



**Subject matter:** Formulation or development of government policy s.35(1)(a)  
Ministerial Communications s.35(1)(b)  
International relations s.27  
Public interest test s.2

**Cases:** AG v Jonathan Cape [1976] QB 752  
Export Credits Guarantee Department v Friends of the Earth

[2008] EWHC 638 (Admin)  
Office of Government Commerce v Information Commissioner  
[2008] EWHC 737 (Admin)  
Babcock v Canada (Attorney General) [2002] S.C.C. 57.  
Re J R Porter MP and Department of Community Services and  
Health [1988] AATA 85

**Representation:**

For the Cabinet Office: Jonathan Swift  
For the Information Commissioner: Timothy Pitt-Payne  
Dr Lamb did not appear and was not represented.

## Decision

The Tribunal upholds the decision notice dated 19 February 2008 and dismisses the appeal by the Cabinet Office against the Information Commissioner's direction to disclose (subject to the redactions specified) the Minutes for the Cabinet Meetings that took place on 13<sup>th</sup> and 17<sup>th</sup> March 2003.

The Tribunal dismisses the appeal by Dr Lamb seeking disclosure of the other records of the Cabinet Meetings that took place on 13<sup>th</sup> and 17<sup>th</sup> March 2003, as identified in its preliminary decision dated 11 August 2008.

## Reasons for Decision

### Introduction

1. We have decided that the public interest in maintaining the confidentiality of the formal minutes of two Cabinet meetings at which Ministers decided to commit forces to military action in Iraq did not, at the time when the Cabinet Office refused

a request for disclosure in April 2007 outweigh the public interest in disclosure

Background

8-11-2008

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*“(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –*

*(a)relations between the United Kingdom and any other State ...”*

The Cabinet Office acknowledged that some redactions had been proposed by the Information Commissioner in his Decision Notice, but argued that these were not sufficient to avoid the risk of prejudice as that arose in the following circumstances:

primary case under section 35, further redactions should be made pursuant to section 27.

6. We should add that FOIA section 2(3) has the effect of designating both the sections 35 and 27 exemptions as qualified exemptions. The result is that the obligation of the Cabinet Office to disclose the information in question did not apply unless (pursuant to section 2(2)(b)) *“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.”*

new information. However, he suggested that if this was the case it might suggest that there had been only limited discussion of the important issues that were decided during the two Cabinet meetings and that there was therefore a strong public interest in disclosure of the Additional Material as it would enable the public to make its own assessment of the performance of their duties by Cabinet Ministers

on those occasions. On this basis he indicated that, notwithstanding the Information Commissioner's concession, he wished to pursue his appeal, although he did not intend to appear in person at the hearing. He therefore filed further

written evidence was nevertheless taken into account without objection from the Information Commissioner.

11 The Information Commissioner filed a Witness Statement by Professor Peter

so reduce the risk that the public interest in maintaining the exemption  
did not outweigh the public interest in disclosure?

15. The approach we take to these issues is governed by FOIA section 58, under which we may allow an appeal and/or issue a substituted Decision Notice if we think that the Decision Notice is not in accordance with the law or, to the extent that it involved an exercise of discretion by the Information Commissioner, we think that the discretion ought to have been exercised differently. We have an express power to review any finding of fact on which the Decision Notice was based. In the

present case we received a considerable body of evidence that had not been before



17. On 8 November 2002 the UN Security Council passed resolution 1441. This  
required Iraq to provide full information about its weapons programmes and to

enable UN inspectors to have access to its facilities. It went on to declare that  
failure to comply would be a material breach of its obligations and that any breach



the course of his statement the Foreign Secretary disclosed that he had personally supported military action during the Cabinet meeting the previous day.

~~Of course, the Foreign Secretary's disclosure that he had personally supported military action during the Cabinet meeting the previous day.~~

circle of individuals to discuss major decisions for which the Cabinet as a whole would ultimately carry responsibility and expressed concern that, viewed overall, the scope for informed collective political judgment by the Cabinet had been reduced. Lord Butler's committee had secure access to intelligence material, its meetings and deliberations were closed, and only its conclusions were published.

29. On 10 March 2005 the House of Commons Public Administration Select Committee, in the course of considering the issue of civil service effectiveness took evidence from Sir Andrew (later, Lord) Turnbull. He had been the Cabinet Secretary in March 2003 and answered questions on the effectiveness of Government in the run-up to the Iraq war and the manner in which the Attorney General's advice had been presented to the Cabinet.

30. In April 2005, following a partial leak, the Government published the 7 March

Opinion.

31. On 22 March 2006 the House of Lords Select Committee on the

*expressed by any of those involved in the provision of advice or information informing that advice” while disclosing “those parts of the Requested Information ...which led to, or supported, the concluded views which were made public by the Attorney General in [the 17 March Opinion]”. The Information Commissioner added:*

*“As the government chose to outline an unequivocal legal position, on such a critical issue at such a critical time, the balance of the public interest calls for the disclosure of the records in full.”*

Because of a perceived difficulty of separating the material to be disclosed from that which was to be retained, so that redacted versions of the originals would not be satisfactory, the Information Commissioner ordered the Legal Secretariat of the Law Officers to publish a disclosure statement setting out the substance of all the

35. In the following paragraphs we deal with the factors on each side of the balancing

separately.

36. The Cabinet Office argued that in this case there were both general arguments in favour of maintaining confidentiality of Cabinet Minutes as a whole, and also specific reasons why disclosure of these particular minutes would be contrary to the public interest.

37. The general factors were said to arise in this way. The Cabinet Office relied on

*"The internal processes through which a decision has been made, or the level at*

achieved without prejudicing the public interest. However, exceptions were again introduced in the aftermath of war during the late 1940s. These recognised that any attempt to maintain the stringent restrictions of the pre-war period would be brought into contempt as a result of the pressure to include in political autobiographies and histories information that had been protected by the requirements of military security during wartime. A memorandum, which was circulated to the Cabinet by the Prime Minister, Charles de Gaulle, in 1957

therefore recommended as "guiding principles" that:

(a) it should be recognised that Ministers should not be required to disclose



be restrained "*if the public interest in concealment outweighs the public interest in a right to free publication*". However, it decided, on the facts of the case before it

that the detailed content of the particular diaries would have a very limited impact on free and open Cabinet discussion because of the passage of time (ten years) since the events recorded. It reached that decision even though "*the individuals involved are the same, and the national problems have a distressing similarity with those of a decade ago*".

*confidentiality as well as the experience of the present leads us to accept the generalisation as a working principle”*

44. The conclusion of the Radcliffe Report was that ex-Ministers should comply with three “working rules”. They should not reveal:

- (a) the opinions or attitudes of colleagues as to the Government business with which they had been involved;
- (b) the advice received from officials; or

(c) the names of the secretaries of officials with whom they had contact

The Committee also recommended certain working procedures, which were less onerous than those that had previously been imposed, but which were designed to ensure effective compliance with the rules it had enunciated. These included a requirement that any ex-Minister wishing to write an account of his or her Ministerial

attended before his resignation.

- (c) "An Honourable Deception? New Labour, Iraq and the Misuse of Power" by Clare Short. This included a number of criticisms about the management of Cabinet business in the years following the 1997 election of a Labour Government led by Tony Blair and quoted from her diary what she had recorded about Cabinet discussions on the question of Iraq in September 2002, 13 March 2003 and 17 March 2003.

Also see now extracts from similar publications written later by Alectair Campbell

...in Cabinet, not the debate that may have led up to

them.

47. In addition to the selected disclosure of Cabinet business through official briefing it was evident from some of the press reports made available to us that information about Cabinet discussions was clearly released to journalists, presumably by Ministers or others who were in attendance. As an example, the Guardian newspaper published an article on 14 March 2003 which quoted unidentified Ministers describing, in general terms, Robin Cook's contribution to the debate on the previous day. Similarly the Independent newspaper published detail of the 17

Against that background we now proceed to consider the arguments on each side of the public interest balance, again limiting our consideration at this stage to the Minutes and not the Additional Material.

Factors in favour of maintaining the exemption

50. The Cabinet Office relied in particular on the importance of maintaining the convention of Cabinet collective responsibility and confidence, as described above, and stressed its importance to the effective functioning of a central element of the nation's system of government. The evidence of Sir Gus O'Donnell stressed that the danger to the convention lay, in particular, in the risk that if Ministers anticipated that Cabinet Minutes would be prematurely disclosed, they would disrupt serious

debate by speaking for the official record and/or ensure that sensitive issues

passage of time between the events in question and the date when Dr Lamb's request was refused). The Information Commissioner's own Decision Notice had stressed that he considered that the circumstances were exceptional and that the

disclosure of the two specific and unusual sets of Cabinet minutes would not have the detrimental effects that the Cabinet Office feared

52. We recognise the importance of the convention and the damage that may result from publication of Cabinet minutes. We carry that assessment into the public interest balance that we are required to perform.

53. The Cabinet Office supplemented its arguments in favour of maintaining the exemption by two additional elements of support. We felt that the main strength of

*transparency, and therefore disclosure, for some time. It was reflected in the willingness of the Courts to require disclosure of relevant documents for the purpose of litigation, heralded by the decision of the House of Lords in Conway v Rimmer. FOIA introduced a radical change to our law, and the rights of the citizen to be informed about the acts and affairs of public authorities”*

Although, therefore, we take full account of the high judicial authority stressing the importance of confidentiality as a means of ensuring the proper functioning of government (an importance which the Information Commissioner went some way to

\_\_\_\_\_ that we are required to apply the law set out in

[REDACTED]

Cabinet confidentiality is an important aspect of good government and it is acknowledged by the Cabinet Office that it may sometimes be overruled. *Porter* does not therefore help us in deciding whether the arguments in favour of disclosure in this case constitute the English law equivalent of "a very strong reason" so as to justify overruling it. It is true that elsewhere in the extract provided

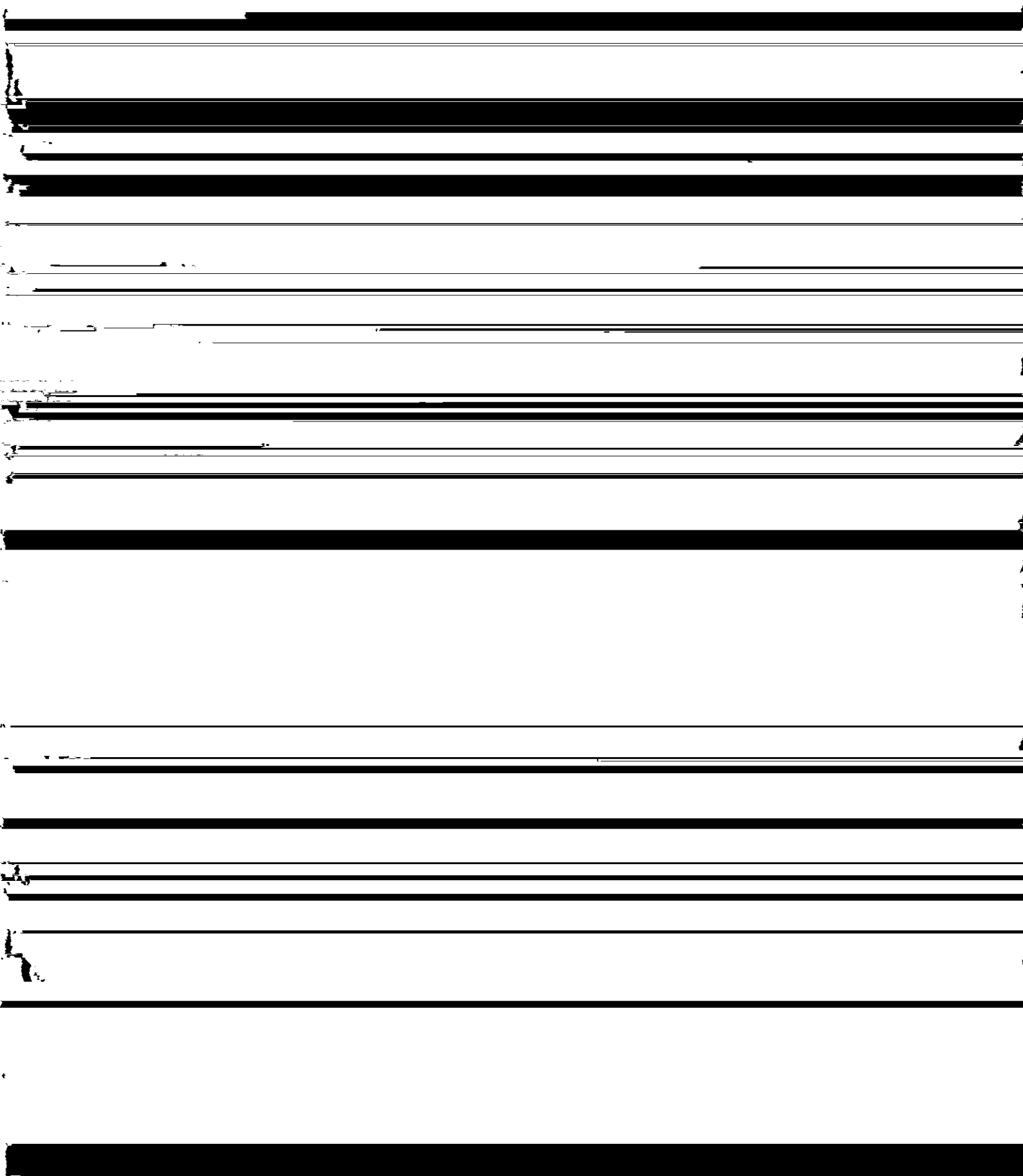


56. The Information Commissioner also argued that Cabinet collective responsibility would actually be enhanced by the disclosure of material showing how the Cabinet operated. We note the point but do not place any great weight on it.

57. Finally, we should mention the specific reasons for maintaining the exemption.

These were that British ...

a strategy that was not supported by many other nations and is now perceived as having been based on incorrect intelligence. It had also been based on legal advice which has been challenged by a number of knowledgeable commentators. The Cabinet Office accented the importance of the decision that had been made but



... Mr. O'Connell's interpretation of the

evidence, stressed the importance of testing the legality of the many other issues that arise during the course of military action. He suggested that the legal advice regarding the detailed manner in which military forces are deployed is as important, if not more important, than the legal advice given at the point at which the initial

Minutes disclosed no evidence of the failure of Cabinet decision-making it would still be in the public interest to see whether the information that was placed in the public domain by the Government at the time was consistent with what had been said behind closed doors.

65. Before us the Cabinet Office accepted that the matters discussed at the two Cabinet Meetings were grave and remain matters of controversy. However, it argued, first, that the more important the issue under consideration the more important it was for Ministers to be able to approach it without any concern that their discussions might be made public. Secondly, it made the general point that if a generally stated public interest is relied on, for example, the interest in transparency

or accountability, at least some consideration should be given to the way in which disclosure of the particular information sought would actually further that public interest. Counsel argued on its behalf that no such justification had been provided in this case and that consideration should in any event also be given to the cost, in

advance either a new (and appropriate) form of accountability

issues not previously subject to public consideration

the public would be significantly better informed on this issue if the Minutes were disclosed.

70. The Information Commissioner challenged the suggestion that the operation of other mechanisms for openness and transparency had been sufficient to satisfy the public interest. He argued that they should not be regarded as alternatives or competing means to freedom of information disclosure; they reinforced it but were not alternatives. Disclosure under FOIA should be regarded as a means of

in this case would set a precedent for the future. As to the passage of time the Cabinet Office argued that the 'age' of the information was as capable of diminishing the public interests pointing in favour of disclosure as those which support the maintenance of an exemption. And, as regards the public interest in maintaining the exemption, it said that the extent of any diminution will vary from

participating in a full and open discussion and scrutiny of options if they had an assurance that there would be consistency of approach with regard to disclosure and that, in what Mr Swift referred to as "the normal run of events" their

contributions to Cabinet debate would not be disclosed prematurely. It is of course

acknowledged on all sides in this case that disclosure of the [redacted] [redacted]



public interest in disclosure would, in his view, have justified the countervailing cost in terms of the detrimental effect on good decision-making. The March 2003

statement by the Minister as Cabinet Secretary, but he expressed the view that

[REDACTED]

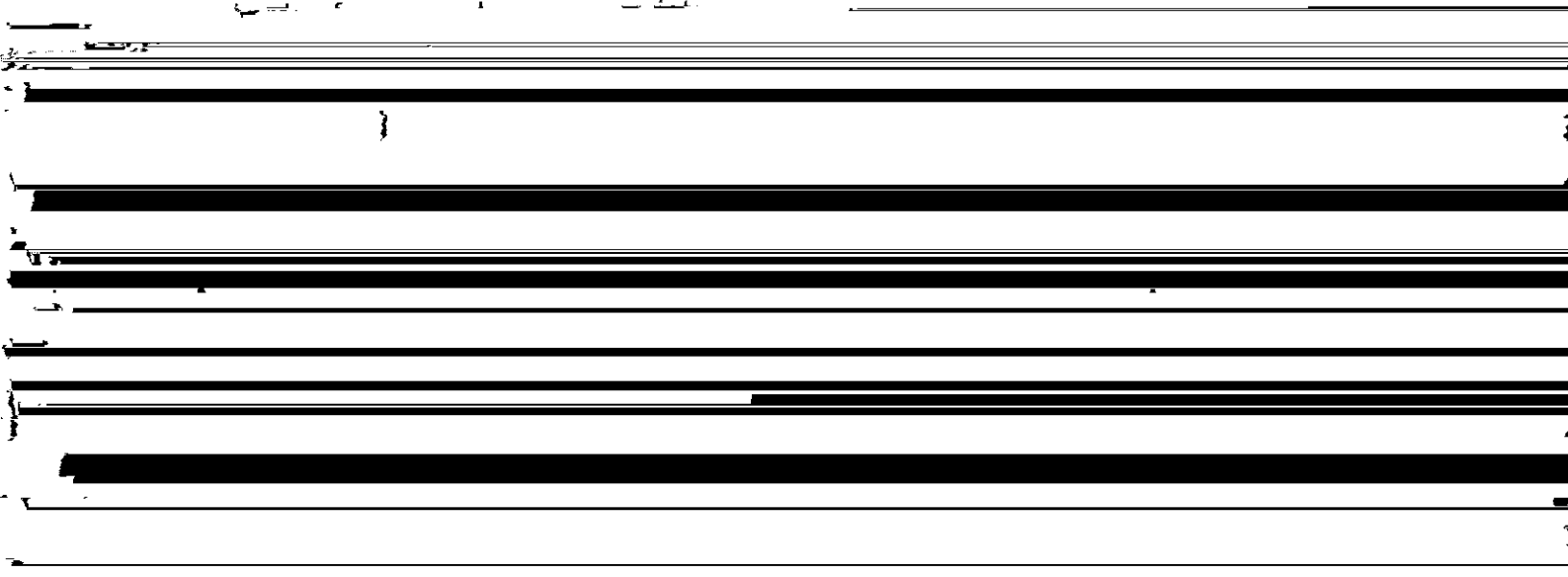
79. Notwithstanding the above there is undoubtedly a strong argument in favour of maintaining the section 35 exemption in respect of Cabinet discussions. However, the public interest factors in favour of disclosure are, in the view of the majority, very

41. The decision to commit the nation's armed forces to the invasion of

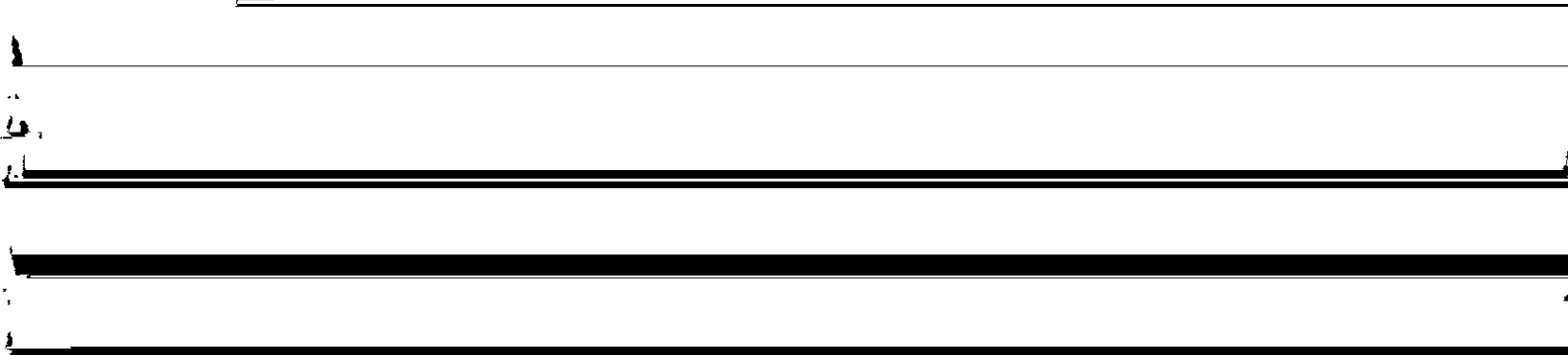
two documents and heard evidence and argument in closed session, which considered whether, for example, the Minutes showed the presence (or absence) of dissent between Cabinet members or the adequacy or inadequacy of the scrutiny applied to either the decision reached or the legal and evidential basis for it. However, the majority considers that the value of disclosure lies in the opportunity it provides for the public to make up its own mind on the effectiveness of the decision-making process in context.

The minority view of Mr Whetnall

83. The minority view seeks to reach the decision most likely to support continued confidence that Cabinets can explore difficult issues in full and in private, and on the



84. Professor Hennessey's witness statement and answers to questions laid particular weight on whether the Cabinet had probed the Attorney's advice and the position



concluded from it was expressed in certain terms. It is plausible against this background that any note of uncertainty would have met with impatience at Cabinet on 17<sup>th</sup> March, and we have the disputed reports (see paragraph 45 above) that

one member of the Cabinet who wished to probe the advice further at that meeting

was discouraged by her colleagues.

87. The conclusions of Lord Butler's committee include a finding quoted at paragraph 28 above.

could add to the factors eroding the integrity of the Cabinet process, objective  
record keeping and good governance

89 This leads to the minority view in the Tribunal that even in the exceptional

discussion and scrutiny. To that extent they would add little new content to the information available to the public. In the course of that scrutiny the Attorney's

~~view has been extensively questioned and probed~~

91. Professor Hennessey's view is that the decision taken at the meeting of 17<sup>th</sup> March – to go to war without the specific authorisation of the United Nations – was a remarkable and for Britain an uncharacteristic step and a failure of Cabinet government. The difference of opinion here is not with that assessment, although it cannot generally be appropriate to take disagreement with a decision, however immense or controversial, as a marker in favour of an unusual degree of disclosure

of the process by which it was reached. The issue is whether early disclosure under Freedom of Information law of any discussion (or absence of discussion) of

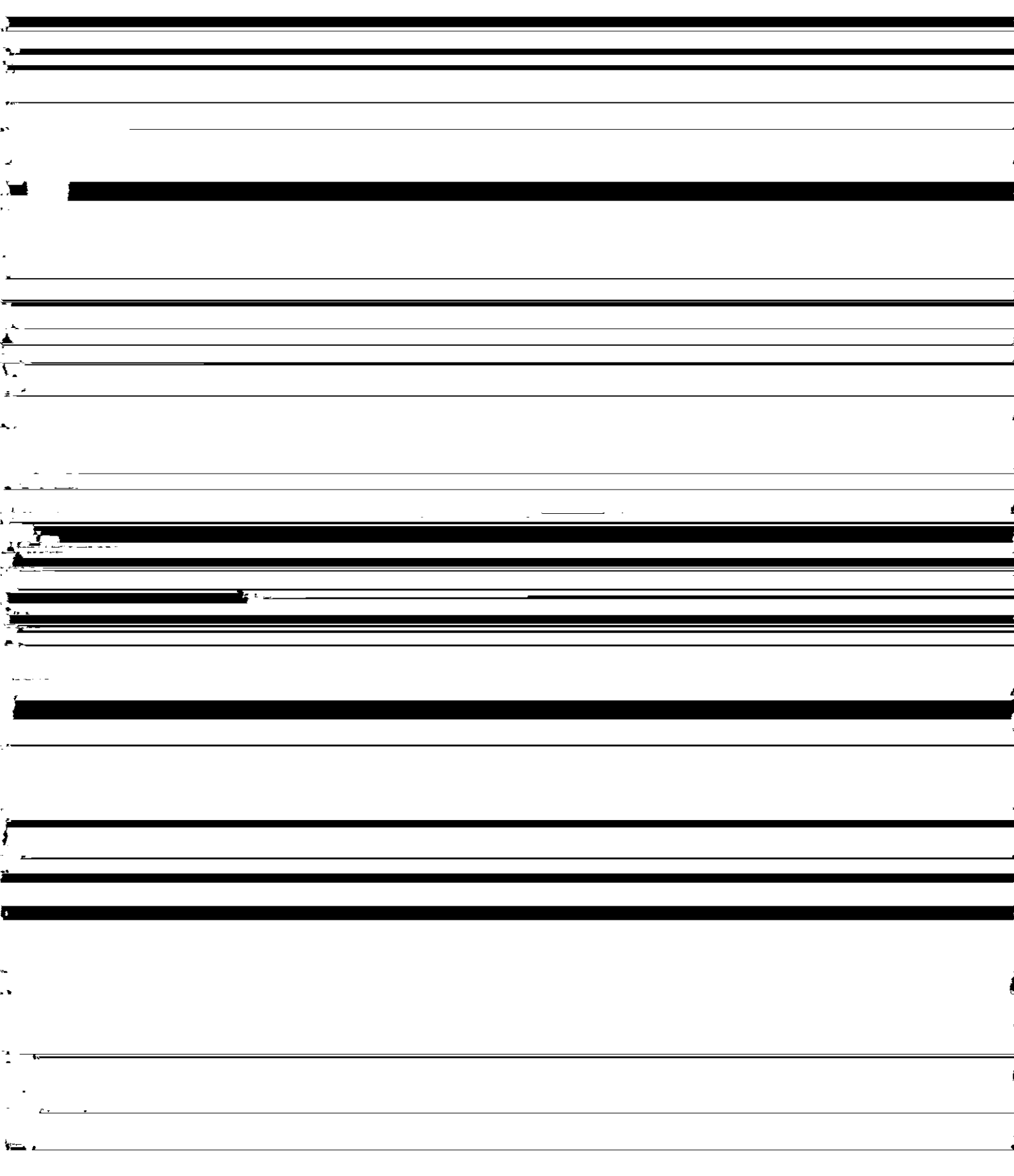
~~such a decision would be more likely to happen~~

right to conclude that the Minutes should have been disclosed by the Cabinet Office.

Compliance with section 27

94. The Decision Notice ordered the disclosure of the Minutes but indicated that some redactions could be made in order to protect the information contained in the Minutes.

contemporaneous notes is likely to be idiosyncratic and could well give a false impression as to the weight and importance that should be attributed to a particular part of the debate or the tone in which the points of discussion were expressed. The Minutes are written by very senior and experienced civil servants and we





Signed

A handwritten signature in black ink, appearing to read 'C. Ryan', written in a cursive style.

Chris Ryan

Deputy Chairman

Date: 27 January 2009