IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0263**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50362049
Dated: 3 October 2011

Appellant:	**Cabinet Office**
Respondent:	**Information Commissioner**
Second Respondent:	**Gavin Aitchison**
Heard at:	**Field House London**
Date of hearing:	**6 September 2012**
Date of decision:	**15 October 2012**

Before
John Angel
(Judge)

and

John Randal
Rosalind Tatam

Attendances:

For the Appellant: James Cornwell
For the Respondent: Robin Hopkins
For the Second Respondent: In person

Subject matter:	**Public interest test under s.2(1)(a) and (b) FOIA.** **Neither confirm nor deny under s.35(3) FOIA.**

***Cases**:* *London Borough of Camden v The Information Commissioner &YV [2012] UKUT 190 (AAC)*
Cabinet Office v IC (EA/2010/ 0031), [2011] 1 Info LR 838
Cabinet Office v IC and Lamb (EA/2008/0024 and EA/2008/0029), [2011] 1 Info LR 782
Department of Health v IC, Healey and Cecil [2012] 1 Info LR 489
Department for Education & Skills v IC (EA/2006/0006), [2011] 1 Info LR 689
Department for Work & Pensions v IC (EA/2006/0040) [2011] 1 Info LR 716
All Party Parliamentary Group on Extraordinary Rendition v IC EA/2011/0286
Home Office and Ministry of Justice v IC [2009} EWHC 1611 (Admin)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 3 October 2011 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. In 1988 Rowntree Mackintosh ("Rowntree"), a large UK confectionary group, was acquired by Nestle, a Swiss company, for £2.55 billion. There was much public controversy surrounding the acquisition at the time centring around UK merger laws because of the lack of reciprocity under Swiss law which appeared to limit freedom to acquire companies based in the home country of the buyer. Rowntree was a long established company with its roots in York with a special reputation for the ethical way it treated its employees and undertook its business. There was concern that these values might be dissipated by a takeover and that the workforce would be adversely affected.

2. Lord Young of Graffham was Secretary of State for Trade and Industry at the time. Under the competition laws in place (Fair Trading Act 1973) he had responsibility for deciding whether to approve the acquisition or refer it to the Monopolies and Mergers Commission. He decided not to make a reference and approved the acquisition.

3. Since 1988 there has been a reduction in confectionary manufacturing in York with many well known brands such as Smarties being transferred to be manufactured overseas. Also there have been hundreds of redundancies and the "Rowntree" sign at the company's York premises has been replaced with a "Nestle" sign.

The request for information

4. More than 20 years later, in November 2008, Mr Aitchison made a request under the Freedom of Information Act 2000 ("FOIA") for all information held by the Cabinet Office dating between 1 April and 1 August 1988 relating to the takeover of Rowntree. Specifically, he asked for:

> " Copies of any and all documentation held by the Cabinet Office, dated between 1 April 1988 and 1 August 1988, relating to the takeover of Rowntree chocolatiers. This should include, but not be limited to, minutes of meetings; copies of letters sent/received by the then Prime Minister or other ministers; copies of any memos or speeches which were either drafted or issued; and copies of any decisions made."

5. In its response, the Cabinet Office provided some information, but withheld other information on the basis of sections 35(1)(a) (formulation or development of government policy) and 35(1)(b) (Ministerial communications) of FOIA. It made no mention of the "neither confirm nor deny" ("NCND") provision at section 35(3) of FOIA.

6. Two more years passed. On 13 September 2010, the Tribunal handed down its decision in *Cabinet Office v IC* (EA/2010/ 0031), [2011] 1 Info LR 838 ("Westland decision"). It ordered disclosure of the minutes of the meeting of the Cabinet on 9 January 1986, in which Michael Heseltine resigned due to his disagreement with colleagues over whether the government should intervene in the investment by an American company in the British helicopter manufacturer Westland plc. Unlike in the case of *Cabinet Office v IC and Lamb* (EA/2008/0024 and EA/2008/0029), [2011] 1 Info LR 782 - concerning the minutes of the Cabinet meeting at which the decision to commence war against Iraq was discussed – the government did not exercise its veto over that order. The minutes of the 'Westland' Cabinet meeting were duly made public.

7. In light of this decision, Mr Aitchison resubmitted his request on 14 October 2010. On 28 October 2010, the Cabinet Office refused to provide any further information on two main grounds.

8. First, it withheld five documents on the grounds of sections 35(1)(a) and (b), as before. As to the public interest in disclosure, the Cabinet Office set out some considerations of a general nature in its refusal of Mr Aitchison's

request. As to the public interest in maintaining the exemptions, the Cabinet Office's case was as follows:

> " These public interests have to be weighed against a strong public interest that policy-making and its implementation are of the highest quality and informed by a full consideration of all the options. Ministers and their advisers must be able to discuss policy freely and frankly, exchange views on available options and understand their possible implications. The candour of all involved could be affected by their assessment of whether the content of the discussions will be disclosed prematurely. If discussions were routinely made public there is a risk that Ministers may feel inhibited from being frank and candid with one another and in seeking the advice of officials or other experts. As a result the quality of debate underlying collective decision making would decline, leading to worse informed and poorer decision making."

9. The second limb of the Cabinet Office's refusal was put as follows: "I can neither confirm nor deny that the Cabinet discussed the takeover of Rowntree in 1988". The writer sought to distinguish the Westland decision and concluded, "The Cabinet Office agrees with this [the Tribunal's observations that records of Cabinet discussions will rarely be disclosed] and remains of the view that there is a strong public interest in protecting collective responsibility as set out above".

10. By letter of 18 November 2010, the Cabinet Office upheld this refusal on internal review, although it made no mention of its NCND position.

The complaint to the Information Commissioner

11. Mr Aitchison complained to the Commissioner about the Cabinet Office's refusal of his request. The Commissioner investigated. He had some difficulty in obtaining prompt and helpful input from the Cabinet Office. He had at one stage to threaten to issue an information notice.

12. On 3 October 2011, the Commissioner issued a decision notice in which he found that the two exemptions claimed were engaged but that the public interest balance favoured disclosure of the information and ordered disclosure of the five withheld documents. He also ordered the Cabinet Office to confirm or deny whether it held any information about Cabinet discussions of the Rowntree takeover.

The appeal to the Tribunal

13. On 7 November 2011 the Cabinet Office appealed to the First-tier Tribunal against the Commissioner's findings. Mr Aitchison was joined as a party.

14. The case was heard mainly in open session but partly in closed session in order to facilitate evidence and submissions on the detail of the disputed information.

15. Mr Aitchison gave evidence as well as oral submissions. He is news editor for The Press newspaper in York (formerly the Yorkshire Evening Press). In 2008 he was the paper's political editor. Jeremy Pocklington gave evidence on behalf of the Cabinet Office both in open and closed sessions. He was Director in, and Deputy Head of, the Economic and Domestic Affairs Secretariat in the Cabinet Office when he provided his written witness statement. Since May 2012 he has been Director of Enterprise and Growth in the Treasury.

The law

16. As mentioned above, all five disputed documents are withheld on the basis of section 35(1)(a) FOIA, which provides that:

> (1) Information held by a government department ….. is exempt information if it relates to—
>
> (a) the formulation or development of government policy.

17. The Cabinet Office also contends that four of the five documents (numbered ii-v in the confidential annex to the DN) fell within section 35(1)(b) FOIA, which provides that:

> (1) Information held by a government department ….. is exempt information if it relates to—
> ...
>
> (b) Ministerial communications...

18. As regards discussions of the Rowntree's takeover – if any – by the Cabinet, the Cabinet Office bases its "neither confirm nor deny" ("NCND") position on section 35(3) FOIA, which provides as follows:

> (3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

19. All of these exemptions are class based exemptions which, when engaged, are subject to a public interest test under section 2. For section 35(3) the

test as to whether the duty to confirm or deny arises is contained in section 2(1)(b)

> " In all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information."

20. In respect of sections 35(1)(a) and (b) the test is found in section 2(2)(b)

> " In all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

21. A number of tribunal cases were relied on by the parties. We should say that we are not bound by any other First-tier Tribunal decisions or those of the former Information Tribunal – see *London Borough of Camden v The Information Commissioner &YV* [2012] UKUT 190 (AAC) §12. In that case the Upper Tribunal found that: "previous decisions are of persuasive authority and the tribunal is right to value consistency in decision-making. However, there are dangers in paying too close a regard to previous decisions. It can elevate issues of fact into issues of law or principle".

22. The parties brought the following findings to our attention some of which have been helpful in guiding our analysis of the facts in this case. We have not regarded them as issues of law or principle.

23. *Department for Education & Skills v IC* (EA/2006/0006), [2011] 1 Info LR 689 involved a request for copies of all minutes of senior management meetings regarding the setting of school budgets in England. The Tribunal ordered disclosure. It held that:

    1. Notwithstanding the absence of a prejudice requirement for the engagement of s. 35(1)(a), the inclusion of information within such a class exemption does not of itself indicate that there will be any damage to the public interest if that information is disclosed. Where s. 35(1)(a) is engaged, the public interest balancing test begins with both pans empty. Disclosure follows if that remains the position (see in particular paragraphs 62-65).
    2. As to the public interest in maintaining s. 35(1)(a), the central question in every case is the content of the particular information in question. No information is exempt from disclosure simply on account of its status or classification, nor on account of the seniority of those whose actions are recorded.
    3. It is appropriate to consider the protection from compromise or unjust public opprobrium of civil servants, but not ministers.
    4. As regards the process of policy formulation, the fundamental principle is that during the process of formulation, disclosure of information on

discussion of policy options is highly unlikely to be in the public interest (unless, for example, it would expose wrongdoing within government). When the formulation of a particular policy is complete is a question of fact. A parliamentary statement announcing the policy will normally mark the end of the process of formulation.

24. *Department for Work & Pensions v IC* (EA/2006/0040) [2011] 1 Info LR 716 involved a request for a copy of the feasibility study undertaken to establish the impact of the proposed identity card scheme. The Tribunal ordered disclosure of information falling within s. 35(1)(a). It held that:

    1. Timing is crucial in an analysis of the formulation and development of government policy. S. 35 FOIA does not automatically deem or assume that disclosure of the information will be harmful. Rather, the particular circumstances of the case must be assessed.
    2. As to the public interest, it is relevant to consider what specific harm would follow from the disclosure of the *particular information* in question. The focus should be on the public interest factors specifically associated with that *particular exemption*, rather than on a more general consideration of the public interest in withholding the information.
    3. In this case, the disputed information was of low importance in terms of the harm that might flow from its disclosure, and relevant in assisting the public in understanding government thinking.

25. *Cabinet Office v IC and Lamb* (EA/2008/0024 and EA/2008/0029), [2011] 1 Info LR 782 concerned the minutes of the Cabinet meeting at which the UK's entry into war against Iraq was deliberated. Although this involved ministerial communications, the Tribunal again ordered disclosure. The underlying issues and public interests were somewhat different to the present case, but the Commissioner says the following points are relevant:

    1. The passage of time is a relevant factor. Its effect will differ from case to case.
    2. The Tribunal's task is not to decide the public interest in general terms about certain *types* of information. Rather, it must decide the balance of the public interest on the *particular facts* before it.
    3. The convention of collective Cabinet responsibility clearly affords very considerable benefits in terms of good decision making at the highest level of government, but it had adapted and would continue to adapt.
    4. Those arguing for disclosure have a "slight advantage", in that they do not have to show that the factors in favour of disclosure exceed those in favour of maintaining the exemption. They only have to show that they are equal.

26. As referred to above, *Cabinet Office v IC* (EA/2010/ 0031), [2011] 1 Info LR 838 also involved minutes of a Cabinet meeting, this time concerning Westland plc. The Tribunal ordered the disclosure of those minutes. Unlike the present case, that case involved publicly aired disagreement between ministers, revelations in published memoirs and conflicting accounts of events. The Commissioner says those, however, were only among the factors supporting the Tribunal's conclusions – there is no suggestion that they were decisive of themselves. The following more general points, the Commissioner says, offer relevant guidance concerning the disclosure of Cabinet minutes and by extension other less sensitive ministerial communications:

    a) The convention of collective responsibility means that Cabinet minutes always contain information of great sensitivity which will usually outlive the particular administration, often by many years. The general interest in maintaining the exemption is therefore always substantial and disclosure within 30 years will very rarely be ordered, and then only in circumstances where it involves no apparent threat to the cohesive working of Cabinet government, whether at the time or in the future.

    b) Such circumstances may include the passage of time, and where those involved have left the public stage.

    c) The fact that the issue discussed in Cabinet has no continuing significance may weaken the exemption, but the importance of the convention of collective responsibility is not dependent on the nature of the issue which gave rise to debate.

    d) There is always a significant public interest in reading the impartial record of what was transacted in Cabinet. The public interest in disclosure is strengthened where the Cabinet meeting had a particular political or historical significance.

    e) In the circumstances, although there was a case for maintaining collective responsibility, 19 years had passed by the time of the request. Only one member of the Cabinet (Ken Clarke) remained in frontline politics.

    f) No member of the Cabinet could justifiably feel traduced by the publication of the minutes of 9 January 1986 in 2005. No member of the present or any future Cabinet would be deterred from putting forward arguments by reason of the thought that the opinions expressed would be made public 20 years later.

27. More recently, the Tribunal in *Department of Health v IC, Healey and Cecil* [2012] 1 Info LR 489 considered the application of s. 35(1)(a) to two risk registers documenting the risks associated with implementing NHS reforms under what was then the Health and Social Care Bill. It ordered the

disclosure of one of those registers. The Commissioner brought our attention to the following points.

28. First, the Tribunal's analyse of the issue of the times at which a "safe space" is required [at paragraph 28].

29. Secondly, at paragraph 67, the Tribunal noted that independent research carried out by the Constitution Unit at University College London has concluded that there is little evidence of FOIA leading to a chilling effect.

30. Thirdly, the Tribunal cautioned against public authorities adopting a de facto absolute approach to a qualified exemption. At paragraph 73, the Tribunal said this:

> " We would observe that the DOH's position expressed in evidence is tantamount to saying that there should be an absolute exemption for risk registers at the stages the registers were requested in this case. Parliament has not so provided. S.35 (and s.36) are qualified exemptions subject to a public interest test, which means that there is no absolute guarantee that information will not be disclosed, however strong the public interest in maintaining the exemption."

31. Mr Cornwell for the Cabinet Office also referred us to *All Party Parliamentary Group on Extraordinary Rendition v IC* EA/2011/0286 at paras. 142 -146 and *Home Office and Ministry of Justice v IC* [2009} EWHC 1611 (Admin) at paras. 34-35.

32. Under section 62 a record becomes an "historical record" at the end of the period of thirty years beginning with the year following that in which it was created.

33. In April 2010 the Constitutional Reform and Governance Act was enacted. Section 45 provided for the "thirty year rule" for historical records to be transferred to the National Archive to be reduced to 20 years but only once implemented through further legislation. In May 2010 there was a change of government. On 7 January 2011 the Deputy Prime Minister announced that the Coalition Government would be introducing the change. The "twenty year rule" will be implemented through secondary legislation making amendments to the Public Records Act and providing for transitional provisions. It would appear from the evidence before us that these transitional provisions, whereby two years' records will be released each year to transition from the existing 30 year rule to the new 20 year rule gradually over a period of 10 years, were to enable the twenty year rule to be introduced in "a manageable and affordable way" and was not to do with the contents or type of information. Also section 62 FOIA will be amended correspondingly gradually to reduce the period after which a record becomes an "historical record" including for records comprising information covered by the exemptions relevant to this case.

34. According to Mr Pocklington, the implementation of these transitional provisions is likely to mean that the disputed information in this case will become publically available in 2015.

The questions for the Tribunal

35. Firstly we need to consider whether the claimed exemptions are engaged. The Commissioner and Cabinet Office both agree that section 35(1)(a) is engaged for all 5 documents and that section 35(1)(b) is also engaged for 4 of those documents. Mr Aitchison is unable to comment because he has not seen the information. We have reviewed the disputed information and agree that these exemptions are engaged. As they are class based exemptions we only need to consider the public interest test under section 2(1)(b) and whether the Commissioner was correct that the public interest balance favoured disclosure.

36. As far as the NCND claim for Cabinet discussions (if any) we need to decide whether the Commissioner's decision that the public interest balance favoured the Cabinet Office being ordered to confirm or deny whether it held information about Cabinet discussions of the Rowntree takeover was correct.

Public interest test - background

37. As there is agreement on the engagement of exemptions the only matter we need to consider is the public interest test. In order to do this we need to identify the factors for and against disclosure and the weight we should give to them. Then we need to make a decision on where the public interest balance lies, bearing in mind that where it is evenly balanced then the disputed information should be disclosed.

38. Firstly, we need to set out the background from the evidence before us.

39. We were provided with evidence that Rowntree was regarded as a great British firm, dating back to the 19th century and operating under that name since approximately 1862. It was important, in economic and employment terms, to the City of York in particular and for years had been planning strategically and successfully to achieve a world presence. At the time, concerns were expressed about the impact of the takeover on employment at Rowntree; subsequent reports state that many jobs were lost following the takeover. We were not provided with any direct evidence these were lost through the takeover. However we were informed that a number of confectionary lines had been moved from York to overseas and therefore conclude that these moves are likely to have resulted in redundancies.

40. Careful building of a European business ahead of 1992 had established Rowntree's brand as an important and growing power in European confectionary. For a non EEC company without an EEC foothold this was an important strategic acquisition. However, while Nestle (the acquirer) appeared to benefit from protection against foreign purchasers under domestic law in Switzerland, Rowntree benefited from no such protection in the UK. Concerns were expressed as to this disparity and its effects on fair competition. Reports suggest that the governments of France, Belgium and West Germany were sufficiently concerned to investigate the potential competitive effects of this takeover.

41. There were calls from the Rowntree board, local councillors and from Opposition and Government MPs for the acquisition to be referred to the Monopolies and Mergers Commission in order to block the takeover.

42. In May 1988, the chairman of Rowntree lobbied the then Prime Minister, Mrs Thatcher, to intervene by referring the takeover bid to the Monopolies & Mergers Commission (the predecessor to the Competition Commission). Mrs Thatcher responded that the government's policy on this issue had been set out in a speech by Lord Young of Graffham, the Trade and Industry Secretary, in a speech on 12 May 1988. The position appeared to be that the government was not minded to intervene and that regulatory oversight of the takeover bid would proceed in the usual way.

43. This position was within the law at the time. Decisions on whether to allow mergers and takeovers to proceed were taken by the Secretary of State for Trade and Industry pursuant to sections 63 to 75 of the Fair Trading Act 1973. In this case, the Secretary of State at the relevant time was Lord Young. Lord Young had the power, under the legislation, to either clear a takeover or to refer it to the Monopolies and Mergers Commission - in effect a quasi-judicial role. His decision was based on a report by the then Director General of Fair Trading, which would have considered the effects on competition and other relevant public interest arguments.

44. However, in a speech given at around May 1988, the then Foreign Secretary Geoffrey Howe appeared concerned that such takeover bids were not taking place on a level playing field.

45. An article in the *Financial Times* on 12 May 1988 suggested that Mr Howe's intervention reflected confusion in government policy on this matter. In her letter to the Rowntree chairman, Mrs Thatcher made no reference to Mr Howe's speech or its bearing on government policy.

46. A further contemporaneous article in the *Independent* written by Jeremy Warner (now assistant editor of *The Daily Telegraph*) referred to an alleged political motivation for the government's reluctance to intervene to protect Rowntree from this foreign takeover bid.

47. From this evidence we conclude that the decision was controversial at the time and of high public interest at both a national and regional level.

48. We were informed by Mr Pocklington in evidence that the regulatory regime governing takeovers has since changed, such that Ministers now have a much more limited role in decision-making. These changes were implemented by the Enterprise Act 2002 which removed the final decision making process from Ministers and transferred it to an independent competition authority (except in certain limited categories of case, not relevant here). Under the current regime the Office for Fair Trading decides whether to clear a merger, clear it subject to conditions or refer it to the Competition Commission for a second stage investigation.

49. Mr Pocklington informed us that there had been some changes to the 2002 Act in 2008 but he was not aware that the policy underlying merger clearance was actively under consideration at the time of the request. In any case it was subject to European competition law.

Public interest factors favouring maintaining the exemptions

50. In relation to the engaged "Ministerial Communications" exemption under section 35(1)(b) the main public interest argued by the Cabinet Office relates to the convention on Collective Responsibility.

51. Mr Pocklington explained to us in detail what this entailed and why it was so important. This was also one of the factors the tribunal had to consider in the ***Westland*** case. In that case the tribunal helpfully set out at §§ 33 – 38 what this convention is:

> 33 The starting point for this decision is consideration of the doctrine or convention of collective responsibility, its purpose, its content and the interests which it is intended to protect.
>
> 34 It is a principle underlying cabinet government which has been recognised for at least one hundred and fifty years. Bagehot acknowledged its significance. Its importance grew as the Monarch`s control of and influence over his or her ministers weakened and they closed ranks against royal attempts to weaken them by promoting divisions. It gained recognition as a fundamental requirement of effective and cohesive government. A useful recent account of its development and significance is to be found in House of Commons Library Research paper 4/82, published on 15th. November, 2004.Its requirements are set out today in the Ministerial Code, which has been published with modifications since 1992. Paragraph 2.1 provides:

> *" The principle of collective responsibility, save where it is explicitly set aside, requires that ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained."*

35 For present purposes, it has two related aspects:

- The requirement that all ministers of every rank publicly support collective decisions of the Cabinet and Cabinet committees, suppressing any private dissent, whether or not they were party to such decisions ("the primary aspect").
- The principle that the content of discussions, including the expression of divergent opinions, leading to such decisions will remain confidential. That imposes a duty of silence on ministers and others with access to the content of such discussions, notably special advisers and civil servants ("the secondary duty")[1].

It is this latter aspect of the convention which is affected by s.1 of FOIA.

36 The object of the primary aspect of the convention is the preservation of a united front in Parliament and in the country without which effective government will not long survive. The requirement has been suspended by Prime Ministers on a very few occasions in relation to a specific issue – most recently by Harold Wilson at the time of the 1975 Referendum on membership of the EEC (as it then was). However, such a dispensation merely underlines the enduring importance of the convention. Clare Short remained briefly in the Cabinet after public criticism of the government`s policy on Iraq but this was an isolated exception to the operation of the rule.

37 The secondary duty (confidentiality) is treated by the Code as a protection for the minister who must loyally support a policy against which he had argued in Cabinet. He should not be exposed to unjust contrasts in the media between the views he once expressed and those he now professes to support. If that were its sole justification, it could be argued that it lapsed at the end of the administration when the immediate demands for an appearance of unity were over and he or she would be free to explain his or her position. However, Mr. Fellgett[2] asserted, there

[1] The terms primary and secondary are used simply as shorthand, not as indicating a view that the one is subordinate to the other.
[2] The Director and Deputy Head of the Economic and Domestic Affairs Secretariat.

> are further considerations. Disclosure of the opinions once expressed among themselves by former ministers, especially in Cabinet, is likely to inhibit candour in similar exchanges among their current and future successors, as mentioned above. Moreover – and this is perhaps another formulation of the same point – the duty of confidentiality is owed, not simply to the individual colleague, the Prime Minister or even the administration as a whole but to the convention itself and the enduring strength and confidence that it provides to the working of Cabinet government. Any breach, by minister, adviser, civil servant or FOIA disclosure, weakens the principle.
>
> 38 It is important to remember that the exemption relied on, s.35(1)(b), covers not simply Cabinet Minutes but all "ministerial communications", hence correspondence, memoranda and reports circulated to colleagues with relevant responsibilities and unminuted oral discussions – the product of "sofa government". The point is that Cabinet minutes, given the subject matter of discussions recorded, are likely to raise the issue of collective responsibility in its most acute form.

52. Mr Pocklington in evidence adds:

> " This does not mean that Ministers may not express different views internally. They must be able to express their views freely and frankly in order to enable the Government to take well-informed and carefully scrutinised decisions, whether those decisions are taken in Cabinet or Cabinet Committee or by individual Ministers. However, given that all Ministers will be expected to take responsibility for and defend the Government's decisions, it is crucial that the opinions expressed in Cabinet and Ministerial Committees, in correspondence and in records of conversation between Ministers, are not disclosed except in exceptional circumstances. Were it to become routine it would alter the character of discussions and reduce their effectiveness in producing good policy. It follows that the internal process through which a decision has been made, or the Committee by which it was taken should not be disclosed."

53. However he accepted the exemptions claimed in this case are qualified subject to a public interest test and there can be no absolute guarantee of non disclosure. However he considered there was a strong public interest in protecting the confidentiality of Ministerial discussions and communications in order to preserve the convention of Cabinet collective responsibility which he says applies in this case. He explained that such collective responsibility also applied to quasi-judicial responsibility to make certain decisions as was the position in this case.

54. The Commissioner accepts there is significant public interest in the convention on Cabinet collective responsibility and its importance in government decision-making. Also he accepts that there is continuing political significance of the issue of takeovers of British companies by foreign rivals.

55. However, he argues that the disputed information was at least 22 years old at the time of the request and therefore the weight to be given to this public interest reduces. Some information retains its sensitivity over time, while other information gradually loses that sensitivity. He says the circumstances of this case place it in the latter category.

56. Mr Pocklington particularly considered that discussions between Ministerial colleagues if revealed in the "near future" would have a chilling effect on the way such discussions would take place in future. He says that if disclosures of such information became routine it would alter the character of discussions and reduce their effectiveness in producing good policy. The chilling effect would also apply to civil servants supporting such discussions. This is an argument which the tribunal often has to consider in regard to the need for a "safe space" for policy formulation and development.

57. The Commissioner was not persuaded that disclosure in this particular case would have any serious impact in terms of eroding the 'safe space' for policy formulation, or in terms of a 'chilling effect'. In particular, disclosure would be very unlikely to:

    1. deter present or future members of the government from considering policy options which some might deem unpalatable;
    2. deter present or future members of the government from putting across their position robustly in relation to similar issues which might arise;
    3. result in unreasonable attempts to intervene in governmental decision-making on such issues; or
    4. pose a threat to the convention of Cabinet collective responsibility or the cohesive working of government.

58. Mr Pocklington admitted in cross-examination that the doctrine of collective responsibility had survived the "shock" of the ***Westland*** disclosures and other odd breaches of the convention but that did not justify future breaches.

59. Mr Pocklington points out that Lord Young, who was Secretary of State for Trade and Industry at the time, and therefore personally responsible for the decision on the Rowntree takeover, is a member of the House of Lords and in June 2010 was invited by the current Government to conduct a review of health and safety laws. This advisory project finished on 19 November 2010. He was later asked to act as an enterprise adviser but this was not until 2011. Mr Pocklington says that because Lord Young is still active in public life this is a relevant factor in weighing up the public interest in this

case. It was not brought to our attention at the hearing that any other ministers in 1988 were still active in public life in 2010. However we are aware that Kenneth Clarke was in the Cabinet in 1986 and in the Coalition Government at the time of the request and remains so, although not in the Department for Trade and Industry or today's equivalent.

60. Finally Mr Pocklington asserts in this case that the public interest is already served by other information in the public domain. The Commissioner's position is that there is insufficient evidence to support that assertion. In any case recent newspaper articles show there is continuing public interest in the events that took place in 1988 which even in 2010 were still affecting people in York. Mr Pocklington urged us to focus on the Minister's decision. The Commissioner says we should consider the evolution leading to the decision and any light particular information might shed on how Government and the Secretary of State arrived at their public decision. We consider that FOIA does not restrict us to what we might consider. Under FOIA we are required to consider "all the circumstances of the case".

61. As to these public interests for maintaining the exemption Mr Aitchison says

> " it is difficult to conceive of how disclosure of these Cabinet minutes could involve any apparent threat to the cohesive working of cabinet government, now or in the future. Those politicians involved in the Cabinet debate concerning the Rowntree takeover have to all intents and purposes left the public stage. The Rowntree takeover has no ramifications for the present government."

62. The Cabinet Office also claimed that a factor for maintaining the exemption was the lack of "... evidence of urgent or wide public concern with the circumstances of the acquisition ...", this lack being assessed solely by a media search undertaken at the time of the request. The Tribunal considers this approach to be misconceived. The Freedom of Information Act is based on an entitlement for an applicant to have disclosed to them information held by a public authority, subject to the exemptions provided in the Act. "Evidence of public concern" is not necessarily material to this entitlement. However we do have before us articles written by Mr Aitchison which seem to show a continuing concern of the people of York.

Public interest factors for disclosure

63. The Commissioner argues that there are strong public interests in the disclosure of the requested information. Those interests relate to enhanced transparency, openness and public understanding of the government's role in and views on (if any):

1. an important issue in industrial policy under the Thatcher government, namely how (if at all) to respond to calls for intervention in takeover bids with potentially serious consequences for competitive markets, and where the would-be purchaser enjoys legal advantages over its rivals;
2. the transfer of a long-standing British company to foreign ownership;
3. an issue of great importance, including in economic and employment terms, to a major British city, and
4. there is further substantial public interest in understanding whether there is merit in the reported suggestions of differences of view between ministers and of political motivation.

64. Mr Aitchison puts the public interest in disclosure in this way

> " York is famed internationally for its confectionary history. It was, for many years, home to two of Britain's best-known chocolatiers, Terry's and Rowntree (latterly Nestlé). And it is the birthplace of many famous products, including Smarties, KitKat, Aero and Fruit Pastilles. The confectionery industry constitutes a big part of York's identity. More broadly, the Rowntree's name holds a wider importance in York and the Rowntree family's legacy is held in huge regard. The takeover of Rowntree by Nestlé in 1988 was a momentous moment in the city's history and it deeply affected many thousands of people - economically and/or emotionally. Our newspaper at the time coordinated the "Hands off Rowntree" campaign, which drew considerable support. Around 13,000 readers signed petition vouchers, which were taken to Downing Street and around 1,000 people staged a demonstration in London. The takeover, and the opposition to it locally, generated news coverage around the world. I believe there can be little doubt that the takeover, and the Government's actions surrounding it, are of public interest and that there is, therefore, an inherent public interest in the public being able to read the impartial record of what was transacted in Cabinet on this issue."

65. Also he says "there is a public interest (and certainly an interest to the public of York) in reading the impartial record of what debate took place in Cabinet concerning the takeover of a very significant business interest in York, which had both historic and cultural implications."

Public interest balance

66. In order to consider the public interest balance we need to identify the time at which we should be considering the test. There has been a consistent line of tribunal decisions which has been largely approved by higher courts

that recognise that the time we should be applying the test is at the time of the request or thereabouts but no later than the time of the internal review, which in this case was 18 November 2010 ("the time period").

67. We have considered all the public interest factors referred to above, in the light of the time period, and have come to the following conclusions in order to apply these factors and the weight we should give to them in the balancing exercise we need to undertake in relation to the disputed information.

68. We consider that the convention in relation Cabinet collective responsibility is a very weighty public interest factor for maintaining the Ministerial Communications exemption (s.35(1)(b)). However at the time of the request the disputed information was 22 years old which in our view diminishes the weight to be given to this public interest in the circumstances of this case. The fact that the historical records provision will be changed only after the time period is something we cannot take into account. However we note that the policy decision to reduce the 30 year rule to 20 years was taken before the time period although not implemented. The new Coalition Government reconfirmed the policy in early 2011 and subsequently gave details of how they intended to implement the change but after the time we need to be considering the public interest test. Although we cannot take into account later factors we believe we can look at later events which shed light on the weight we might give to a factor existing at the time of the request. The fact that there are intended to be transitional provisions again sheds light on the factor existing at the time, and we note these seem to be for cost and operational reasons rather than relating to the type or content of the information.

69. At the time of the request the policy decision had been taken to reduce the 30 year rule. This did not change despite a new government. The government (in its various guises) had, in effect, decided that the public interest in keeping historical records secret for 30 years would reduce to 20 years.

70. We accept the Commissioner's view of the chilling effect on future behaviour in the circumstances of the case and therefore do not give it as much weight as the Cabinet Office would wish us to give this factor. In this case, 22 years later, there would be no information "revealed publicly in the near future" [3] about Ministerial communications (including discussions in Cabinet if any) in 1988. Also we are mindful of the fact Lord Young was no longer in government in 2010. Although he acted as an adviser this was not in a policy area related to mergers and it appears to have been a one off project in 2010 which ended at the time of the internal review.

71. We accept that government must be given a protected safe space for policy formulation and development. However in the circumstances of this case we

[3] Quote from Mr Pocklington's witness statement at para 19.

find that there is very little evidence that merger policy or the Ministerial Code were under active policy review during the time period. In any case merger policy is very different today to that in 1988. Therefore we find the need for a safe space was diminished and accordingly the weight we should attribute to this public interest factor.

72. The concern expressed by Mr Pocklington that Cabinet discussions and minutes if routinely disclosed would have a chilling effect and, in effect, make it difficult to maintain the convention on collective responsibility should be treated with a certain amount of circumspection. We would state, as have other tribunals faced with similar requests, that such information will be rarely disclosed because of the strong weight of the public interest in maintaining the exemptions. However we are required by law to consider the circumstances of each case and undertake a public interest test, so there will be occasions when the public interest balance favours disclosure. This does not mean, in Mr Pocklington's words, that it will "become routine".

73. In contrast the public interest in transparency and openness in this case seems to us to be very weighty indeed. This is not only for the reasons given by the Commissioner and Mr Aitchison, and the likely continuing consequences for employment in the confectionary industry in York. There is also a weighty public interest in knowing that when a Minister of the Crown is charged with exercising a quasi-judicial function (as was the case with the decision which fell to Lord Young to take about the takeover of Rowntree), the quasi-judicial role of the decision maker was not compromised by improper political or other pressure. Although the regime for taking decisions on takeovers has altered so as to remove Ministers from the process, there remain other areas in which controversial decisions have to be taken by Ministers on a quasi-judicial, rather than a political, basis. We discuss this aspect more fully in the confidential annex.

74. As a result we find that in the circumstances of this case, and also when aggregating the factors for and against disclosure, the public interest in maintaining the exemptions does not outweigh the public interest in disclosure. We particularly find that there is very significant public interest (including for researchers of social, political and industrial history) in reading the impartial record of contemporaneous communications regarding a matter that had been of widespread concern both nationally and locally (and is still of concern today), whether these documents show the public authority acting entirely properly or whether there is any evidence otherwise. We do not find in the circumstances of this case that the public interest in Cabinet collective responsibility has the same weight.

75. We have provided a detailed analysis of the disputed information in the confidential annex to this decision which will only be made open (if at all) when any appeal process has been exhausted and the decision to disclose upheld.

Conclusion and remedy

76. We find that the public interest balance favours disclosure. We therefore uphold the Commissioner's decision notice and order that documents i - v of the disputed information are disclosed within 30 days of the date of this decision. We also order that the Cabinet Office confirms or denies whether it holds information about Cabinet discussions of the Rowntree takeover within the same timeframe.

77. Our decision is unanimous.

[Signed on original]

John Angel
Judge Date: 15 October 2012