading of it). The DCMS suggested that, in the absence of specific matters requiring disclosure, reliance on transparency at such a high level of generality led to the conclusion that this category of information would always have to be disclosed; that there was in effect an absolute obligation of disclosure. We think that this is a fair criticism and that, in the particular circumstances of this case, the issue of transparency concerning deliberative process, as opposed to the underlying factual background which has been disclosed, does not carry conclusive weight.

27. Promoting accountability and public understanding. The Information Commissioner argued that the listing decision was quite subjective and had not been explained in any detail in the short Parliamentary answer by which it was announced. However, neither his arguments nor our reading of the disputed information has convinced us that it contained anything which would

have materially increased the available information, bearing in mind the amount that was put into the public domain at the time and the additional information that has been released under the original request in this case. Accordingly we do not believe that, on the particular facts of this case, the issue of accountability would be served to any significant extent by disclosure of the disputed information.

28. Encouraging public debate. The Information Commissioner again set his argument at a high level of generality and was criticised by the DCMS for (in its view) failing to establish any link between the desirability of public participation in general and the substance of the disputed information in the circumstances surrounding the decision to which it relates. It may certainly be said that the disclosure of any information may facilitate, to some degree, public debate. But for the point to bear any material weight it must draw some relevance from the facts of the case under consideration. Otherwise it may operate as a justification for disclosure of all information in all circumstances, which would be inconsistent with the classification of section 35 as a qualified exemption in the FOIA. Having inspected the disputed information we do not believe that it would serve to inform public debate on the issue of listing to any material extent.

29. Broadening policy input. This was not pressed by the Information Commissioner's counsel at the hearing of the Appeal. We do not think that it would, in any event, add anything material to the other points on which he relied in the Decision Notice and we saw nothing in the disputed information relevant to this issue that led us to doubt our conclusion that the arguments in favour of disclosure were weak.

30. The age of the information. The information was already nearly seven years old when the original request for disclosure was made. The passage of time generally has greater impact in potentially diminishing the public interest in maintaining confidentiality than it does in increasing public interest in disclosure (and is accordingly dealt with in paragraph 39 below). However it does have some relevance, insofar as the issue of listing sports events does

return as an item of some public debate at irregular intervals, although the technical and commercial background is likely to be so different that information about the decision making process on a previous occasion is unlikely to inform public debate to any material extent on a later one. Our inspection of the disputed information convinces us that it would not do so in the present case.

Factors in favour of maintaining the section 35(1)(a) exemption.

31. As we have mentioned previously the DCMS argued before us that this exemption gives rise to different issues than those arising under section 35(1)(b). However, it also argued that a distinction existed as between, on the one hand, communications between civil servants and, on the other, communications between a civil servant and a Minister. We think that it would be unhelpful to apply such a rigid sub-division in this case. We have proceeded on the basis that we should consider each communication in its overall context, which will include the identity of both the author and intended recipient, as well as other factors such as the general subject matter, detailed content and surrounding circumstances.

32. The reason for suggesting the distinction appeared to be to enable the DCMS to distinguish this case from the facts of *Department for Education and Skills v ICO* (EA/2006/0006). In the course of deciding in that case that the minutes of a senior departmental committee should be disclosed a different panel of this Tribunal set out its views on the weight that it should apply to the perceived impact of disclosure on the relationship between civil servants and Ministers. It set out a total of eleven "principles" which it considered should guide its decision. The first of those was expressed in the following terms:

> *" 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."*

That passage was specifically approved by Mitting J in the *Export Credits Guarantee* decision referred to above. We also have in mind that in the *OGC* case referred to in paragraph 21 above Burnton J, having made it clear that the general impact of disclosure on government processes was not to be treated as “ulterior”, added:

> *“There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case.”*

33. In the present case we received evidence from both Mr Ramsay and Mr Allan about the detrimental effect which they feared would arise if the confidentiality identified by Mitting J were to be eroded. Mr Swift argued that the need to maintain trust and confidence between Ministers and civil servants enabled the latter to do the job that the public expects of them and that the issue therefore went to the heart of maintaining good government. He stressed that the purpose was to protect the process of providing effective advice and assistance and not to protect the individuals involved. This requirement applied even when, as in this case, the disputed information is found on inspection to be anodyne. Mr Allan expressed the view that the harm to the public interest would result, not from any single disclosure, but from the erosion of confidence that would be the consequence of a failure to recognise the importance of the benefits that accrue from the confidential relationship that exists.

34. Mr Hooper, for the Information Commissioner, relied heavily on the section of the *DfES* decision immediately following the paragraph quoted in paragraph 32 above, in which the Tribunal commented on some of the evidence and arguments relied on in that case for maintaining the exemption. The points mentioned that have potential application to the facts of this case were as follows:

a. The strength of any arguments in favour of maintaining confidentiality over advice provided during the decision-making process diminishes once a decision has been made. The Tribunal rejected any suggestion that disclosure should be prevented indefinitely and said that it was a question of fact as to whether disclosure in a particular case should be regarded as premature.
b. The fact that other information on the same topic had already been disclosed was not a significant factor in favour of disclosure.
c. The public is entitled to expect civil servants to continue providing independent and robust advice to Ministers even if there is an enhanced risk of it being disclosed to the public at some stage.
d. The public is also entitled to expect that politicians entering government would treat fairly civil servants who may have had advice published which supported a policy of a previous administration with which the incoming government did not agree.
e. The risk of ill-informed public criticism of civil servants is likely to be reduced, not increased, by an appropriate level of disclosure.

35. The DCMS warned us to be careful that we did not treat the points we have summarised as a template or checklist for determining this Appeal. The Information Commissioner, on the other hand, stressed the similarities between the two cases and argued that the Decision Notice properly applied the *DfES* decision. He relied, in particular, on a concession in cross examination that there had not been any discernible deterioration in the standard of conduct of civil servants since the decision was published and argued that there had been no reason to maintain the exemption once a short passage of time had passed after the announcement of the government's decision on listing. In closing submissions he suggested that the appropriate delay should be measured in weeks or maybe a few months at most.

36. We believe that the difference between the two sides on this issue is less than might appear from the vigour and detail with which the Appeal was argued. Both sides accepted that the balancing exercise must be performed in the light of the particular facts of each case. Mr Swift acknowledged, as he

had to when dealing with a qualified exemption, that disclosure would be appropriate if it would serve a public interest of sufficient importance. He also accepted that, even before the FOIA was introduced, there had been occasions when advice to Ministers had been made public (although he stressed that this would not be a matter of routine or for the purpose of achieving short-term political advantage). Mr Allan made it clear in both his witness statement and in the course of cross examination that he recognised that circumstances might arise in which disclosure might be appropriate. He put it in these terms in the final paragraph of his witness statement:

> *"…it is my view that there ought to be strong reasons in the public interest in the disclosure of the information requested in order to equal or outweigh the public interest in maintaining [the] exemption"*

On the other side of the debate the Information Commissioner acknowledged, in both the Decision Notice and the arguments presented to us by his counsel, that Ministers and those advising them needed "private thinking space" in which full and frank debate might take place, as well as an environment which did not discourage proper record taking. He did not suggest that those factors should be ignored because of the principles set out in *DfES* and indeed the need for thinking space was recognised in paragraph 75(iv) of the Tribunal's decision in that case.

37. The basis of our decision on this aspect of the case is that the comments in *DfES* do not bind us but may assist us in applying appropriate weight to relevant factors, acknowledging that they are subject to the general requirement to decide each case on its own facts and that this Appeal differs in both context and type of document at issue.

38. We approach with some caution the reference in Mr Allan's evidence to the need for "strong reasons" in favour of disclosure. The test is set out in section 2(2)(b). Its effect is that they must be strong enough to at least equal those in favour of maintaining confidentiality, but no more. Where the factors in favour of maintaining confidentiality are themselves strong then the contrary

factors must be equally strong. Where the case for not disclosing is relatively weak then an equally weak case in favour of disclosure may be sufficient to have the material published. As already stated members of the panel reached different conclusions as to the strength of the case in favour of maintaining the exemption but were agreed that it was in all events strong enough to outweigh the factors in favour of disclosure.

39. We approach with equal caution a suggestion by Mr Hooper that there may be a defined period after which advice leading to a decision should be disclosed. Section 35(2) already provides a fixed point in the process of developing and implementing policy at which statistical information drops out of the exemption. But it creates no equivalent rule in respect of any other category of information falling within the exemption. In the present case the disputed information was undeniably old at the time when the request for information was made. Against that it is said that the process of identifying sporting events that merit listing is a continuing one with periodic reconsideration being required as a result of commercial and technological developments, as well as changing popular habits in watching sport and supporting particular events. We do not think it appropriate to suggest any form of time-related guideline that might operate as a restriction on the broad range of matters that should be taken into account when carrying out the public interest balancing exercise. It is sufficient, for the purposes of this decision, to record that we took account of the age of the information as one of the relevant issues when assessing the public interest balance.

40. Some emphasis was placed in cross examination on the role of professional integrity and the standards required in the Civil Service code as a bulwark against possible degradation of relationships between Ministers and civil servants caused by the increased possibility of their communications being disclosed under FOIA, including the integrity of advice and record keeping. We agree that integrity and good standards have a part to play and that they must be viewed in the context of the legal framework in place from time to time. Although we found ourselves again reaching different conclusions as to the precise extent to which this might undermine the case in favour of

maintaining the exemption, we were unanimous in reaching our overall conclusion.

Conclusion on the public interest balance in respect of section 35(1)(a)

41. We are agreed that deliberative material falling within the scope of section 35(1)(a) ought not to be disclosed without adequate reason. And although, as previously stated, we differ on the precise weight of the factors to be applied on each side of the scales, we are also agreed that there is in this case no consideration of sufficient weight in favour of disclosure to match the general good government reasons for maintaining appropriate confidentiality concerning the deliberative documents, in the form of Civil Service submissions, with which this Appeal is concerned. We accordingly conclude, unanimously, that the public interest in favour of maintaining the exemption outweighs the public interest in disclosure and that those parts of the disputed information that fall within section 35(1)(a) should not be disclosed.

Application of the section 35(1)(b) exemption

42. The Information Commissioner argued that any sensitivities in relation to collective responsibility had been materially reduced as a result of changes in the composition of the Cabinet since the decision in question was made, that the communications included in the disputed information were in fact quite anodyne and would not give rise to any criticism or embarrassment, and that there was therefore no public interest in further delaying their disclosure. We can confirm, from our own inspection of the disputed information, that neither the Ministerial communications themselves nor the references to them within the civil servants' submissions disclose anything worthy of comment, let alone criticism. However, their anodyne content does not detract materially from the general principle that the convention of collective responsibility is entitled to the limited protection created by sub-section (b), which means that confidentiality should be maintained unless the public interest in disclosure at least equals the public interest maintaining the exemption. Where, as in this case, the public interest in

disclosure is so weak that it does not equal the public interest in maintaining the section 35(1)(a) exemption it clearly cannot equal the public interest in maintaining the section 35(1)(b) one which, as stated in paragraph 16 above, we have decided is not less protective of confidentiality. Accordingly we conclude, again unanimously, that the public interest in maintaining the section 35(1)(b) exemption outweighs the public interest in disclosure.

43. The DCMS sought to bolster its arguments based on the practice of Cabinet government by arguments based on judicial authority regarding public interest immunity and comparative case law from other jurisdictions. Because of the overall conclusion we have reached it is not necessary for us to consider those arguments in detail.

44. Finally we should mention that part of the case in favour of disclosure was that the DCMS had voluntarily disclosed to Mr Batchelor one item of Minister to Minister correspondence and certain information in civil servant submissions. There was some suggestion that in one case this may simply have been a mistake made at a time when DCMS personnel were still relatively unfamiliar with the FOIA. However, the main argument put forward by DCMS was that there were particular reasons for the disclosures and that they did not on the whole indicate inconsistency in its approach or undermine its arguments for continuing to refuse to disclose the disputed information. We did not find anything in the content of the disclosed material or the circumstances in which it was disclosed that materially undermined the DCMS case or would justify reconsidering our conclusions above on the relative weight to be applied to the factors for and against disclosure.

Conclusion and remedy

45. We have concluded that the DCMS was entitled to refuse to disclose the disputed information and that its appeal should therefore be allowed. As no further action is required we do not intend to issue a substituted Decision Notice.

Signed

Chris Ryan

Deputy Chairman   Date: 29 July 2008