**IN THE FIRST-TIER TRIBUNAL Case No.s EA/2011/0225 & 0228**
**GENERAL REGULATORY CHAMBER**
**INFORMATION RIGHTS**

**ON APPEAL FROM:**

**The Information Commissioner's**
**Decision Notice: FS50341647**
**Dated: 13 September 2011**

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|---|---|
| **First Appellant:** | **Stephen Plowden** |
| **Second Appellant:** | **Foreign and Commonwealth Office** |
| **Respondent:** | **Information Commissioner** |
| **Heard at:** | **Field House London** |
| **Date of hearing:** | **28 and 29 March 2012** |
| **Date of decision:** | **21 May 2012** |

**Before**

John Angel
(Judge)

and

Dr Henry Fitzhugh
Marion Saunders

**Attendances:**

| | |
|---|---|
| For the First Appellant: | In person |
| For the Second Appellant: | James Eadie QC and Julian Milford |
| For the Respondent: | Robin Hopkins |

**Subject matter: s.27 FOIA international relations; s.35(1)(b) FOIA ministerial communications.**

***Cases***: *Hogan v IC and Oxford City Council [2011] 1 Info LR 588*
*Muttit v IC and Cabinet Office (EA/2011/0036)*
*Campaign Against the Arms Trade v IC and MOD (EA/2006/0040)*
*APPGER v IC and MOD [2011] 2 Info LR 75*
*R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 65*
*Cabinet Office v IC and Lamb [2011] 1 Info LR 782*
*Department of Health v IC, Healey and Cecil (EA/2011/0286 & EA/2011/0287)*

# DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal largely upholds the Information Commissioner's decision notice dated 13 September 2011 and orders the disclosure of the following parts of the record of a telephone conversation between President Bush and Mr Blair on 12 March 2003 within 30 days of the date of this decision:

Letter head
Header
Greeting
1st paragraph
Last sentence only of 2nd paragraph with the redaction of the 9th, 10th, and 11th words
1st and 3rd sentences only of the 3rd paragraph
1st sentence only of the 6th paragraph
Salutation
Cc line

# REASONS FOR DECISION

## Background

1. These appeals concern the information contained in a record of a telephone conversation between then Prime Minister Tony Blair and then US President George Bush on Wednesday 12 March 2003 concerning the possible invasion of Iraq (which began on 20 March 2003).

2. In early 2003, with Iraq not fully complying with its obligations under United Nations ("UN") resolutions (in particular resolution 1441) with regard to inspections of its weapons programme and facilities, the UK (along with the US and others) made diplomatic efforts to secure enough votes on the UN Security Council to enable the passing of a further resolution which would give Iraq a final deadline for compliance with earlier resolutions.

3. On 10 March 2003, the French President, Jacques Chirac gave a television interview, during the course of which he announced that France would not support the proposed resolution which gave automaticity for military action. Much of Mr Plowden's case concerns the UK's interpretation of Mr Chirac's words in that interview, and how that interpretation influenced the UK's decision to go to war against Iraq. In essence he considers that the UK and US misrepresented (or may have misrepresented) President Chirac's meaning in order to justify abandoning further efforts at securing a UN Security Council resolution.

4. At 11:48 on Wednesday 12 March, Matthew Rycroft, then one of Mr Blair's Private Secretaries, sent to a number of officials at 10 Downing Street an email entitled "French veto – urgent". In response to Mr Plowden's request for information the Foreign & Commonwealth Office ("FCO") initially withheld this document, but subsequently released it.

5. Later on 12 March 2003, Mr Blair and Mr Bush had the telephone conversation to which the disputed information in this appeal relates.

6. On 13 March 2003, two telegrams were sent detailing diplomatic discussions between the UK and France concerning President Chirac's comments and the French position. On similar themes and also on 13 March 2003, the FCO memo headed "France and Iraq" was compiled. These documents were also initially withheld, but subsequently released to Mr Plowden.

7. On 14 March 2003, Mr Blair and President Chirac discussed their positions on Iraq. This is set out in the record of their telephone call, which again was initially withheld but subsequently released to Mr Plowden.

8. On 18 March 2003, Mr Blair proposed to the House of Commons that the UK use all means necessary to uphold UN resolution 1441 and to disarm Iraq's weapons of mass destruction ("WMD") facilities.[1] Mr Blair's motion proposed that the House:

> " ... regrets that despite sustained diplomatic efforts by Her Majesty's Government it has not proved possible to secure a second Resolution in the UN because one Permanent Member of the Security Council [France] made plain in public its intention to use its veto whatever the circumstances".

That motion was passed.

9. The war against Iraq commenced on 20 March 2003. The UK ended formal combat operations in Iraq on 30 April 2009.

10. On 15 June 2009, the Government announced the establishment of the Iraq Inquiry, to be presided over by Sir John Chilcot ("the Chilcot Inquiry"). The Chilcot Inquiry officially launched on 30 July 2009. Its final hearings concluded on 2 February 2011. Its report is still awaited.

11. Jack Straw MP, Foreign Secretary at the time of the decision to go to war against Iraq, gave evidence to the Chilcot Inquiry on a number of occasions. During his evidence on 8 February 2010, Mr Straw was asked "whether it had been agreed between Number 10 and the White House on the afternoon of [12 March 2003] that we would, between us, say it was the French who prevented us from securing a resolution?"[2] Mr Straw referred to the record of the phone call with which this appeal is concerned. He maintained that Mr Chirac's intervention had made the securing of the requisite Security Council votes "close to impossible".

12. Three days later on 11 February 2010 Mr Plowden made his request – see below for this particular record. In his notice of appeal he explained that he wished to establish whether there was such an agreement made during 12 March telephone conversation.

**The Request**

13. By an email dated 11 February 2010, Mr Plowden made a request as follows:

> *"…My request under the FoI Act relates to some documents referred to in the transcript of the Iraq Inquiry for 8 February, the afternoon session when Jack Straw was the witness.*
>
> *On page 91, Sir Roderic Lyne referred to a number of messages from France received on 11, 12 and 13 of March 2003 explaining that the British had misinterpreted President Chirac's words in his TV interview of 10 March. I would like to see the records of these messages, both the written and oral messages, including the record of the telephone call from M Villepin to Mr Straw of 13 March.*

[1] HOC Hansard 18 March 2003 column 760.
[2] Extract from evidence at the Iraqi Inquiry.

*On page 92, Mr Straw said that in the course of his telephone conversation with M Villepin, he (Mr Straw) said that there should be a discussion of these issues at Head of Government level. I would like to know whether this was followed by a discussion between Mr Blair and President Chirac, and if so I would like to see the records of the discussion and any comments on it made by FCO Ministers or officials.*

*On pages 93 and 94, Sir Roderic referred to an agreement made with the White House (Mr Straw's answer to Sir Roderic makes it clear that this was a discussion between the PM and the President) to say that it was the French who prevented us from securing a resolution. I would like to see the records of that discussion and any comments on it made by FCO Ministers or officials."*

14. The FCO confirmed to Mr Plowden that it held five documents within the scope of the request. Three of the five documents related to the "first tier" of the request (messages from France); one related to the "second tier" of the request (discussion between Mr Blair and President Chirac); and one to the "third tier" of the request (a record of a telephone conversation between Mr Blair and President Bush of 12 March 2003).

15. By letter dated 12 April 2010 the FCO refused to disclose any of the information claiming that all documents were exempt under ss.27(1) and (2) and s.35(1)(a) FOIA ("Refusal Notice"). Mr Plowden asked for an internal review on 28 April. The FCO provided the response to the review by letter dated 6 July 2010 upholding its Refusal Notice.

**The legal framework**

16. FOIA s. 27(1) provides, insofar as is relevant here:

> (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,
>
> (b) relations between the United Kingdom and any international organisation or international court...

17. There are two essential elements:

a) would disclosure of the information be likely to prejudice international relations;

b) if so, does the public interest in maintaining the exemption outweigh the public interest in disclosing it.

18. In relation to the first element we note this is a prejudice-based exemption; the usual principles from *Hogan v IC and Oxford City Council* [2011] 1 Info LR 588 therefore apply. The requisite prejudice must be real, actual or of substance; the exemption is engaged if disclosure is more likely than not to cause such prejudice, or if there is a very significant and weighty chance of it, even if falling short of

being more probable than not: *Muttit v IC and Cabinet Office* (EA/2011/0036) at §40.

19. The threshold in the particular context of s.27(1) was explained by the Tribunal in *Campaign Against the Arms Trade v IC and MOD* (EA/2006/0040) at §81:

> " ... we would make clear that in our judgment prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from the KSA or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty. The prejudice would lie in the exposure and vulnerability to that risk."

20. In relation to the second element (the public interest test) we take note of the Upper Tribunal decision in *APPGER v IC and MOD* [2011] 2 Info LR 75, where the Tribunal adopted (at §56) the following extract from the Master of the Rolls' judgment in *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 – also see *Secretary of State for the Home Department v Rehman* [2001] UKHL 47:

> " In practical terms, the Foreign Secretary has unrestricted access to full and open advice from his experienced advisers, both in the Foreign Office and the intelligence services. He is accordingly far better informed, as well as having far more relevant experience, than any judge, for the purpose of assessing the likely attitude and actions of foreign intelligence services as a result of the publication of the redacted paragraphs, and the consequences of any such actions so far as the prevention of terrorism in this country is concerned."

21. We agree and apply the above principles. Moreover even though a national security exemption has not been claimed for the disputed information in this case we find that we are still subject to the same principles and should accept that the executive branch of Government has expertise and experience in relation to foreign policy matters as well as security matters which the Tribunal cannot match.

22. FOIA ss. 27(2) and (3) provide that (emphasis added):

> (2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.
>
> (3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the

> circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

23. As the Tribunal observed in ***Muttit*** at §59, s. 27(2) "is a class-based exemption, reflecting the fact that there is an inherent public interest in not breaching another State's confidences".

24. We also observe that whether information is confidential information under this exemption is different from the exemption under s.41 FOIA. There is no need to show an actionable breach of confidence. Whether information is confidential is prescribed by sub-section (3).

25. FOIA s. 35(1)(b) provides that:

> (1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—
> ...
> (b) Ministerial communications...

26. This exemption was considered by the Tribunal in *Cabinet Office v IC and Lamb* [2011] 1 Info LR 782. In ordering the disclosure of the Cabinet minutes concerning the decision to go to war with Iraq, the Tribunal considered the passage of time to be a relevant factor (§73). It also considered the exceptional features of the Iraq war decision to be highly relevant. At §81, the Tribunal found that:

> " The very unusual nature of those factors, particularly when viewed in combination, also have the effect of reducing any risk that this decision will set a precedent of such general application that Ministers would be justified in changing their future approach to the conduct or recording of Cabinet debate. This is not to say that it is only in such an extreme case as the present that disclosure should be ordered. It will be for future Tribunal panels to decide whether other sets of circumstances may justify disclosure. We simply decide that on the facts of this case the public interest in disclosure was at least equal, at the relevant time, to the public interest in maintaining the exemption."

27. In *APPGER v IC & FCO* EA/2011/0049-51 the Tribunal stated at §146

> " …..should we elevate ss 35(1)(b) and (d) to having the same inherent weight in favour of maintaining the exemptions as that of s.35(1)(c) which reflects a long standing Convention? We consider Blake J was referring to the combination of specificity and convention as establishing a strong weight in favour of maintaining the Law Officer exemption and both of these factors are not present together for subsections (b) and (d). However we are prepared to accept that the weight we should attribute to the s.35(1)(b) and (d) exemptions because of their specificity is higher than for s.35(1)(a), but not as weighty as for s.35(1)(c)."

We agree and adopt this finding in relation to the inherent weight we should apply to the Ministerial Communications exemption.

28. All of the above exemptions are qualified, meaning that they take effect only where "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information" – s.2(2)(b) FOIA. As the Tribunal confirmed in *Lamb*, "those arguing for disclosure therefore 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" (§34).

29. When applying the public interest test Mr Hopkins has drawn to the Tribunal's attention that we need to consider a few principles.

30. First, FOIA applies to information not documents. This principle is well established, but vital to a proper consideration of this appeal. The Tribunal's task is not to assess the consequences of disclosing the *record of the phonecall*, but the consequences of disclosing the *particular extracts from the information contained in that record*.

31. Secondly, in some cases before the IC and/or Tribunal, it is neither proportionate nor meaningful to dissect a requested document on a sentence-by-sentence or paragraph-by-paragraph basis. This, however, is an exceptional case, for the reasons given below. Given the exceptional gravity of the decision to commence war against Iraq, a sentence-by-sentence might be an appropriate approach provided it is meaningful in the context of the Request.

32. Thirdly, on a related note, it is vital that qualified exemptions not be treated as *de facto* absolute ones. The Tribunal has cautioned against this on a number of occasions, including in its very recent decision in *Department of Health v IC, Healey and Cecil* (EA/2011/0286 & EA/2011/0287) at §73:

> " 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."

**Complaint to Information Commissioner ("IC")**

33. Mr Plowden complained to the IC on 6 August 2010. During the course of the Commissioner's investigation, the FCO found a further document within the second tier of the request. On 3 March 2011, the FCO decided to disclose five of the six documents in their entirety, including a note of a discussion between Mr Blair and President Chirac. However, the FCO was not prepared to disclose the note of the telephone conversation between Mr Blair and President Bush of 12 March 2003.

34. The IC distinguished between those parts of the Blair/Bush note which contained or reflected information provided by President Bush ("the Bush information"), and those parts which did not ("the Blair information"). The IC found that s. 27(1) was engaged with respect to the Blair/Bush note in its entirety.

35. The IC noted his dissatisfaction that the FCO had been inconsistent as to whether it contended that the relevant prejudice "would" or "would be likely to" arise. He considered the FCO's final position to be that prejudice "would be likely to" arise (§§19-21 DN). He was satisfied that, given the importance of the UK's relationship with the US, s. 27(1)(a) was engaged (§§24-28 DN). The FCO made no mention of relations with the UN (the "international organisation" under s. 27(1)(b) to which the FCO had initially referred) in its later submissions to the Commissioner.

36. The IC found that s. 27(2) was engaged with respect to the Bush information only, as the remaining information was not "obtained from" the US. Although there was no direct evidence that the US had expressly indicated that the matters discussed should be treated as confidential, the context suggested this to be the US' expectation (§§30-34 DN).

37. Further, the IC considered s. 35(1)(b) was engaged with respect to the entirety of the Blair/Bush note because it was effectively a ministerial communication from the Prime Minister to the Foreign Secretary (§§36-39 DN). As s. 35(1)(b) was engaged, the Commissioner did not consider s. 36 as the exemptions are mutually exclusive.

38. The IC found that the public interest favoured the maintenance of the exemptions with respect to the Bush information. At §83 DN, the IC concluded that:

> " After careful consideration, and in circumstances where the respective public interest considerations are very finely balanced, the Commissioner is of the view that the public interest in maintaining the section 27 exemption to protect the confidentiality of the information provided by the US (in the form of information provided to Mr Blair by President Bush), outweighs, by a significant, but by no means overwhelming margin, the public interest arguments in favour of disclosure of this information, persuasive and weighty though they are."

39. As regards the remaining information, however, the IC concluded that the public interest in disclosure "appreciably exceeded" that in maintaining the exemptions at ss. 27(1) and 35(1)(b). He considered the public interest in accountability for the decision to go to war in Iraq to be "paramount"; disclosure would provide key information concerning what was discussed between Mr Blair and President Bush only days before military action against Iraq commenced. The Commissioner had regard to the decision of the Tribunal in ***Lamb***, which also concerned information concerning the decision to go to war in Iraq (in that case, the minutes of the relevant meeting of the Cabinet).

40. The IC concluded at §§87-88 DN:

> " In reaching this decision, the Commissioner has taken due account of the factors which, to a significant extent, reduce the strength of the important public interests protected by section 27 and section 35(1)(b). These factors include the fact that, at the time of the request, neither Mr Blair or President Bush remained in office (indeed a different administration was in place in the US and a different Prime Minister was heading the UK Labour Government), and Mr Blair no longer held a key role in domestic politics. In addition, UK forces were no longer engaged in Iraq. Most importantly of all, particularly with regard to section 35(1)(b) there had been a passage of time of almost seven years since the decision which forms the background to this request was taken, and a decision taken by government to have the circumstances surrounding the Iraq War and lessons learned from the same, investigated by a major public inquiry.
>
> All of these factors, in the Commissioner's view, mean that the public interest considerations both for and against disclosing the identified partial information, are at the very least equalised. As the Tribunal confirmed in the aforementioned Cabinet Minutes case, 'those arguing for disclosure therefore 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'. In the present case, given the impetus for disclosure generated by the importance of the information concerned, the Commissioner is satisfied that at the time of the request, the complainant was entitled to the slight advantage referred."

41. Other important factors in the IC's decision included (a) that the FCO appeared from its own correspondence to be taking a "blanket" approach, i.e. basing its arguments predominantly upon the type of information rather than the particular information (§73 DN); (b) that a record of a comparable conversation between Mr Blair and President Chirac had been placed in the public domain (§75 DN), and (c) that Sir John Chilcot, who presided over the Iraq Inquiry, had commented upon the problems caused by the withholding from the public domain of information about crucial exchanges between Mr Blair and President Bush (§§93-95 DN).

42. The IC accordingly ordered disclosure of the Blair/Bush note, but with the Bush information redacted.

**The appeal to the Tribunal**

43. Mr Plowden appealed to the First-tier Tribunal ("FTT") on 6 October 2011 against the IC's decision that the Bush information should be withheld. The FCO appealed against the IC's decision to disclose the rest of the information. Both considered that the IC had determined the public interest balance wrongly in relation to the parts of the record of the Blair/Bush conversation on 12 March 2003 ("the disputed information") which were not decided in their favour.

44. Mr Plowden considered

    a) the IC's conclusion that the public interest favoured the maintenance of the exemptions with respect to the Bush information was wrong;

    b) the IC gave too much weight to the public interest in the UK's relationship with the US as compared with other countries and/or the UN;

    c) the IC erred in accepting without evidence the FCO's judgment that the US would be seriously concerned by disclosure of the Bush information; and

    d) in relation to the likely effects on the UK's relations with the US that disclosure of this particular information would not set a precedent for all similar information to be disclosed in future.

45. The FCO appealed against the rest of the IC's decision. The FCO considered that the IC had got the public interest balance right for the Bush information but wrong for the Blair information.

46. The Tribunal ordered that both appeals be consolidated and heard at the same time.

47. The hearing was held on 28 and 29 March where evidence was heard in open and closed sessions. This is the FTT's normal practice where evidence is required in respect of the disputed information which by its very nature must remain confidential under FOIA until the Tribunal orders disclosure and the appeal process has been exhausted.

48. The FCO provided evidence through two witnesses. Angus Lapsley is Director for the Americas who advises the Foreign Secretary and Minister of State within the FCO directly and is regularly engaged with counterparts in the United States. David Quarrey is the Afghanistan and Pakistan Co-ordinator and Director, Foreign Policy, National Security Secretariat. He has been working in the Cabinet Office in this role since July 2011. Both witnesses gave evidence in open and closed sessions.

49. Mr Plowden gave evidence on his own behalf. He also called Clare Short who was an MP for many years and a member of the Cabinet and Parliamentary Labour Party at the time the UK went to war against Iraq. The IC did not provide any witnesses.

50. At the end of the hearing the Tribunal directed that the parties could provide final written submissions by 10 April. This was later extended to 17 April 2012.

## Questions for the Tribunal

51. The IC found that s.27(2) was engaged for the Bush information and that ss 27(1) and s.35(1)(b) were engaged for all the disputed information. Neither appellant is disputing these findings.

52. If the Tribunal find these exemptions are engaged then the only questions for us are:

    a) what information is covered by the s.27(2) exemption?

    b) whether the public interest balance favoured:

        i) maintaining the s.27(2) exemption (and any other exemptions) for the information covered by the s.27(2) exemption, and

        ii) disclosing the rest of the disputed information.

53. In relation to the application of the public interest test under s.2(2)(b) the FTT is required to determine whether "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

**What exemptions are engaged?**

54. The disputed information is an internal note between two ministerial private secretaries recording the main points discussed between President Bush and Mr Blair during a telephone conversation on 12 March 2003. The note had a very limited distribution list. We agree with the FCO and IC that s.35(1)(b) (Ministerial Communications) is engaged for all the information. The disputed information is in the form of a letter written between the Prime Minister's Private Secretary and the Foreign Secretary's Private Secretary.

55. We also agree with the FCO and IC that s. 27(1)(a) (International Relations) is engaged. Here there is a prejudice based test. Mr Lapsley explained in evidence that the UK has a uniquely close and privileged relationship with the US. He stated that there was "no comparator" in terms of "breadth and depth" of the UK's relationship with the US. This relationship is vital to the UK's national interests. The relationship between Prime Minister and President is the apex of and most important strand of this "special relationship". The US expects and requires confidentiality as regards the records of the private conversations of heads of state. The US information is characterised by immediacy, frankness, informality and a context of exceptional gravity. In Mr Lapsley's view disclosure of this information would cause significant damage to these relationships. There would be a significant risk of a "cooling off" or of a reduction in access and candour from the US' side. Any reluctance by the UK's international partners to entrust it with confidential information would weaken the UK's bargaining position.

56. These points were confirmed by Mr Quarrey. He explained the presumption of absolute confidence which such exchanges tend to attract, and the importance to the UK of the US President speaking freely and frankly to the Prime Minister. He confirmed that disclosure of such information would result in a real risk of the US withholding information or seeking to place restrictions on the handling within the UK of US information. Mr Quarrey explained that the UK has a privileged insight into US policy-making beyond that enjoyed by other countries.

57. The FCO witnesses were unable to show actual evidence of prejudice despite a few disclosures in other matters relating to the US at court and ministerial level. However the Tribunal accepts the evidence of the witnesses and finds that the disclosure of the disputed information would be likely to prejudice the relations between the UK and the US.

58. The IC also found that s.27(2) was engaged for the Bush information. The Tribunal having considered the disputed information and the closed evidence in relation to it find that s.27(2) is engaged for the Bush Information on the same basis as the Commissioner, but that the extent of the Bush information is greater than that found by the IC.

59. In the Tribunal's view the IC took too narrow a view of the words "confidential information obtained from a State other than the United Kingdom" in s.27(2). Although there was no express confidentiality agreement, the circumstances described in evidence in this case make it clear to us that there was an expectation of confidence in relation to the discussions at head of state level in the circumstances of this case and any record of the discussions. However s.27(2) only relates to information "obtained" from President Bush in this case. The disputed information records what President Bush says. That is what the IC describes as the Bush information. However the record also includes a note of whether Mr Blair agreed with what was said without further analysis. In our view this is so closely related to the Bush information that it is difficult to distinguish it in terms of what is or is not caught by s.27(2). If it is not caught then there would be the ridiculous position of say a proposal being put forward being protected from disclosure, but the agreement to that proposal not being so protected, even though that agreement is meaningless without knowing what the proposal was. This could lead to unnecessary or incorrect conjecture or inference. We cannot believe that is what Parliament meant when drafting s.27(2).

60. The disputed information also includes what President Bush and Mr Blair discussed and agreed together without identifying who originated the subject of the discussion. Here it is impossible to distinguish what President Bush actually said. Again we believe that Parliament intended for us to take a common sense approach so that mutual exchanges of this kind can potentially be protected under s.27(2), as well s.27(1)(a).

61. The importance of the distinction between the two sub-sections is that although they are both qualified exemptions one is class based and the other is not. In other words whereas s.27(2) is automatically engaged, s.27(1)(a) has to satisfy a prejudice based test before being engaged.

**Mr Plowden's evidence**

62. Mr Plowden's evidence largely challenged the merits of the "special relationship" between the US and UK and the legality and merits of the decision to commence war with Iraq. He also identified what he considered to be deficiencies in the mechanisms for executive decision-making in the UK, for example Mr Plowden suggested that there should be greater scrutiny by the Cabinet and/or Parliament of prime ministerial decisions.

63. Ms Short explained that she had serious reservations about going to war with Iraq as had many other PLP (Parliamentary Labour Party) colleagues. The 'red line' as far as the doubters were concerned was the lack of a specific UN mandate in the form of a 'second resolution' authorising the use of force. Mr Blair had promised that there would not be military action without a second resolution. Her view was that UNSCR 1441 did not authorise the use of force. Mr Blair went to great lengths to get the Security Council to agree to a second resolution. Ms Short claims that having failed to persuade a majority of the Security Council to support a draft second resolution Mr Blair's argument shifted. Firstly the Attorney General's opinion now found it would be lawful to go to war without a second resolution. Secondly in any case President Chirac had said France would veto any second resolution and therefore it had become impossible to get a second UN resolution. These changed facts, amongst others, persuaded Ms Short to support the Cabinet decision to go to war.

64. Ms Short later obtained a transcript of the Chirac interview. In her view this made it clear that France would vote against any resolution that truncated the Blix process (UN weapons inspectors) or allowed the US and UK to declare war without specific UN authority. However President Chirac also said that, if after a few months, the inspectors found that there was no guarantee of Iraq's disarmament it would be for the Security Council to decide the right thing to do (and in his words) "but in that case, of course regrettably, war would become inevitable. It isn't today." Ms Short considers that this statement cannot be reconciled with the Government's assertion that President Chirac had said France would always vote against and if necessary veto any resolution authorising the use of force, then or at any time in the future.

65. Ms Short also points out to us that she became aware that the disputed information had a very limited distribution or circulation list. She explained that such notes are usually circulated more widely around Whitehall in accordance with the Ministerial Code. However in the run up to the Iraq war they ceased, in her understanding, to be circulated so widely. Even the opinion on whether it would be legal to go to war was not circulated to members of the Cabinet in the usual way. She suggests that the reason is not so much about national security but rather political security.

66. In Ms Short's view the Americans did not need a second UN resolution to satisfy their domestic needs. However Mr Blair wanted legitimacy for a decision to go to war in order to ensure he had the backing of his party. The stumbling block was legal authority without a second UN resolution. This was overcome by the Attorney-General's final legal opinion, the alleged position of the French veto over any resolution and briefing against Hans Blix in order to discredit his investigations.[3] The war in Iraq had profound results which led to the setting up of the Chilcot Inquiry. Ms Short considers the conversation between Mr Blair and President Bush would provide an important contribution to understanding how this happened, particularly because of the email of 12 March 2003 which she had not seen before this hearing.

[3] Transcript day 2 page 65 lines 13 and 14 and page 77 lines 2 to 5.

67. At 11.48 on 12 March 2003, before the telephone conversation between President Bush and Mr Blair later that day, an email was sent by the Prime Minister's Private Secretary to other staff at No.10 and one other marked 'high' importance and headed the 'French veto – urgent' as follows:

> " The French Ambassador has just called, on instructions from the Elysee, to say that Chirac's comment '*Whatever happens, France will vote no'* needs to be read in the context of what he said immediately before about 2 hypotheses – either our resolution gets nine votes or it doesn't. In other words, the Ambassador claims that it is not the case that he said that he would vote no against any resolution."

68. Ms Short says it is inconceivable that Mr Blair would not have known about this email before his telephone discussion with President Bush later that day.

69. In summary Ms Short considered that at best Mr Blair was economical with the truth in order to get the necessary Cabinet and Parliamentary support to declare war on Iraq in March 2003, albeit sincere in his desire to do the best for the country. Her view is that the significance of the war is such that there is a very weighty public interest in knowing whether Mr Blair and President Bush discussed, during their conversation on 12 March, the way they would present the French position.

70. Mr Plowden says that there was little chance of getting a second resolution passed with the necessary 9 votes needed and therefore the UK deliberately set out to blame the French position for why they had to proceed without such a resolution. He explained that one reason for haste was that the military timetable was in conflict with the diplomatic timetable.[4]

71. It is not for this Tribunal to determine what the French position was or whether there was an alleged misrepresentation by Mr Blair to the Cabinet, PLP and Parliament of President Chirac's stance on the securing of a further UN Resolution. That may be a matter for the Chilcot Inquiry. Our role is only to determine whether the controversy surrounding this amounts to a public interest factor we need to take into account in this case and if so what weight to give to the factor.

**The FCO's evidence**

72. Mr Lapsley in previous roles and his current role has direct daily experience with liaising with senior US officials. His evidence can be summarised as follows:

    a) There is a heightened public interest in matters surrounding the UK's military action in Iraq in the light of the controversial nature of the UK's intervention in Iraq. However this is outweighed by the prejudice to the UK's relationship with the US if the information in this case was disclosed.

[4] Hans Blix reference from the Chilcot Inquiry pages 270 and 288 lines 8 to 12.

b) The relationship has a level of intimacy, trust and confidence unparalleled in our dealings with other countries in respect of the UN, NATO, intelligence sharing and many other important matters.

c) Maintaining the strength and trust of the relationship with the US is vital to the UK's national interest.

d) The relationship between the UK Prime Minister and the US President represents the very apex of the networks of links between the UK and the US and is the most important link between the two countries and has "huge value" to the UK's national interests.

e) Although there is no formal confidentiality agreement for private conversations at Heads of State level, there is a presumption of confidentiality underpinned by a number of factors including:

   i) Immediacy and frankness of exchanges and the informality with which these exchanges are reported;

   ii) The context in which the exchange took place particularly in this case (subject of exceptional gravity);

   iii) It would be a serious breach of diplomatic etiquette to disclose one government's view of another;

   iv) The particular culture and attitudes of the US government which has a strong culture of confidentiality and expectation of confidentiality.

f) Disclosure of the disputed information would cause significant damage to the relationship between the US and UK governments and relationship between the US President and UK Prime Minister where they feel free to think out loud and effectively to formulate policy together subject to state ratification.

g) There would be a significant risk of a "cooling off" in the extent to which the US administration cooperated with and confided in the UK government, although there was no evidence that this had happened so far despite disclosures in other legal proceedings and elsewhere, albeit not between a UK Prime Minister and US President.

h) The knowledge that the type of conversation involved could be liable to disclosure would be likely to have an adverse or "chilling effect" on such conversations and their recording.

i) Our relationships with other countries would be adversely affected if it were seen that our degree communications with the US had diminished.

j) The Chilcot Inquiry meets any public interest need for transparency.

73. When Mr Lapsley was asked about what he thought would be the extent of the expected damage if there was disclosure he did not think there would be a reduction in intelligence sharing of a kind which would threaten the UK's security.[5]

74. We note that although the FCO originally argued in the Refusal Notice that disclosure of the disputed information would be likely to have a harmful effect on US/UK relations there was no evidence provided to the Tribunal that suggested this had happened following the disclosures at the Chilcot Inquiry.

75. Mr Quarrey who had spent time in 10 Downing Street as one of the PM's Foreign Policy Private Secretaries explained that the Prime Minister and US President spoke regularly on matters within his remit. He said "their discussions were conducted with a presumption of absolute confidence." He took notes of these conversations and circulated the record in the form of a letter to a limited senior readership in order to inform Whitehall colleagues of US thinking, the Prime Minister's views and the action points agreed. In his view even to have raised the question of their confidentiality with the US would have raised concerns about the extent to which the Prime Minister and President could speak completely frankly. Records of conversations were given protective markings under the UK system of classification. In general, they would be marked in most cases "CONFIDENTIAL", and in some cases "SECRET". Mr Quarrey explained the "security" classification covers information whose disclosure is likely to:

    a) Raise international tension;
    b) Damage seriously relations with friendly governments;
    c) Threaten life directly, or seriously prejudice public order, or individual security or liberty;
    d) Cause serious damage to the operational effectiveness or security of UK or allied forces or the continuing effectiveness of highly valuable security or intelligence operations;
    e) Cause substantial material damage to national finances or economic or commercial interests.

    The "confidentiality" classification covers information whose disclosure is likely to:

    1. materially damage diplomatic relations;
    2. prejudice individual security or liberty;
    3. cause damage to the operational effectiveness or security of UK or allied forces or the continuing effectiveness of highly valuable security or intelligence operations;
    4. work substantially against national finances or economic or commercial interests;
    5. impede the investigation or facilitate the commission of serious crime;
    6. impede seriously the development or operation of major government policies;
    7. shut down or otherwise substantially disrupt significant national operations.

[5] Transcript Day 1 page 107 lines 17 to 23.

76. Mr Quarrey considered that the release of the disputed information would seriously worry the US administration and would risk it reconsidering the way in which it speaks to the UK Government, including the way in which exchanges take place at Head of State or Government level. It risks the UK losing a particularly privileged position vis-à-vis the US. In any case he says the Chilcot Inquiry has examined the issue that Mr Plowden is concerned about and provided a number of examples where Mr Blair, Mr Straw and others had given relevant evidence before the Inquiry.

77. Both of the FCO witnesses accepted that there could be exceptional circumstances where notes of conversations between a UK Prime Minister and US President justified disclosure if it was uncontentious and the US agreed to disclosure, but the Iraq war was not such a circumstance.

**The public interest test**

78. We should remind ourselves of the actual request we are considering:

> *In pages 93 and 94, Sir Roderic referred to an agreement made with the White House (Mr Straw's answer to Sir Roderic makes it clear that this was a discussion between the PM and the President) to say that it was the French who prevented us from securing a resolution. I would like to see the records of that discussion and any comments on it made by FCO Ministers or officials*

The FCO says that it holds one document with that description which is the disputed information – the note of the telephone conversation of 12 March 2003.

**Factors in favour of disclosure**

79. Mr Plowden puts his case in the following nutshell:

> " *going to war is the most important decision a country can take. The invasion of Iraq was and is widely believed both in Britain and abroad to be illegal and immoral. It led to thousands of British casualties, the deaths of thousands of innocent Iraqi civilians and untold other sufferings. The invasion increased the threats to our national security: the attacks on London on 7 July 2005 were made by people angered by this action and so too, apparently, were other planned attacks which the security forces have thwarted. The claim used to justify the invasion, that Iraq possessed weapons of mass destruction and had failed to comply with UN Security Council mandatory resolutions requiring Iraq to rid itself of such weapons, turns out to have been mistaken. Even if there had been good grounds for that belief at the time, peaceful means of getting rid of these weapons through the work of the UN's inspectors and by other peaceful diplomatic efforts had not been exhausted. All this is already pretty well known. The question which is still to some extent obscure, and on which documents whose disclosure I have requested might throw light, is whether the British prime*

*minister and foreign secretary deliberately misrepresented the French position in order to justify the invasion."*[6]

80. During the course of the proceedings and in his final submissions it was clear that Mr Plowden was looking for any information that could help understand why the UK went to war with Iraq.

81. In our view Mr Plowden provides a very weighty public interest indeed in favour of disclosure. We make this finding even though the FCO witnesses downplayed the importance of a decision to go to war, which we find difficult to accept. Also in our view, particularly from the evidence in this case, the circumstances surrounding a decision by a UK government to go to war with another country is always likely to be of very significant public interest, even more so with the consequences of this war.

82. The FCO acknowledge the strength of the public interest in transparency about, and accountability for, the UK government's decision to commence war against Iraq because it would provide key information concerning what was discussed between Mr Blair and President Bush only days before military action against Iraq commenced.

**Factors in favour of maintaining the exemptions**

83. The inherent public interests in the three exemptions engaged represent the principal factors in favour of maintaining the exemptions in this case. There is a very weighty public interest in the Tribunal's extended definition of the Bush information not being disclosed for the reasons given by the FCO's witnesses. The likelihood of relations with the US being prejudiced by disclosure of confidential information provided by President Bush to Mr Blair just before war with Iraq was declared is very high indeed.

84. The whole of the disputed information is subject to s.27(1)(a). There has been expert evidence that any disclosure could lead to a reduction in information sharing generally which would in turn lead to the severe prejudice of the UK on security and diplomatic levels. Although Mr Plowden questions this, following the approach of other Tribunals set out in §§ 20 and 21above, we accept the evidence of the senior civil servants given in this case. This again is a very weighty factor against disclosure.

85. The record of the discussion on 12 March took the form of a ministerial communication. The inherent weight of this exemption only adds to the weight of the factors against disclosure.

**Public interest balance**

86. Before undertaking this exercise we note that Mr Hopkins argues it is axiomatic that, in considering the engagement of exemptions and the public interest test, the focus must be on the *particular information*, rather than the *type* of information.

[6] Open Bundle pages 85 and 86

This is not to say that the latter is irrelevant. For example, the IC and FCO both agree that disclosure of any information from a record of this type is likely to result in an adverse diplomatic reaction from the US. We agree which is why we find that the claimed exemptions are engaged – see above. However, where (as here) a sentence-by-sentence approach is called for, and where there is exceptionally strong public interest in the disclosure of the information – see below, then it will not do simply to say that *nothing* from a record of a conversation between a UK Prime Minister and a US President should be disclosed. Rather, it is important to ask, with respect to each sentence: what is it about this particular information which would *additionally* (i.e. over and above the fact that it comes from a record of a Prime Minister-President conversation) prejudice international relations such that the public interest in disclosure is outweighed?

87. In relation to these principles we note that with respect to the Blair information, the FCO has (a) focused too much on type and insufficiently on particularity, and (b) adopted an approach which is tantamount to saying that, as regards the US (or at least as regards communications with the US at head of state level), no information which engages ss. 27(1) or (2) should *ever* be released. In other words, when it comes to the US, the FCO appears to treat qualified exemptions as absolute ones.

88. These points are borne out by the evidence before the Tribunal. Ms Short's evidence, for example, was that Gus O'Donnell (then Cabinet Secretary) effectively adopted the position that "anything to do with the Americans should not be published".

89. Further, the FCO was clear that it applied an exceptionality threshold for the disclosure of any information of the sort contained in the record of the disputed information. When asked under what sorts of circumstances information falling within s. 27(1) might be released, Mr Lapsley and Mr Quarrey gave examples of anodyne information (which Mr Quarrey accepted was unlikely to be recorded in the first place) or information which the US agreed could be disclosed. To the extent that either scenario is realistic, it is of no assistance here, because s. 27 would not be engaged in such circumstances. In our view the tenor of the FCO's case is that when it comes to the US, no information of the sort with which this Tribunal is concerned should ever be released.

90. Bearing these points in mind we are faced with a very difficult task. The strength of the weight of the factors for and against disclosure, are very high in this case.

91. The main public interest in favour of disclosure in effect played a large part in the setting up of the Chilcot Inquiry. The decision to go to war with Iraq was of exceptional gravity and controversy. Information that can provide a better understanding of the events leading up to and how we made that decision is in our view subject to an exceptionally strong public interest in disclosure. However no party in this case is suggesting that the Inquiry will not be able to do substantially the job it is tasked with. In fact Ms Short speaks very highly of some of its members. It has still to report but is expected to do so in the autumn. We know that it heard evidence about the subject matter of this case and has seen the disputed material. However the then Cabinet Secretary Gus O'Donnell would not

give the Inquiry the right to publish the disputed information although it would appear the Inquiry will be able to refer to it and draw conclusions from it. There was evidence that one reason for the delay in publication of the report is because the Inquiry has approached the new Cabinet Secretary as to whether he still wishes to maintain Gus O'Donnell's position on disclosure of the disputed information and other documents. However at the time of the Request this was not necessarily a factor. Whatever the position there is a strong expectation that Chilcot will address the public interest expressed so clearly by Mr Plowden above, even if this does not lead to the actual disclosure of the disputed information.

92. Therefore in our view the strength of this exceptional public interest in disclosure is lessened because Chilcot is dealing with it, albeit it is unlikely to be able to disclose the actual document and there are continuing delays in publication.

93. The public interest in favour of maintaining the exemption is also exceptionally strong, namely that it could prejudice the relations with our main ally, the US. However there is no actual proof although we accept the expert opinion of the FCO witnesses. Moreover we note that despite the revelations from the Chilcot hearing in relation to the disputed information the FCO witnesses were not able to give examples of any prejudice which had arisen since those disclosures. Also we take into account the matters referred to in the Decision Notice at §40 above including that neither participant in the 12 March 2003 conversation was in office at the time of the Request and that our troops had left Iraq by that time. These matters in our view go to lessening the strength of this public interest. We do not consider that the disclosure of the President Chirac/Mr Blair conversation further weakens the exemption in the circumstances of this case.

94. Applying these factors to the disputed information and the evidence in this case, we take a similar approach to the IC in respect of the Bush information (with our wider interpretation) and the Blair information. We are of the view that we should consider the disputed information on a sentence by sentence and paragraph by paragraph basis in the circumstances of this case.

95. We agree with the IC that the weight of the public interest in maintaining the exemptions for the Bush information (with our wider interpretation) narrowly outweighs the public interest in disclosure. The fact that the s.27(2) FOIA exemption is engaged for this information, in our view, tips the balance.

96. For the Blair information (where only ss.27(1)(a) and 35(1)(b) are engaged) we find that the public interest balance is the reverse and that the public interest in disclosure narrowly outweighs the public interest in maintaining the exemptions.

## Conclusion

97. Our findings on the public interest balance mean that parts of the record of the telephone conversation between President Bush and Mr Blair on 12 March 2003 must be disclosed. These parts are identified in the Decision at the commencement of these reasons and must be disclosed to Mr Plowden within 30 days of the date of this decision.

98. Our decision is unanimous.

Signed:

John Angel
Principal Judge (FTT IR) Date: 21 May 2012