

FOI: A SHOCK TO THE SYSTEM

Jeremy Hayes considers Government's options following a ruling ordering the release of Cabinet Minutes from 2003 on going to war in Iraq , under the Freedom of Information Act 2000 .*

If the Cabinet Office decides to publish the minutes of the Cabinet meetings in 2003 which authorized the war in Iraq, we are unlikely to discover anything new or surprising. We have that on the authority of Clare Short, one of only two dissenting members of the Cabinet at the time. So why is the government unlikely to release the minutes as required in the judgment of the Information Tribunal set out in January? Ms Short's account of the meeting was set out in her memoir, " An Honourable Deception: New Labour, Iraq and the misuse of power " published in 2006. She alleges that her efforts to question the Attorney General were effectively blocked.

"I then attempted to initiate a discussion. I asked why it was so late and whether you had changed your mind. There were then many voices calling for me to be quiet and not ask such questions and no discussion was allowed."

She is by no means the only member of the Cabinet of the time to give some account of what transpired in those meetings .David Blunkett , Robin Cook , John Prescott and the former Downing Street spokesman , Alistair Campbell have all written about those fateful meetings . In fact this was one of the main reasons why the current Cabinet Secretary, Sir Gus O'Donnell found it hard at the Tribunal hearing to sustain the case for Cabinet confidentiality.

The official record which has been ordered to be disclosed is thought to be insufficiently detailed to challenge her record. The handwritten notes taken by the Cabinet Secretary, Sir Andrew Turnbull which gave a much fuller account are not included in the documents for disclosure. It seems unlikely that the records might publicly embarrass anyone in the Cabinet at the time.

Using the veto

But the betting among observers and commentators is that the government will refuse to comply and opt instead to use a power of veto contained in the Freedom of Information Act 2000 (Section 53) to block publication for once and all. Appealing to the High Court might carry the risk of losing the legal argument for a second time.

If it does choose this course it will be the first time the veto has been used in the four years and more that Freedom of Information has been operational in Britain.

It will require a Cabinet decision to do this but this is one decision on which it may be easy to get unanimous agreement.

Why should ministers be so concerned about revealing information which is unlikely to cause major public embarrassment? At issue in their eyes is a principle that officials and ministers should be able to consider policy, ‘think the unthinkable’, and make decisions collectively in Cabinet without the steps that led to those decisions becoming public.

Since FOI came in there has been mounting concern in the Cabinet Office and the Ministry of Justice at the inroads requests for information under the Act have made into Whitehall’s sanctums, particularly on issues of policy advice or ‘the conduct of public affairs’. These categories of information, together with information ‘likely to prejudice international relations’, are covered by exemptions but subject to a test of public interest. In this case the Tribunal agreed with the Information Commissioner that the issues involved were exceptional and the public had a right to know.

Although the government has managed to hold back much previously confidential information this has largely come about as the result of delays, arguments and appeals with those requesting information and the Information Commissioner whose job it is to rule on requests which have been refused.

The publication of minutes which conclusively showed that Tony Blair had decided to exempt Formula One from a tobacco sponsorship ban *after* meeting Bernie Ecclestone

took three years to emerge , well after Blair had left office and the House of Commons which he appeared to have misled .

Openness or Obfuscation

The repeated delays and protracted arguments over confidential papers under the Freedom of Information Act are a far cry from the goals set out in 1996 when Tony Blair took on the former Labour leader John Smith's project for the citizen's 'Right to Know'. Blair declared that the Act would "signal a new relationship between government and people: a relationship which sees the public as legitimate stakeholders in the running of the country and sees election to serve the public as being given on trust."

But now far from encouraging a climate of greater openness in government the Act seems to be driving Whitehall towards behaving more secretively. Rachel Sylvester of The Times noted in December that civil servants are using codenames in emails, or replacing some letters with asterisks when discussing individuals, so that a search for a person's name under the Freedom of Information Act draws a blank. "Legislation that was meant to encourage more openness has, in fact, led to greater obfuscation", she concluded .

Defining Public Interest

To the Information Commissioner and the Information Tribunal panel the legality of the Iraq war and the extent to which Cabinet Ministers weighed up the advice of the Attorney-General, Lord Goldsmith, was simply too important an issue to be exempted from disclosure . On this issue , in their judgment , the public does have a 'Right to Know'.

Using the veto would put the Iraq Cabinet minutes beyond reach, at least for fifteen years if new recommendations on the release of cabinet documents are taken up. But it is unlikely to stem the flow of requests for information on policy making and decision making in government. The Information Commissioner, Richard Thomas, in his last

months in post, feels his judgment on what the term 'public interest' means has been entirely vindicated. His appointed successor Christopher Graham, currently head of the Advertising Standards Authority, now has a stress-tested definition to guide him. If Whitehall wants to draw a line in the sand to deter this type of inquiry in the future then the veto may have only a very limited effect.

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