The Campaign for Freedom of Information

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Response to the Call for Evidence

by the Commission on Freedom of Information

(Updated 27.11.15)

This paper is an updated version of the submission previously made to the Commission on Freedom of Information. In particular, it adds further Tribunal cases to the survey at paragraphs 36 to 76 and a discussion of their implications.

The Campaign

1. The Campaign for Freedom of Information was established in 1984 to promote freedom of information legislation in the UK. We played a key part in encouraging the government to introduce what became the FOI Act and in improving the bill during its Parliamentary passage. We work to improve the operation of the legislation, assist requesters in using it, promote good practice and provide training to both requesters and public authorities.

INTERNAL DISCUSSION

2. The Campaign's view is that the FOI Act's existing approach to the disclosure of internal discussion provides more than adequate protection for sensitive information. There is no case for providing greater protection.

The public interest test

3. The FOI Act's exemptions for internal discussions are found primarily in section 35(1)(a) for information relating to the formulation and development of government policy; section 35(1)(b) for information relating to ministerial communications; section 36(2)(a) for information likely to prejudice collective responsibility; and sections 36(2)(b)(i) and (ii) for information likely to inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation.

4. These provisions are all subject to the Act's public interest test. Exempt information can only be withheld if the public interest in maintaining the exemption outweighs that in disclosure. The public interest test is of particular importance in relation to the section 35(1)(a) exemption because of its vast and indiscriminate approach. It protects all information relating to policy formulation, regardless of its source, content or sensitivity. It does not focus on advice, assessment or exchange of views but catches anything which relates to policy under consideration, including newspaper editorials, published reports, purely factual information, research studies, consultation responses and other material which may reveal little if anything about the particular options under consideration or the views of the officials or ministers considering them.

Without the public interest test all such information would be protected for 20 years, regardless of its sensitivity.

5. The public interest test is also the route by which the public may obtain technical insight into the background to policy issues. It may explain the shortcomings of statistics, the reasons why a statutory definition has taken a particular form, why specific research findings need to be treated with caution or why a problem falls outside the reach of legislation which might be thought to address it. Access to such material may improve the public's understanding of an issue or allow those with the knowledge and interest to discuss it with government in ways that contribute to better decisions. It may also highlight shortcomings in the official approach to an issue, which government itself may not recognise or prefer not to acknowledge. It may assist those trying to persuade the government to pay attention to an issue not on its agenda – or those trying to dissuade it from taking action of which they disapprove. The public interest test is what opens those doors. Without it the exemptions would keep them permanently shut.

6. The suggestion that these exemptions might operate without the public interest test, whether for 20 years or some shorter period, would be an enormously retrograde step entirely at odds with the public's expectations, the requirements of accountability and the government's own declared commitment to openness.

7. In this context we note the prime minister's 2010 declared intention that Britain should become 'the most open and transparent in the world'[1]. We also note the recent statement by the Leader of the House of Commons, Chris Grayling, that FOI:

> 'is a legitimate and important tool for those who want to understand why and how governments make decisions, and this government does not intend to change that'.[2]

That strongly suggests that access to internal discussions should *not* be restricted.

'Safe space' and 'chilling effect'

8. In considering requests for information about internal discussions, the Commissioner and Tribunal apply two separate concepts: 'safe space' and the 'chilling effect'. The first refers to the shielding of the decision-making process from the difficulties that may be

[1] http://www.opengovpartnership.org/country/united-kingdom
[2] House of Commons debates, 29 October 2015, col. 522

caused by the public peering over the shoulders of officials or ministers as they develop their thinking. An early decision of the Information Tribunal explained:

> 'The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy'[3]

9. By definition, the need for this 'safe space' is held to come to an end once the decision is announced or shortly afterwards. That does not mean that advice or other policy materials are then freely available on request. Any harm to the public interest that may then be caused also has to be assessed and this is often done by focussing on whether disclosure would have a 'chilling effect' on the recording of similar material in future. The chances of that are assessed in light of factors such as the frankness of any views, the sensitivity of the issue, the age of the information at the time its disclosure would occur and the consequences of the disclosure. Particular weight is given to disclosures that might damage working relations within government, perhaps as a result of an official's comments being used by critics to attack the minister, in turn making the minister less likely to seek such views in future. If such a 'chilling effect' is likely, a further question is asked: whether the public interest in avoiding that harm outweighs the public interest in disclosure.

10. It may be difficult to demonstrate whether a 'chilling effect' has occurred. The Upper Tribunal (UT) has recently overturned a First-tier Tribunal (FTT) decision precisely because the FTT gave weight to the fact that after 10 years of FOI the government had still failed to provide direct evidence of it. The FTT had suggested the department should have compared records before and after FOI to look for such changes. The Upper Tribunal described this as an 'unrealistic and unattainable' expectation.[4] We think that overstates the problem. The exercise may be complex, but it is certainly not unattainable.

11. Such research was carried out in 2001 by the National Archives of Canada as part of a review of Canada's Access to Information Act (ATIA). Archivists examined numerous

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[3] EA/2006/0006, Department for Education and Skills & Information Commissioner & The Evening Standard, 19 February 2007.
[4] Department for Work and Pensions v Information Commissioner, John Slater and Tony Collins [2015] UKUT 535 (AAC) (20 July 2015)

series of government records to see whether any difference could be found between similar records created before and after the Act's 1983 introduction. The selected series of records included minutes of a permanent secretary level committee dealing with fisheries, minutes of a ministerial advisory council on the environment, records relating to two prime ministerial visits to Moscow one before and one after the Act, records used to advise ministers on the progress of public works projects and all the operational files of four central agencies including the Treasury Board, a body with many of the functions of the UK's Cabinet Office.

12. The study examined the volume, comprehensiveness and completeness of narrative of records before and after the ATIA.

13. The researchers assumed that they would discover that the Act 'had a significant and negative influence on record-keeping'. In fact their results showed that:

- 'the quantity of records was stable before and after the Access to Information Act'.
- 'The issues dealt with in records after 1983 remained as significant and complex as they were prior to the legislation.'
- 'The content/narrative remained unchanged after the introduction of the…Act. All elements of records were captured from beginning to end in a comprehensible fashion and consistently for all Government areas we examined.'
- The only detected changed was a reduced volume of central agency records following changes to archiving instructions but in these cases the retained records 'were more substantial…quality made up for quantity'

14. The National Archives concluded:

> 'At the outset of the investigation, it was expected that we would find differences in record-keeping in the Government with the implementation of the Act in 1983. However, after extensive analysis, this was not found to be the case.'[5]

[5] The Access To Information Act and Record-Keeping in the Federal Government, August 2001, National Archives of Canada. Available online at the time of writing at http://fs.huntingdon.edu/jlewis/FOIA/CanATI/Attallah02paper-records1-e.html

15. This study does not of course tell us what has happened in the UK. Its significance is that it demonstrates that *assumptions* about a 'chilling effect' may not withstand critical examination. They should not be the basis for legislative changes.

16. The Tribunal has often asked officials giving evidence to it whether FOI has deterred them from recording what should have been recorded. The standard reply appears to be for witnesses to insist that they have never done so, but fear that weaker-willed colleagues elsewhere may have.

17. If officials *fear* that what they write will be disclosed under FOI, their recording may well become more careful. It does not follow that this will involve the omission of significant information, let alone omissions which undermine good government. It may simply involve a reduction in the use of uninhibited language or expressions of exasperation that occur, particularly in emails, between colleagues who know each other well.

18. A more important question may be whether their fear of disclosure is well founded – or based on a misunderstanding of the level of protection actually provided under FOI.

19. The Justice Committee's 2012 report on its post legislative scrutiny of the FOI Act reported the evidence of the former Home Secretary, Jack Straw, a member of the present Commission, who had been responsible for taking the FOI Bill through Parliament. Mr Straw told the committee that he and ministers:

> 'sort of believed that in section 35 we were establishing a class exemption, but that has not turned out to be the case because of the way it has been interpreted by the courts. It has also led to, frankly, some rather extraordinary decisions by the Freedom of Information Tribunal, in which *they suggested that it can apply only while policy was in the process of development but not at any time thereafter. That is crazy and it is not remotely what was intended*.'[6] (emphasis added)

20. In July 2015, the chair of the House of Commons Public Administration committee appeared on BBC Radio 4's 'Today' programme to discuss the work of the present Commission. He spoke in similar terms:

[6] House of Commons Justice Committee, Post-legislative scrutiny of the Freedom of Information Act 2000, First Report of Session 2012-13, Volume 1, paragraph 159.

> 'The restrictions on policy advice were intended to be permanent but they have been reinterpreted to mean that *unless the policy is actually under discussion, well, the policy advice can be disclosed*'.[7] (emphasis added)

21. Both comments express the mistaken view that policy advice has no protection from disclosure once a policy decision has been taken.[8] Officials hearing this from such distinguished sources are likely to become more guarded in what they record in the belief that everything they write will be disclosable after the decision. Such comments are likely to produce a 'chilling effect'. The answer to that is not to restrict the Act but to promote a more accurate explanation of the protection it provides for sensitive discussions.

22. We assume that similar comments are also made by ministers and senior officials, whose view of FOI is coloured by the particular FOI cases which come to their attention, which will be a distilled concentrate of the most sensitive and to them most troublesome cases.

23. We have been privately told by the head of a major body, that FOI has severely restricted the willingness of his board colleagues to express views in writing. When asked which organisation he was referring to, he named a body which is not subject to either the FOIA or the related Environmental Information Regulations (EIR). The contamination of this debate by unrealistic fears highlights the need to look with particular care at claims that the FOI Act has had, or threatens to have, a harmful effect on the government's ability to carry out its functions.

24. Concern about a chilling effect may partly echo concerns about leaks. Their effect is likely to be far more drastic than FOI disclosures. A leak is likely to occur at the time of maximum sensitivity, not months or years later. It may have been deliberately selected for greatest political impact and is not subject to the scrutiny of a regulator before it is made. The former Cabinet minister Kenneth Clarke wrote in his memoirs that during John Major's term as prime minister 'the Cabinet became as leaky as a sieve and no minister wished to raise any serious business there'.[9]

25. Lord O'Donnell, the former Cabinet Secretary has said that Tony Blair 'was reluctant at times to take as many Cabinet discussions as possible, because he felt that they would

[7] BBC Radio 4, 'Today' programme, 18 July 2015

[8] The views above may partly result from differences in terminology. To a specialised FOI audience, the terms 'safe space' and 'chilling effect' refer to two distinctive concepts the former, by definition, ending with the taking of a decision. In Whitehall parlance the term 'safe space' may embrace both. For those who use the term in the latter sense, it may come as a shock to read that the Commissioner and Tribunal believe the need for a 'safe space' (which in their terms may mean any protection at all) comes to an end once the policy decision is taken.

[9] Quoted in Peter Hennessy: "The Prime Minister: The Office and its Holders since 1945" (Palgrave Macmillan 2001)

become very public very quickly'. The same was true of Cabinet Committees because Mr Blair 'would have thought that that wasn't a safe space'.[10]

26. Government may not believe it can do much about leaking, particularly by Cabinet ministers. But it may feel it can do something about FOI, which is a creation of statute. It is possible that a degree of anxiety about the former has been transferred to the latter, perhaps even colouring Mr Blair's own well-known regret over the introduction of FOI.[11]

27. A feature of many section 35 tribunal cases is the disconnect between the severe consequences that government maintains would flow from *routine* disclosure of policy advice and the innocuous content of the disputed material involved in the particular case.

28. The very first section 35 case to be heard by the Information Tribunal (as it then was) was a request for minutes of senior DFES management meetings which had discussed the response to a schools 'funding crisis'.[12] It led to the department providing emergency funds and making new funding arrangements for future years.

29. The FOI request, in January 2005, related to minutes of meetings between June 2002 and June 2003. The Information Commissioner found that sections 35(1)(a) and (b) of the FOIA (the exemptions for policy formulation and ministerial communications) were engaged but ordered disclosure on public interest grounds. The decision was appealed.

30. Those giving evidence at the tribunal included Lord Turnbull, the former cabinet secretary. He warned that the disclosure of policy discussions would strike at the heart of civil service confidentiality, threaten the role and integrity of the civil service, reduce the neutrality of the civil service, undermine frank policy-making, lead to the transfer of accountability for decisions from ministers to officials and expose officials who were

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[10] Evidence of Lord O'Donnell to the Chilcot Inquiry, 28 January 2011.

[11] Although Mr Blair complained in his memoirs that FOI inhibited the expression of views in policy making he also acknowledged he regretted FOI because it might help expose his own administration's 'scandals'. These, he said, were just as damaging as those of the previous government:

"What I failed to realise is that we would also have our skeletons rattling around the cupboard, and while they might be different, they would be just as repulsive. Moreover, I did not at that time see the full implications of the massive increase in transparency we were planning as part of our reforms to 'clean up politics'. For the first time, details of donors and the amounts given to political parties were going to be published. I completely missed the fact that though in Opposition millionaire donors were to be welcomed as a sign of respectability, in government they would very quickly be seen as buying influence. The Freedom of Information Act was then being debated in Cabinet Committee. It represented a quite extraordinary offer by a government to open itself and Parliament to scrutiny. Its consequences would be revolutionary; the power it handed to the tender mercy of the media was gigantic. We did it with care, but without foresight. Politicians are people and scandals will happen. There never was going to be a happy ending to that story, and sure enough there wasn't. The irony was that far from improving our reputation, we sullied it." Tony Blair, A Journey, Hutchinson, September 2010, page 127. For a fuller account see: www.cfoi.org.uk/2010/10/the-blair-memoirs-and-foi-2.

[12] EA/2006/0006, The Department for Education and Skills & Information Commissioner & The Evening Standard (19 February 2007)

apparently identified with the policies of an outgoing government to suspicion from new ministers. Other senior officials referred also to the loss of frankness and candour, the impact on record keeping, the danger of government by cabal and the increased risk of 'sofa government'.

31. The Tribunal did not dispute the importance of these arguments. But it held that the public interest in withholding the disputed minutes by the time of the request 18 or more months later was 'tenuous at best' particularly as the minutes themselves were 'fairly skeletal'. The public interest in confidentiality did not outweigh the public interest in disclosure.

32. The disclosed minutes can be found at *Appendix 1.* Elements of the documents (marked in green) had already been disclosed following internal review. Further passages (marked in purple) were released prior to the Tribunal hearing. The disputed information consisted solely of the non-highlighted passages.[13] These included comments such as:

> 'Andrew Wye[14] confirmed that it would be possible to provide 3-year declarations of amounts available and the formulae for distribution. Action: Tom Goldman to complete list of grants.'
>
> 'Stephen Kershaw to produce a note on how the Department is channelling significant funds into remodelling and why this is such a top priority'
>
> 'There was a discussion around extra funding for local authorities to take into account changes to the level of Standards Fund grant. It was noted that this will lead to a softening of some cliff edges but not all.'
>
> 'Local Authorities had not consciously sought to divert funds and the public debate was unfortunate'
>
> 'It was crucial to balance our response and maintain our room to manoeuvre for both this and next year.'
>
> 'It was very difficult to get meaningful figures as there was such a mix of different factors in their individual positions.'

[13] The highlighting is by the Tribunal or the DfES
[14] The department did not attempt to argue that the names of officials mentioned in the minutes should be withheld under section 40 of the FOIA.

> 'The difficulties rose from lack of action rather than anything deliberate. Part of our strategy should be to lead those authorities who genuinely did have the money to ease school difficulties to make a rapid decision.'

33. The only undisclosed passage which referred directly to policy options stated:

> 'Stephen Crowne updated on ongoing work the purpose of which was to arrive at a package of measures built around a commitment of a guaranteed per-pupil increase to create stability for the next two years. Remaining questions were how this was to be achieved and there were two funding routes:
>
> i. via EFS (with passporting)
>
> ii. via a ring-fenced grant to LEAs.
>
> Which option is a matter of ongoing discussion with the centre but we needed to move fast for an announcement before the end of the month. Both had risks: there is the potential for passporting to be unsuccessful or even perverse; the ring-fenced grant ran the risk of squeezing local services and /or leading to a rise in Council tax. Discussion brought home the seriousness of the issue.

34. In fact, the commitment to a guaranteed per-pupil increase in funding was announced in Parliament in July 2003, 17 months before the FOI request, together with an account of the combination of means by which it would be achieved.[15] The only additional information provided in the minute is the recognition of the fact that neither of the two options mentioned was entirely risk-free. This would not have been news to anyone familiar with school funding.

35. The case illustrates a theme which has regularly recurred in section 35 and 36 cases. The government resists disclosure not (we assume) primarily because of the consequences of releasing the particular information at issue but because it fears that it will set a precedent for the future disclosure of related but more contentious information. The response of the Commissioner and Tribunal is that their decisions are based on the facts of each case and that the disclosure of innocuous examples of information does not mean that sensitive material will be treated in the same way.

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[15] Hansard, House of Commons Debates, 17 July 2003, cols. 454-8

TRIBUNAL DECISIONS

36. In this section we describe decisions involving central government departments issued by the First-tier Tribunal (FTT) or Upper Tribunal (UT) involving the FOI exemptions relating to internal discussions.[16] It does not attempt to deal with cases involving the corresponding EIR exceptions. The summaries cover, as far as we are aware, all the cases decided during the three years from December 2012 to November 2015. We have not focussed on Information Commissioner (IC) decisions as these have been dealt with by the IC's own submission. However, the tribunal cases are sometimes more revealing as they include cases where the government has not accepted the IC's findings.

37. The effect of disclosure and the public interest arguments are assessed at the time that the request was refused or the refusal upheld on internal review. The passage of time between that time and the date on which the Commissioner or Tribunal considers the case is disregarded.[17] The question asked is whether the refusal was justified at the time it took place and not whether it can be disclosed at the time of the appeal.

EXEMPTION UPHELD

38. This group of cases describe the FTT cases during the last three years which found that the public interest test favoured the withholding of the disputed information. Some of these cases also involve exemptions other than those relating to internal discussions. The summaries below generally disregard these other exemptions.

Two Chancellors

39. A request was made for information relating to meetings between the Chancellor of the Exchequer, George Osborne, and the former Chancellor, Lord Lawson, over the previous 22 months. The Treasury said it held the transcript of a telephone conversation between the two which it withheld in part under section 35(1)(a). The Information Commissioner confirmed that the exemption was engaged and found the public interest favoured withholding the information. The FTT agreed. It accepted there were public interest factors in favour of disclosure, but the need for a safe space was 'very strong'. The Chancellor needed to be able to consult people like former chancellors on matters of fiscal and banking policy while that policy was being formulated and developed. The request, six months later, was made 'relatively soon' after the conversation, policy was 'live' and the conversation related to policy of 'extreme importance to the country's financial stability'. Disclosure might also have a chilling effect on the willingness of

[16] These are described in paragraph 3 above. The survey does not include cases decided on the basis of section 36(2)(c)
[17] Evans v Attorney General, UKSC 21, paragraph 73.

senior figures from business and politics to engage in discussions of this sort and to allow them to be recorded if they were liable to be disclosed prematurely.[18]

Bradford and Bingley

40. The Cabinet Office was asked for information about the sequence of events leading up to and after the nationalisation of Bradford & Bingley (B&B) in 2008. The request also asked whether the matter had been discussed at Cabinet. The IC found the public interest favoured withholding the information and refusing to confirm or deny whether Cabinet discussions were held. The FTT agreed. 'The argument that the detail of scenarios that needed to be considered in the B&B situation may have to be revisited in the future by Ministers and their advisers is a powerful one' and was 'the most significant factor'. The policy issues were still 'live' at the time of the request in March 2011 and a safe space continued to be required. Disclosure of whether Cabinet had discussed and approved the nationalisation would 'intrude upon the Cabinet's discretion to decide how such decisions are made' and would 'create expectations or pressure for certain types of decisions to be taken at Cabinet level'.[19]

Domestic abuse

41. Minutes of meetings of a task group set up by the Welsh Assembly Government to assist with proposed legislation on domestic abuse were requested. At the time of the request, a few weeks after the white paper consultation ended, policy formulation was 'still underway (and indeed at quite an early stage)'. The Information Commissioner decided the public interest favoured withholding the information to protect the Welsh Government's safe space to develop policy. The FTT agreed, particularly 'when viewed at the time when the request was submitted'. The requester argued that the public interest favoured disclosure because the focus of the proposed legislation had changed during the group's deliberations from being gender neutral to targeting violence by men upon women. The FTT found that the issue of gender balance was addressed in the group's report and there was no evidence of any concealed shift in emphasis in the disputed records themselves.[20]

Briefings on PQs

42. The FTT upheld the Information Commissioner's refusal under section 36(2)(b) to order disclosure of the briefing notes provided to the prisons minister in support of draft answers to a series of Parliamentary Questions. These sometimes dealt with the background to the question and the possible motive or interest of the MP asking it. The Tribunal gave substantial weight to the need to avoid deterring: 'any possibly astute

[18] EA/2013/0074, Brendan Montague & Information Commissioner & HM Treasury (7 January 2014)
[19] EA/2012/0251, Bradford & Bingley Action Group & Information Commissioner & Cabinet Office, 10 June 2013
[20] EA/2013/0278, Tony Stott & Information Commissioner & Welsh Assembly Government, 16 July 2014

advice that might appear risky, hostile to a member or simply indiscreet but which nevertheless, in the opinion of the official, needs to be given'. It continued:

> 'The Tribunal is frequently pressed by government departments with claims as to the "chilling effect" on frank communication of disclosure of internal discussions and reports. The Tribunal is not always impressed by them. Here, though, we are dealing with a vital and sensitive interface between minister and civil servant. This is an area of government where the need for confidentiality is clear because the points that need to be made to a minister may be based on evidence of varying strength and may involve strong criticism of the questioner or another member or third party. The official offering advice may be understandably reluctant to make them public, whilst properly concerned that they should be before the minister. It is for the minister to decide what should be used, what rejected, what is too tenuous to be relied upon…
>
> Whether or not disclosure of these particular notes would affect the way that the officials concerned perform their duties is less significant than the question whether the threat of publicity might affect briefings generally in future. We consider that there is considerable force in the contention that a very important channel of communication would be seriously inhibited.' [21]

Building Schools for the Future

43. In 2010 the government announced the cancellation of Labour's 'Building Schools for the Future Programme'. Following judicial review, the decisions relating to a number of affected councils were retaken in July 2011. One of the affected authorities, Sandwell Metropolitan Borough Council, later made an FOI request for information about the decisions affecting its funding which was refused in part in February 2013. The IC ordered disclosure. The disputed information consisted of 7 submissions to the Secretary of State. The FTT found the information fell within section 35(1)(a) and that the public interest favoured its withholding. 'It would expose a very significant part of the relationship between Ministers and the politically neutral civil service to a deeper and not necessarily constructive degree of scrutiny.' There was a 'plausible risk' that disclosure would cause policy submissions to be written differently with 'an eye to a public audience' and ministers may be less inclined to seek and rely on formal advice.[22]

Education Secretary's letter to schools

44. A request sought information about the Education Secretary's decision to write to local schools about workshops offered to them as part of the Tottenham Palestinian Literary

[21] EA/2011/0267, Angela Kikugawa & Information Commissioner & Ministry of Justice, 20 May 2012
[22] EA/2014/0079, Department for Education & Information Commissioner, 28 January 2015

Festival. The letter, in September 2011, had reminded schools of their statutory duty to provide a balanced account of opposing views about political issues and asked for assurances that this would be done. The request, sent a few weeks after the letter – and therefore after the need for 'safe space' - sought the correspondence with a third party which had expressed concerns about the festival to the Secretary of State and the associated internal discussion. The requester argued that the public interest justified disclosure as the Secretary of State, who had intervened personally, had also received and declared a donation from a Zionist organisation. The Tribunal accepted that this could create a perception of bias but found that the advice given to ministers did not display bias and the sending of the letters was not unreasonable in the circumstances. The FTT upheld the ICO's refusal to order disclosure, agreeing that this would be likely to prejudice frank discussions between officials and between officials and third parties (section 36(2)(b)(i) and (ii)). It would also discourage third parties from reporting concerns about the promotion of potentially extreme views at schools. (section 36(2)(c)).[23]

Request about a request

45. The requester sought information about the handling of a previous request he had made to the Home Office about the appointment process for selecting a chief constable. The new request was made 3 months after the decision on the previous request. The IC found that the information contained frank comments and had been properly withheld under section 36(2)(b)(i). In its decision, the FTT agreed finding that 'stakeholders would be less free and frank in their input' to future decisions and that 'this "chilling effect" would have a significant negative impact on responses to requests under the Act'. The Tribunal found no evidence of inappropriate behaviour by the Home Office and held that the public interest favoured withholding the information.[24]

Boating accident

46. The request sought information about a boating accident which had occurred in Cherbourg Marina in September 2011. Some ministerial correspondence relating to the incident was held. The IC upheld the MOD's refusal to disclose the advice under section 36(2)(b)(i). The FTT also did so, finding that: 'there was a compelling argument that a Minister should be able to receive candid confidential advice from his or her civil servants and that this would be undermined if the advice provided here was liable to disclosure and public scrutiny.'[25]

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[23] EA/2012/0204, Dr Bart Moore-Gilbert & Information Commissioner & Department for Education, 23rd September 2013.
[24] IEA/23/0059, Howard Roberts & Information Commissioner & The Home Office
[25] EA/2013/0214, Nick Dunnett & Information Commissioner & Ministry of Defence, 26 March 2014.

Archbishop of Canterbury

47. Correspondence between the then Archbishop of Canterbury, Rowan Williams, and the Prime Minister David Cameron during the PM's first 13 months in office was withheld under section 36(2)(b)(ii). The IC upheld the refusal finding that disclosure would have a 'severe' inhibiting effect on exchanges between them. The FTT agreed finding that there was 'a public interest in the PM being able to develop that relationship in order to have confidence that the Archbishop would not feel inhibited in his correspondence'. It added that 'had there been (which there wasn't) evidence of the Archbishop saying things in private which were not consistent with what he was saying in public, that would have significantly influenced our judgment on the public interest test.'[26]

Blair/Bush telephone conversation

48. A request was made to the Foreign and Commonwealth Office in February 2010 for a record of a telephone conversation between the Prime Minister Tony Blair and the US President George Bush in March 2003 in the run-up to the invasion of Iraq. The requester alleged that a comment, made by the former Foreign Secretary Jack Straw to the Chilcot inquiry, indicated the heads of state had agreed to misrepresent a comment by the French President in order to justify abandoning further efforts to secure a UN resolution before taking military action. The FCO withheld the information under section 27 (international relations) and under s.35(1)(b) as the record had been passed from Mr Blair to the then Foreign Secretary, and was therefore a ministerial communication. The IC upheld the refusal to disclose Mr Bush's comments under s.27 but ordered the disclosure of Mr Blair's side of the conversation. The FTT largely upheld the decision. However, the Upper Tribunal set it aside, finding that it was unrealistic to isolate one side of the conversation from the other and would encourage potentially misleading speculation. A different FTT panel reconsidered the case and found that the public interest favoured withholding the information: the 'overwhelming considerations' were the 'highly confidential' nature of the information and existence and stage of the Chilcot Inquiry. It added that it had not found the disputed information to contain any 'smoking gun'.[27]

Getting your bill through the Lords

49. A request was made for a copy of "Getting your bill through the House of Lords" a guide produced for officials handling government bills by the Government Whips Office in the House of Lords. The version of the guide had been produced for the coalition government in 2013. The IC had found that although the guide did not relate to any specific policy proposal, the process of passing a bill related to the formulation of

[26] EA/2012/0245, Adam Roberts & Information Commissioner & Cabinet Office (25 October 2013)
[27] EA/2011/0225 and 0228, Stephen Plowden & Foreign and Commonwealth Office & Information Commissioner, 28 January 2014 (rehearing).)

government policy and a guide to that process also engaged section 35(1)(a). The public interest in improving public understanding of the Parliamentary process justified disclosure except for specific passages referring to the handling of the bill during a coalition government. The Cabinet Office (CO) appealed. The FTT accepted its argument that the guide was also a ministerial communication. It had been produced on behalf of the Chief Whip, a minister, for communication to other ministers. The Tribunal found that parts of the guide repeated information that was publicly available but that parts would reveal tactical advice which could enable peers to delay or frustrate the passage of legislation and indirectly have a chilling effect on future editions of the guide. If ministers' decisions about the handling of legislation appeared to conflict with the guide's advice this could also undermine collective responsibility. The FTT found that the guide should be disclosed with the passages capable of producing these effects redacted, but rejected the CO's argument that even disclosure of a redacted copy of the guide would be damaging. [28] The CO has appealed to the Court of Appeal.

Legal action against the Pope

50. In the run up to the Pope's September 2010 visit to the UK some campaigners had sought to have him arrested. A request in November 2011 sought information from the Cabinet Office about its strategy to deal with such legal threats. Most of the information was withheld under section 27 (international relations) but a small amount was withheld under section 35(1)(a) and (b). The FTT upheld the Commissioner's decision that the public interest favoured withholding these materials.[29]

Huntingdon Life Sciences

51. A request sought information from the Department of Business, Innovation and Skills about its provision of banking and insurance services to Huntingdon Life Sciences Limited (HLS) since 2001. DBIS and its predecessor departments had taken this unprecedented step because HLS had been unable to obtain these services due to the threat of violence from animal rights groups against firms doing business with it. The request was made in April 2011. The withheld documents included two ministerial communications to colleagues. The FTT upheld the refusal under section 35(1)(b) commenting that 'Government ministers must feel free to exchange candid opinions, options and possible solutions without fear that their exchanges may be disclosed, perhaps long after they look place, thereby endangering the commercial interests of HLS and other identified entities or, still worse, the personal safety of their staffs.' Such concerns remained 'very serious live issues, even after the passage of several years'. The case for withholding under s.35(1)(a) was 'much less compelling' because

[28] EA/2014/0223, Cabinet Office & Information Commissioner, 22 July 2015
[29] EA/2012/0259, European Raelian Movement & Cabinet Office (6.12.13)

decisions had been taken 10 years before the request, 'time has passed and policy has been formed and maintained'. Other exemptions were also upheld.[30]

EXEMPTION NOT UPHELD

52. This section describes FTT decisions which have *rejected* the department's claims under section 35(1)(a) or (b) or section 36(2)(b) of the FOI Act. This does not necessarily mean that the information has been disclosed: in some cases the information may have been withheld under other exemptions or further appeals may still be pending. The case of the badger cull risk logs was dealt with under the EIR not the FOIA but is included here as it is referred to in the Commission's call for evidence.

Badger cull risk logs

53. Four 'risk and issue' logs relating to the badger cull were withheld by DEFRA following an EIR request. The IC ordered disclosure. DEFRA's appeal was dealt with by the UT because of its power to make an enforceable order relating to the anonymity of witnesses. The UT dealt with the case on its merits, not on a point of law.[31]

54. A DEFRA project board had considered the risk logs in the summer of 2010. The UT considered that at that time there had been 'powerful pointers' to the need to maintain a safe space to protect its ability to think in private. The public interest in withholding information did not last only until a policy had been formulated and announced. Nor did the UT consider that the issue was whether at the relevant time (in this case the date of DEFRA's internal review, September 2012) the department still needed a 'space to think privately'. Instead, it said, the question was 'whether at that date the public interest in keeping the 2010 thinking private outweighed the public interest in its disclosure.' DEFRA listed a series of adverse consequences it felt would flow from disclosure. Disclosure would increase the chances of the identified risks, particularly legal challenge, materialising; require a substantial diversion of resources to be spent on explanation; endanger farmers; jeopardise relations between the NFU (who were represented on the project board) and its members; deter the NFU or other bodies from participating in future projects or lead to such material being drafted in a less frank fashion in future.

55. The UT found the contents of the risk logs themselves to be 'anodyne' and DEFRA's arguments so unconvincing that it did not ask the other parties to even present their

[30] EA/2012/0158, Rhonda Moorhouse & Information Commissioner & Department of Business Innovation and Skills, 12th June 2014
[31] DEFRA v Information Commissioner and The Badger Trust [2014] UKUT 526 (AAC) (28 November 2014)

case. By the time of the request's refusal, the risks well known; the logs contained no legal advice or information that would assist opponents in bringing a legal challenge and in any event an unsuccessful judicial review had already occurred; the proposed counter measures were not 'surprising or informative'; disclosure would not increase the risk to farmers, as none were identified; and people of the calibre selected to serve on the project board would not be inhibited by the prospect of future disclosure. Moreover, the contents of the logs were so 'anodyne' that the UT spent time considering whether it was actually possible to draft them in a *more* anodyne manner. They contained 'nothing that an intelligent reader would not expect to see'. It found that the public interest arguments against disclosure 'were effectively spent' by the date of the request's refusal, 'including those advanced that disclosure would inhibit future robust discussions and risk assessments'. But the public interest in favour of disclosure remained.

56. The disclosed logs are attached as *Appendix 2*. An indication of the lack of details can found in their account of the risks legal challenge being brought. This it is said could delay implementation and damage DEFRA's reputation. The proposed steps to mitigate this risk are:

> '1.Process in place to ensure all evidence and options are presented to Ministers. 2. There is an audit trail. 3. Early and close working with lawyers to identify and consider all potential legal issues. 4. Examine/learn from the Welsh legal challenges'

If the risk materialises, the suggested contingency measures are described as: 'Use current information/knowledge on the potential legal challenges'.

57. A separate entry deals with the possible 'failure to get industry acceptance' resulting in 'no delivery of a cull'. The mitigation steps in full are 'Early and close working with the industry'. The contingency plan should the risk materialise is described as: 'Take into account current knowledge of how the industry see a cull working'.

Planning Aid

58. At the end of November 2010 the Royal Town Planning Institute was informed that government funding for its Planning Aid England service, on which it was almost wholly dependent, would cease from the following March. Shortly afterwards it applied to the Department for Communities and Local Government (DCLG) for information about the decision including any background papers that had informed it. The DCLG, which had had its own budget cut by 33%, said the decision was based on 3 ministerial submissions which it withheld under section 35(1)(a). The IC found that the public

interest balance favoured their disclosure. The department appealed. It argued that at the time of the request it was still considering new arrangements to fund a range of organisations to provide community planning advice and policy formulation was still underway. New arrangements would be made in the context of the Localism Bill then before Parliament. Planning Aid might be eligible for funding under these (it subsequently received some funding).

59. The FTT accepted that decisions on new funding arrangements were still underway but found that the decision to cease funding of Planning Aid was 'a 'sufficiently discrete decision' that had been 'definitely decided by the minister' with the 'implications and processes having been thought through and advised upon; announced; and at the initial stage of implementation'. The public interest favoured disclosing information about this decision to inform the ongoing debate, partly stimulated by the ending of the service's funding. The fact that the decision had been taken without a clear idea of what would replace the service added substantially to the public interest in disclosure. However, decisions on the *new* arrangements were still continuing at the time of the request. The FTT found that the public interest favoured withholding information about these to allow the department to formulate policy 'free from premature disclosure and distracting scrutiny.'

60. The documents disclosed in this case are attached as *Appendix 3.* They mainly describe the service provided by Planning Aid and the implications for it of various options, much of which had been discussed with Planning Aid at the time. Some recommendations are contained in the documents though these are also described in the FTT decision, presumably having been disclosed by DCLG in open session at the hearing.[32]

EC Infraction proceedings

61. The DWP refused to disclose a letter from the UK government to the European Commission setting out its position in relation to infringement proceedings against the UK for contravening EU social security legislation. In 2011, the European Court of Justice had issued a decision requiring a revision to UK policy. The DWP claimed that at the time of the request in September 2013 its policy was still being discussed and a safe space was still required. The FTT did not agree that the UK's letter to the Commission related to policy formulation or development at all. It was a 'snap-shot' of the UK's position on the issue in 2013. The fact policy may change did not mean a statement of

[32] EA/2012/0071, Department of Communities and Local Government & Information Commissioner & Nic Posford, 23 January 2013

the existing policy involved policy formulation. The FTT observed that had it accepted that section 35(1)(a) was engaged it would not have accepted that a 'safe space' was still necessary. The proceedings had been ongoing for four years at the time of the request with no indication of resolution in the foreseeable future. The DWP case amounted to a 'denial of information' for 'an indefinite period', 'an untenable and unacceptable claim'.[33]

62. The case was appealed to the UT which found an error in the FTT's approach to the section 27 exemption, which had also been involved. Section 35 is not mentioned in the UT decision. By the time of the UT hearing the infraction proceedings had been withdrawn and the DWP was prepared to release the disputed letter.[34]

Free school applications

63. The Department for Education refused a number of FOI requests for the list of applications to open new free schools during a specified period, the areas in which they would operate, the faith, if any, and details of applications to open university technical colleges or technical academies. The IC ordered disclosure and the DfE appealed. It argued that at a later stage public comment would be invited on the applications which had not been filtered out by then. At the time of the requests decisions on free schools policy were still being made and the department was drawing on the lessons learnt from these applications. The FTT found that the requests did not seek any deliberations or advice nor any selection of the facts that might have been fed into policy making. They sought 'the whole factual matrix without any selection, prioritisation or evaluation' and this did not engage the s.35 exemption. The Tribunal was also 'unimpressed' with the department's argument that negative publicity might discourage further applications, prejudicing the effective conduct of public affairs (s.36(2)(c)). It was critical of a survey submitted in support of the DfE position which purported to show that almost half of the proposers of new schools would have been less likely to apply if they knew that details would be made public. The question wrongly led applicants to believe that their personal details would be disclosed and this bias 'fatally undermines' the results. The Tribunal ordered disclosure finding that 'The benefit of transparency and the ability to inform the public debate was of far greater

[33] EA/2014/0197, Sir Roger Gale MP & Information Commissioner & Department for Work and Pensions, 21 December 2014

[34] Department for Work and Pensions v Information Commissioner and Sir Roger Gale [2015] UKUT 0599 (AAC), 4 November 2015.

importance than the slight administrative inconvenience for civil servants of receiving representations and arguments at a time that was not convenient to them.'[35]

Andrew Lansley's ministerial diary

64. A journalist sought access to the ministerial diaries of a number of Department of Health ministers, later narrowed to that of the then Health Secretary Andrew Lansley. The entries related to the period during which the Health and Social Care Bill then before Parliament. The IC upheld reliance on a number of exemptions (for personal information and security bodies) for certain entries but did not accept that section 35(1)(a) applied. The FTT held that section 35(1)(a) and (b) did apply. However, it concluded that because the diary entries 'give no detail about the anticipated discussions or the intended objectives, disclosing them would in general be unlikely to compromise the freedom to think the unthinkable, consider all options and argue for and against positions. The evidence has not satisfied us that there are entries in Mr Lansley's diary which required protection for the preservation of substantive safe space.' The FTT gave high weight to the public interest in revealing which external organisations the minister had met during this time, particularly lobbyists. Personal engagements referred to in the diary were exempt under section 40(2). It was particularly unimpressed by the evidence of senior civil servants. One witness said that the quarterly releases of information about ministerial engagements 'fully met' the public interest in transparency, although the releases for the relevant period had not been published at the time and were not in fact published till many months later. They also omitted telephone or video conference contacts. The witnesses' argument that the public therefore already had a complete record of who the minister had met 'did not correspond with reality and lacked rational justification'. The Tribunal was particularly critical of their argument that if the diary entries were released showing blank spaces, ministers would feel obliged to schedule entirely pointless meetings simply to ensure that they were not criticised for inactivity, a suggestion the Tribunal described as 'incredible'. The Upper Tribunal dismissed the department's appeal. It is currently appealing to the Court of Appeal.[36]

Universal Credit

65. Several documents used to assess the risks in implementing the Universal Credit Programme (UCP) were requested under FOI in March and April 2012. Universal Credit is a new benefit that is replacing 6 existing benefits and tax credits. The FTT observed

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[35] EA/2012/0136, EA/2012/0166 and EA/2012/0167, Department for Education & Information Commissioner & British Humanist Association, 15 January 2013

[36] Department of Health v Information Commissioner & Lewis, [2015] UKUT 0159 (AAC)

that the programme offered 'immense' savings to the exchequer, but if the highly complex system for calculating benefits broke down there would be 'widespread anxiety and hardship' and 'a major threat' to the whole venture. Both the National Audit Office (NAO) and the Public Accounts Committee (PAC) had produced highly critical reports on the management of the programme. The requested documents were a high level 'Project Assessment Review'; a 'Risk Register' evaluating likelihood and severity of potential risks and the measures to prevent them; an 'Issues Register' describing problems and failures; and a 'High Level Milestone Schedule' setting out the projected and actual completion dates for key milestone events. The DWP argued that disclosure would undermine candour and robust comment both by those interviewed for such reviews and by the drafters. Disclosing the risk and issues registers would destroy their 'blunt and pithy' quality, damage relations with external parties and make it more likely that some of the risks would result. The Milestone Schedule could easily mislead if the assumptions were not understood. Providing the necessary explanations would divert resources from the project itself.

66. The FTT noted the sharp contrast between the NAO and PAC criticism and the 'unfailing confidence and optimism' of DWP press releases and ministerial statements. It highlighted the fact that the government seemed to be suggesting that the programme would be completed on schedule even though milestones had not been achieved on time. There was a particularly strong public interest in allowing the public to judge whether criticism of the programme was well–founded.

67. The government should have been able to document a 'chilling effect' after 10 years of FOI. In the absence of such evidence, the FTT was not persuaded that this would occur, particularly in light of the large measure of courage, frankness and independence likely from senior officials assessing risk and providing advice. The PAR itself was drafted in management consultancy terminology, not 'designed to proffer blunt or biting opinions nor speculative suggestions'. The problems described in the Issues Register were of a predictable kind, unlikely to prompt much public reaction. The Milestone Schedule listed a variety of completed and missed milestones in the past, not the current situation. The public's views would not be distorted by the fact that the Risk Register focussed on problems rather than successes, once its purpose was explained. Although there might be some prejudice of the kind claimed by the DWP, the public interest required disclosure.[37] This decision was set aside by the Upper Tribunal. It held that the FTT was wrong to attach weight to the government's failure to document evidence of a chilling effect, which might have occurred but be difficult to prove. It was also wrong to

[37] EA/2013/0145, 148 & 149, Slater & IC & DWP, 24 March 2014

draw conclusions about the absence of a chilling effect from the release of a related document, which it had not seen. The case will be reheard by a new FTT panel.[38]

Reducing regulation

68. The Cabinet Office (CO) refused to disclose the number of times the Reducing Regulation Committee, a cabinet sub-committee, had met in the past two years. It argued that disclosure would damage collective responsibility by exposing the committee structure to external accountability. The pressure of public opinion might lead ministers to schedule meetings that were unnecessary but deemed prudent in presentational terms. The IC found the public interest favoured disclosure and the FTT agreed. A rehearing was ordered after the UT found that the FTT had misunderstood one part of the CO's argument.[39] The new FTT panel also ordered disclosure. It was critical of the CO evidence, which had suggested that what it called 'the pollutant of publicity' would lead ministers to change their behaviour. The CO evidence was 'materially flawed and its reasoning unpersuasive'. The request 'did not ask for any details, sensitive or otherwise about the meeting', it 'simply asked for a global figure'. The FTT found it hard to believe that 'hard bitten, street wise, fighting politicos would scurry about trying to fill a mental quota of meetings simply because this release had taken place'. It was possible that the information might of little value but it noted that this particular committee 'may be a species that merits deeper consideration – it was a new animal in Whitehall; it was very much trumpeted by the 2010 incoming government'.[40] At the time of writing a further appeal was still possible.

Steiner schools

69. The British Humanist Association (BHA) applied for Department for Education documents discussing whether Steiner schools would be likely to meet the criteria to enter the Free Schools programme. The DfE argued that policy on the criteria was still being formulated, disclosure would have a 'chilling effect' and undermine public confidence in its approach towards Steiner schools. The IC found the public interest favoured disclosure. It argued that free schools were a radical new policy, Steiner schools have unique philosophical and educational features, the public was entitled to know how DfE engaged with those and there was strong public interest in a fully informed debate about them. It doubted whether policy formulation rather than decisions on individual school applications was taking place and 'struggled' to understand what impact disclosure would have. The FTT found the IC's submissions on

[38] DWP v IC, John Slater and Tony Collins [2015] UKUT 535 (AAC), 20 July 2015
[39] Cabinet Office v Information Commissioner 2014 [UKUT] 0461 (AAC)
[40] EA/2013/0119 (remitted), Cabinet Office & Information Commissioner, 12 November 2015

the public interest test 'persuasive to the point of being overwhelming' and DfE arguments weak and ordered disclosure.[41]

70. The disclosed documents are attached at *Appendix 4*. They highlight areas where the approach of Steiner schools conflict with Ofsted requirements, although the outcomes at age 16 are above national standards. They suggest questions that should be raised with Steiner schools making free school applications. Most significantly, they discuss serious complaints received from some parents (publicly available on the Internet) about the alleged failure of Steiner schools to deal with bullying. This is said to be linked to the belief in 'karma' or destiny, part of the philosophy underpinning Steiner schools, and the suggestion that to be bullied may be a child's 'karma', a concern of substantial public interest.

'Go Home' campaign

71. The Home Office withheld emails sent to the Home Secretary in July and August 2013 relating to the 'Go Home' campaign. This was a pilot project in which vans were driven round six London Boroughs with the message, targeted at illegal immigrants, 'Go Home Or Face Arrest'. The FTT upheld the IC's decision that the emails should be disclosed. It found that by the date of the request, the day the pilot exercise concluded, the need for a safe space had ended, although the evaluation phase of the project was continuing. The emails had accompanied weekly situation reports for ministers, which had already been disclosed. The FTT held that there was 'nothing particularly remarkable or compelling about the withheld information' which was largely factual and did not contain opinions or subjective assessments. It demonstrated 'the unexceptionable but still reassuring fact that considerable care and attention was given by Home Office officials to reporting progress on the pilot so that proper ministerial oversight could be exercised'. It revealed 'the mechanisms by which decisions about this pilot were taken and this attracts a very strong public interest in favour of disclosure.'[42] This decision is currently under appeal to the Upper Tribunal.

72. Although the FTT in this case considered whether the 'safe space' was needed at the time of the *request*, it would have been entitled to consider the issue at the date of the *refusal*[43] which has sometimes been taken to be the date of internal review.[44] In the present case the HO refused the request on 21 October 2013, the day before the Home

[41] EA/2014/0017 Department for Education & Information Commissioner & Richy Thompson on behalf of British Humanist Association, 24 June 2014

[42] EA/2014/0310, Home Office & Information Commissioner, 29 June 2015

[43] See the Supreme Court decision in Evans v Attorney General, UKSC 21, paragraph 73.

[44] [2013] UKUT 526 (AAC), Cabinet Office v Information Commissioner & Gavin Aitchison, paragraph 15.

Secretary told Parliament that the project had been evaluated and would not be continued. The internal review upholding the refusal was completed 5 months later, in March 2014.

Tweeting arrests

73. The Home Office had carried out a series of arrests of suspected illegal immigrants in August 2013. It tweeted information about the operation as it happened, accompanied by photographs and video footage. This use of Twitter itself proved highly controversial. An FOI request about the decision use Twitter was refused under section 36(2)(b). The FTT found that the HO no longer required a safe space at the time of the request and doubted that there would be a chilling effect. The information was neither 'startling nor dramatic', revealed evidence of 'good administration' and contained nothing that would alarm those considering the impact on future exchanges. It ordered disclosure.[45]

Data Protection Directive

74. The Ministry of Justice (MOJ) was asked for letters from the European Commission (EC) to the government in 2004 and 2006 concerning deficiencies in the way the UK Data Protection Act (DPA) had implemented the Data Protection Directive. The FTT found that the information was exempt under section 27(2)[46] but not under section 35(1)(a). At the time of the request, in May 2011, most of the alleged infraction issues had been resolved and those remaining were not being pursued. The lead official responsible for the negotiations was not even aware of which remained outstanding. The negotiations appeared to have been 'parked by both sides' as attention had shifted to the shaping of the EC's proposed new Data Protection Regulation, which would replace the Directive. The FTT found there was 'no evidence before us' that the alleged infractions represented live policy issues or that a safe space had been needed at the time of the request. However, it was in the public interest to understand the deficiencies of the DPA to allow public participation in influencing the government's approach to the new law.[47]

Employment Judges' remuneration

75. In a March 2011 report, the Senior Salaries Review Body (SSRB) recommended that the role of salaried Employment Judges should be re-graded, with a consequent pay increase. The government deferred any decision on the recommendation due to its public sector pay freeze without undertaking to implement it later. The SSRB complained about the matter in its March 2012 report. A September 2012 request for

[45] EA/2015/0030, Home Office & Information Commissioner & Alistair Sloan, 20 July 2015
[46] Information provided in confidence by another state or international organisation
[47] EA/2012/0110, Ministry of Justice & Information Commissioner & Dr Chris Pounder, 23 July 2013

information about the issue was refused under section 35(1)(a). The MoJ argued that, in the absence of any final decision, disclosure would intrude on the safe space and lead to less candid policy discussions. It would also make it 'impossible' for officials to offer ministers advice, a claim the FTT considered to be 'overstated'. The Tribunal found that the MoJ had relied 'mainly on generic considerations' without giving sufficient consideration to the specific contents of the documents or the particular public interest in disclosure. The documents did not contain 'blue sky thinking' or 'specially robust discussion' nor was the subject matter particularly sensitive. There were also special features particular to the case such as 'the public interest in the preservation of an independent and high quality judiciary' and 'the constitutional significance of the protection of judicial remuneration through a mechanism such as the SSRB'. The MOJ had not even acknowledged these as relevant to the public interest test even after the requester had expressly drawn attention to them. The failure to implement SSRB recommendations for several years was a 'very significant departure from previous practice' which 'tends to undermine the standing and credibility of the SSRB'. The FTT found the public interest in disclosure outweighed the ordinary need for safe space for policy making.[48] The MOJ appealed against the decision to the Upper Tribunal but subsequently withdrew the appeal.

Ministerial portfolio

76. In November 2012 the Guardian newspaper reported on an interview with the then Secretary of State for Energy and Climate Change, the Liberal Democrat Ed Davey MP.[49] He revealed that he had asked the Prime Minister to remove responsibility for renewable energy from his Conservative Minister of State, John Hayes MP, known for his vigorous anti-windfarm stance. FOI requests were made for Mr Davey's letter, and related correspondence. The FTT found that section 35(1)(b) was engaged but the public interest in upholding it was limited as the minister had voluntarily made the contents of the letter public. This 'undermines the usual or normally high public interest in protecting sensitive ministerial correspondence on a matter of internal governance'. The Tribunal was not been persuaded that the space for frank discussion between the P.M. and a Cabinet Minister has been impaired or that future discussions would be affected. It added: 'On the contrary, we are of the view that when government ministers voluntarily conduct a discussion, argument or debate in the public forum, it is important that the public are properly informed of the facts, the background and the

[48] EA/2013/0127, Jonathan Brain & Information Commissioner & Ministry of Justice, 15 September 2014
[49] http://www.theguardian.com/politics/2012/nov/23/ed-davey-interview-energy-deal; http://www.theguardian.com/politics/2012/nov/23/lib-dems-tories-green-energy

context'. It was in the public interest 'to ensure that the public know and understand what such dispute is about and the effects if any on public policy, and governance'.[50]

SOME OBSERVATIONS ON THESE CASES

77. These accounts indicate that the FOIA provides substantial protection for internal discussion. The protection applies both to information requested while policy formulation is underway and to information sought afterwards, where disclosure might affect future discussions. Examples of material withheld because of the likely chilling effect include information about:

- the DfE's refusal to disclose officials' submissions on the Building Schools for the Future programme, decided 11 months before the request (paragraph 43)
- background notes to Parliamentary Questions which had been answered between 2 and 4 years before the request (paragraph 42)
- information about the nationalisation of Bradford and Bingley, 3 years before the request (paragraph 40)
- a record of the Blair/Bush telephone conversation, which took place 7 years before the request (paragraph 48)
- ministerial exchanges about the provision of banking and insurance to Huntingdon Life Sciences, where the relevant decision had been taken 10 years earlier (paragraph 51).

78. The cases where the FTT has *not* upheld the government's claim are those where it has found that:

- *the relevant exemption was not engaged* because the information did *not* relate to the formulation or development policy. See the cases of the EC Infraction proceedings (paragraphs 61-2) and the Free school applications (paragraph 63)
- *the decision-making process had come to an end without a decision* (eg the case of the Data Protection Directive, paragraph 74)
- *the information was judged too anodyne to have a chilling effect.* These include the cases of the badger cull risk logs (paragraphs 53-7), the Lansley diary (paragraph 64) and the number of meetings of the Reducing Regulation Committee (paragraph 68).

[50] EA/2013/0287 & 0288, DECC & Information Commissioner, 4 November 2015.

- *the particular circumstances justified disclosure on public interest grounds of information which might otherwise have been withheld*. Examples include information about the withdrawal of Planning Aid funding (paragraphs 58-60), the risk assessments on the Universal Credit Programme (paragraphs 65-67), concerns about Steiner schools (paragraphs 69-70), employment judges' remuneration (paragraph 75) and the ministerial correspondence whose substance the minister himself had publicised (paragraph 76)

79. Some of the above decisions are not final and are subject to a further appeal (Lansley diary) or a rehearing (Universal Credit) or at the time of writing could still become subject to further appeals (Better Regulation Committee).

80. We comment further on some these issues below.

Risk assessments

81. One of the cases where the FTT has found the disputed information to be anodyne involves the badger cull risk and issue logs. This is a particularly significant as it falls into a category which the Commission's call for evidence suggests may require special protection. Risk assessments are not a special case. The impact of disclosure depends on the sensitivity and frankness of their contents and the timing of the request. Policy advice generally often includes the discussion of risk. The UT decision in the badger cull case made it clear that had the information been requested 18 months earlier, it would have ruled against disclosure. By the time of the actual request, the case for confidentiality had lost its force. The public, and the public interest, benefit from such a discriminating approach. To exclude risk assessments from access, permanently or for a given period, as a class would deny the public significant information whose disclosure may do no harm at all.

82. Not all risk assessments are anodyne. Some are clearly more substantial including those relating to the Universal Credit Programme described above. In the past the Tribunal has ordered the disclosure of reviews dealing with the Identity Card Programme.[51] It has supported the government's refusal to disclose a strategic risk register dealing with the NHS reforms finding a safe space was required at the time. It ordered the disclosure of a transitional risk register dealing the risks in implementing the NHS reforms which it found did not involve policy formulation.[52] That decision was vetoed. It has been

[51] EA/2006/0068 and 0080, Office of Government Commerce & Information Commissioner (2 May 2007). This decision was quashed by the High Court because the Tribunal's use of a select committee's findings was held to contravene Article 9 of the Bill of Rights 1689. A new hearing dated 19 February 2009 also ordered disclosure.

[52] EA/2006/0068 and 0080, Department of Health & Information Commissioner & John Healey MP & Nicholas Cecil, 5 Aril 2012

prevented from ruling on the release of assessments of the HS2 rail project by the last minute withdrawal of an appeal to the FTT and the use of the veto instead.

83. In those decisions on which the Tribunal has expressed a view, it has recognised the need to protect the safe space but not been persuaded that any chilling effect outweighs the public interest in disclosure. Indeed, in its earlier decision on the Identity Card reviews, the Tribunal quoted an experienced former civil servant involved in producing such reviews who said he already drafted them with the possibility of disclosure in mind, as a result of leaks:

> 'There is always a concern that these reports, like other public documents, may occasionally enter the public domain, for example as a result of leakage. For myself, therefore, I always try to ensure that the reports are drafted diplomatically so that if this did happen there would be no unnecessary political embarrassment and no unnecessary damage to the relationship between Government and officials. The style of the reports is therefore sensitive to that consideration.'[53]

84. If other reviewers already adopt this approach there may be little risk that any disclosure under FOI would produce a further 'chilling effect'.

Ministerial behaviour

85. The Lansley diary case (paragraph 64) involved a request for slightly more comprehensive information about ministerial meetings, than that which the government already publishes proactively. The government's witnesses failed to persuade either the FTT or UT that disclosure would be damaging. Among their arguments was the suggestion that ministers would be so worried about the implications that could be drawn from blank spaces in their diaries that they would be obliged to schedule completely pointless meetings to avoid criticism - and a disclosure which forced them to misuse their time in this way would not be in the public interest. The UT observed that if ministers were capable of deliberately wasting their time for such reasons, the public interest in scrutinising their diaries was even greater. It found that these views 'undermined the weight to be given to…[the witnesses'] objectivity, accuracy, and reasoning as a whole'. There are other criticisms of the civil service witnesses, for making claims that were 'unrealistically absolute', 'did not correspond with reality' or being 'keener to repeat generalised lines to take than to give direct answers to…questions'.[54]

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[53] EA/2006/0068 and 0080, Office of Government Commerce & Information Commissioner, decision of 2 May 2007, paragraph 89

[54] EA/2013/0087, Department of Health & Information Commissioner

86. Remarkably, the government is using *this* case to try and establish the principle that the FTT should show 'deference' to civil servants' evidence[55] – an extraordinary claim in light of the serious criticism of officials' evidence in the case. It is currently appealing to the Court of Appeal.

87. The FTT and UT accounts of the government's case in the Lansley diary (paragraph 64) case may be contrasted with that in the FTT's decision in the Buildings Schools for the Future case (paragraph 43), where the more balanced approach of the department's witnesses significantly enhanced its case.[56]

Cabinet committee meetings

88. The FTT has not been prepared to accept that disclosing how often the Reducing Regulation Committee had met (paragraph 68) may be 'very damaging' out of context.[57] This appears to be another example of 'anodyne' information. The supposed harm flows from the fact that the committee is a Cabinet committee and that any disclosure about such committees is assumed to be harmful. It should be recalled that it was formerly asserted that even revealing the *names* of Cabinet committees would be damaging. This view evaporated overnight when the then Prime Minister, John Major, authorised the regular release of the names and composition of Cabinet committees in 1992.[58]

89. There may be cases where revealing a sudden flurry of activity by a particular committee may indicate that a specific policy issue has suddenly become 'live'. If so, that may qualify for exemption on the facts of the case. Revealing the number of meetings over a 2 year period on an issue which the government itself has declared to be a priority raises no such issue.

90. An illustration of what the government *has* been prepared to accept in relation to disclosures of Cabinet Committee papers, is shown at *Appendix 5,* a 2005 paper of the Ministerial Working Group on Asylum and Migration, part of the Cabinet Committee

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[55] According to Mr Justice Charles in the Upper Tribunal 'Effectively, this generally based argument was that, having regard to the novel subject matter of this request under FOIA, the deference due to the Department's two witnesses meant that…what the FTT (and the Information Commissioner before them) should have done…is to effectively accept the Department's view, and thus the validity of the reasoning and opinions of its witnesses, without subjecting them to critical analysis or such a degree of critical analysis. *Department of Health v IC and Lewis* [2015] UKUT 0159 (AAC), paragraph 61

[56] 'Mr McCully was an entirely open and candid witness. The fact that he was willing to accept there would be no particular harm from disclosure of certain material and, for example, that there would be a heightened public interest following the Judicial Review challenge, gives his evidence in relation to his principled position in relation to disclosure of Ministerial submissions considerable weight.' EA/2014/0079, Department for Education and Information Commissioner, 28 January 2015.

[57] EA/2013/0119, *Cabinet Office & Information Commissioner* (decision of 12 November 2015) paragraph 18.

[58] House of Commons debates, 6 May 1992, col.64

system. This paper was released under FOI in response to a 2009 Tribunal decision.[59] A key part of its reasoning was that the report 'set out the pros and cons neutrally without assigning views to any Minister or department'. The report was released without a further appeal or veto, indicating that disclosures within this class are possible.

91. Any attempt to exclude Cabinet, and particularly Cabinet committee, papers from access would be particularly damaging. Much government discussion between departments takes place via the Cabinet committee system. Much of this is dealt with by correspondence and does not involve meetings at all. At the time of the coalition government the official guidance on the Cabinet committee system stated:

> 'Policy or other proposals will require consideration by a Cabinet Committee where they meet one or more of the following conditions:
>
> - the proposal takes forward or impacts on a Coalition agreement
> - the issue is likely to lead to significant public comment or criticism
> - the subject matter affects more than one department
> - the Ministers concerned have failed to resolve a conflict between departments through interdepartmental correspondence and discussions...
>
> The kind of proposals which will almost certainly require collective consideration include:
>
> - any issue which would have an impact on the good operation of the Coalition, or which takes forward government policy in an area covered by the Coalition Agreement
> - publication of consultation documents and Green and White Papers
> - responses to Select Committee Reports
> - adoption of negotiating stances for international meetings
> - agreeing final policy proposals before legislation is introduced
> - new regulatory or deregulatory proposals.'[60]

Similar principles, minus the references to 'coalition government' no doubt continue to apply.

92. The fact that issues likely to result in 'significant public comment or criticism' are required to be dealt with under the Cabinet committee system highlights how unacceptable a new exemption for Cabinet or Cabinet committees would be. It would

[59] EA/2008/0073, Cabinet Office & Information Commissioner, 7 January 2009.
[60] Cabinet Office, 'Guide To Cabinet and Cabinet Committees'

automatically exclude all contentious proposals from FOI. It would also provide a means of guaranteeing secrecy for any inconvenient information, on any subject, by ensuring that it was circulated 'for information' through the Cabinet committee system.

93. We note the view of the then Attorney General, Dominic Grieve, who in his 2012 evidence to the Justice Committee (albeit before the Supreme Court's ruling in *Evans*) opposed the idea of a new FOI exemption targeted merely on Cabinet 'minutes':

> 'there may at times be good arguments for Cabinet minutes to be revealed. One argument might be that this is all a long time in the past and is essentially a request for historical information early. I suppose another argument might be - again, I am dealing with hypotheticals - that, if there was something so extraordinary in the Cabinet minutes that concealing it from the public was maintaining a fiction that might, for example, be regarded as scandalous, that might have a bearing on it. It all depends on what the minutes are about, what they show and the context in which the meeting took place...
>
> I have heard it suggested, and it has been suggested in the past, that one might exempt Cabinet minutes and remove the veto; it is a decision for Parliament. As I said earlier, if you do that, you may inadvertently lose the benefit of sometimes being able to get Cabinet minutes revealed. There would be a potential loss there because Westland illustrates that there was a circumstance in which it was possible to do that'[61]

Policy advice disclosed in the public interest

94. We have identified at paragraph 78 (4th bullet point) FTT cases where the weight of the public interest arguments have led to decisions for disclosure of information from civil service submissions that might otherwise have been withheld. The category includes one case (Universal Credit Programme) where the FTT decision has been set aside and a new hearing ordered. These account for a very small number of the cases dealt with by the FTT in the last 3 years. Since these cases presumably include those where the government has been dissatisfied with the IC's decisions, that small number is significant. The chances of any one of the large numbers of Whitehall submissions produced each day being requested and ordered to be disclosed having gone through the appeals system is extremely low. The number of officials directly affected must be tiny. That is relevant to any assessment of a 'chilling effect'.

95. In those cases disclosure was based on a variety of different public interest arguments. These include the fact the information in question related to:

[61] Justice Committee, Post–legislative scrutiny of the Freedom of Information Act 2000, First Report of Session 2012–13, Volume II, evidence given on 16 May 2012, Questions 488 and 489

- a ministerial communication whose substance had been openly disclosed by the minister making it
- potentially serious concerns about a group of schools that had applied to enter the Free Schools programme
- the decision to withdraw funding for a significant public advice service at short notice and without a clear idea of what would replace it
- a decision affecting the credibility of the Senior Salaries Review Body and the quality of the judiciary
- the management of the Universal Credit Programme, a reform of immense significance which if not handled effectively could cause 'widespread anxiety and hardship'.

96. These are all serious arguments about the public interest. It is in the nature of the balancing exercise involved that there may be weight on both sides of the case. The question is not whether these decisions are all indisputably correct but whether the public interest is served by a system which allows for such decisions to be taken by independent, experienced tribunals, carefully considering the evidence and argument both ways, without their options being restricted to exclude particular information altogether. We have no doubt that it is.

THE MINISTERIAL VETO

97. The veto, in section 53 of the FOIA can be used to overturn an order to disclose exempt information under the section 2 public interest test.

98. In the proceedings involving Prince Charles' correspondence (in which the Campaign for Freedom of Information intervened) the government appeared to maintain that the power of veto went beyond this. It suggested that it could be used to overturn the common law public interest test incorporated into the section 41 exemption for breach of confidence and the balancing test applied under the section 40(2) exemption for personal data. The Supreme Court decision in *Evans v Attorney General* UKSC [2015] makes clear that veto is available only in relation to the section 2 public interest test.[62]

99. The veto can be used if a Cabinet minister or the Attorney General has 'on reasonable grounds'[63] formed the opinion that the balance of public interest favours withholding

[62] See in particular the judgement of Lord Wilson at paragraph 172(b). His approach was supported by Lord Mance and Lady Hale at paragraph 124.
[63] FOIA section 53(2)

exempt information. The government argued that this merely meant that the minister's grounds needed to be rational.

100. However, the decision which the government vetoed in *Evans* had been taken by the Upper Tribunal, a superior court of record with the same status as the High Court. Its decision had been reached after a six day hearing in which the parties had been represented by leading and junior counsel, arguments had been vigorously tested and constitutional experts from both sides had given evidence and been cross examined. It resulted in a 65-page decision, described by the Divisional Court as 'a most elaborate, thorough and fully reasoned determination'[64] plus several annexes one of which was 109 pages long.

101. Lord Neuberger, the President of the Supreme Court, supported by Lord Kerr and Lord Reid concluded that to overturn a judicial decision required a minister to do more than merely hold a different rational view and prefer that view that of a court or tribunal:

> 'A statutory provision which entitles a member of the executive (whether a Government Minister or the Attorney General) to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United Kingdom. It would cut across two constitutional principles which are also fundamental components of the rule of law.
>
> First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive. Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen. Section 53, as interpreted by the Attorney General's argument in this case, flouts the first principle and stands the second principle on its head. It involves saying that a final decision of a court can be set aside by a member of the executive (normally the minister in charge of the very department against whom the decision has been given) because he does not agree with it.'

102. To overturn these principles required the legislation to be 'crystal clear' that this was Parliament's intention. Lord Neuberger did not find such clarity in section 53 and the use of the veto had therefore been unlawful.

103. Two other Supreme Court judges (Lord Mance and Lady Hale) adopted a different approach to Lord Neuberger's but agreed that the veto had been unlawful. Section 53 required 'a higher hurdle than mere rationality'. Although a cabinet minister could

[64] [2013] EWHC 1960 (Admin) at paragraph 55

substitute a different view on the weighing of the public interest arguments, the Attorney General had in effect substituted his own findings on the evidence for those of the Upper Tribunal without even explaining why he considered its factual findings had been wrong. The Supreme Court held, by a majority of 5 to 2 that the veto had been unlawfully used.

104. By a majority of 6 to 1 it also found that the veto could not be used at all in relation to environmental information, because its use was incompatible with the EU directive which gave rise to the UK's Environmental Information Regulations.

Parliament's intentions

105. The government maintains the Supreme Court's ruling that something more than the normal judicial review test of rationality is required for the veto to be exercised undermines Parliament's clear intentions. A statement issued by the prime minister, on 26 March 2015 said:

> 'Our FOI laws specifically include the option of a governmental veto, which we exercised in this case for a reason. If the *legislation does not make Parliament's intentions for the veto clear enough*, then we will need to make it clearer.' (emphasis added)

106. Mr Straw, who as Home Secretary took the FOI Bill through the House of Commons and was closely involved in decisions about the veto told BBC Radio 4's Today programme on 14 May 2015:

> 'Parliament was absolutely clear that there should be protection for this kind of correspondence and…Parliament was exceptionally clear that if necessary the Attorney General could be given a right of veto over the Information Commissioner's and Tribunal's decisions to publish. And one of the really worrying aspects about this case which has not received enough attention is that *the Supreme Court on a split decision decided in their wisdom to literally to rewrite what Parliament had decided* and there is a serious question there for justices of the Supreme Court to reflect on whether they are exceeding their power which in my view they are' (emphasis added)

107. The Commission's call for evidence states:

> 'in March this year, the Supreme Court ruled that the veto could no longer be used *as Parliament had understood it would work when its provisions were being enacted*. One consequence of the Supreme Court's judgement is that the circumstances in which the veto can be exercised are now extremely narrow, although there remains considerable uncertainty about the precise scope of the veto. This judgement raised serious questions about the constitutional implications of the veto, the rule of law, *and the will of Parliament.'* (emphasis added)

108. The above statements all suggest that the Supreme Court's decision has undermined the will of Parliament. However, there is no indication in Hansard that Parliament was ever told that the veto could be used against a decision of the *tribunal or courts*. It is *this* use of the veto which the Supreme Court (like the Court of Appeal before it) has found to be unlawful.

109. When the FOI Bill was originally introduced, the public interest test was purely voluntary - the Information Commissioner would only have been able to *recommend* not *require* disclosure on public interest grounds. This would have meant that a public authority would have decided for itself whether it was in the public interest for it to disclose exempt information which, for example, revealed its own incompetence or misconduct.

110. During the Bill's Commons stages, Mr Straw agreed to make the public interest test legally binding. However, he insisted that ministers should have a power of veto over the *Commissioner's* decisions under the public interest test. There was no suggestion that the veto could also be used against a decision of the *Tribunal or High Court*, both of which dealt with appeals under the scheme set out in the bill as originally drafted.

111. In the extracts below, the veto is sometimes referred to as an "Executive override" or "exemption certificate". The italicising is ours.

112. Thus, Mr Straw told the Commons during the FOI Bill's report stage on 4 April 2000:

> 'The issue remains of what happens if, notwithstanding *the commissioner's order*, the public authority continues to believe, for sound reasons, that the information should not be disclosed. Most regimes that we have surveyed have some sort of Executive override of one sort or another, and we propose to have one.' [col 921]

113. A few moments later he said:

> 'In practice, it would be an extremely unwise Cabinet Minister who chose to issue an exemption certificate amounting to *a veto of a decision made by the commissioner* to order disclosure without consulting his or her Cabinet colleagues' [col. 922]
>
> 'I do not believe that there will be many occasions when a Cabinet Minister with or without the backing of his colleagues will have to explain to the House or publicly, as necessary, why he decided to require information to be held back *which the commissioner said* should be made available. [col. 923]
>
> 'The possibility of an Executive override means that a Minister will *not be able to appeal against a decision by the commissioner.* Such a provision would otherwise

be otiose. I accept that if we removed the Executive override, we would need to provide for an appeals mechanism. [col. 923]

'Circumstances could arise in which Ministers genuinely considered - we are talking about fine judgments - that the public interest *overrode the commissioner's judgment* about disclosure or non-disclosure '[col. 924]

114. The following day, 5 April 2000, Mr Straw said:

'I do not happen to believe that a Minister would seek to use an exemption certificate to prevent the release of factual and background information when that was *ordered by the commissioner*. '[col.1023]

'Hon. Members are aware that as a result of representations that were made to us, we have changed the Bill, partly in its text and partly by tabling amendments on Report…so that that the *commissioner will have a power to order disclosure subject only to Executive override* in the limited circumstances which I described yesterday' [col. 1094]

'I believe that, from the Government's point of view, it would be disingenuous for us to send the Bill to the other place having incorporated *the change to the position of the commissioner* - who would have a power to make an order for disclosure rather than simply what is at the moment a provision for recommendation - without also having on the face of the Bill the balancing arrangement by which there could, in limited circumstances, be an Executive override.' [col. 1095]

'However, it is my judgment…that the new clause is better in the Bill because then the complete scheme of change in principle - the change from discretionary disclosure to a *power to the commissioner* and a duty to abide by that *save for the circumstances of Executive overrid*e - is there.' [col. 1106]

115. At the bill's second reading in the Lords on 20 April 2000, Lord Falconer the Minister of State at the Cabinet Office explained:

'Clause 52 sets out the exception to the duty to comply with decision or enforcement notices. This is the so-called executive override provision. It is important to note the limitations on this provision…First, this is not a general override *of the commissioner's decisions*; it applies only to decisions taken under Clause 13.[65] Secondly, the Minister must explain publicly why *he has chosen to disagree with the commissioner*. Thirdly, the decision is subject to judicial review and *the commissioner will have the locus* to seek such a review. Thus, this is not an easy provision for Ministers to use.' [col. 828]

'If the *information commissioner* rules against the Minister, under Clause 52 the Minister is entitled to override it. In another place my right honourable friend said that if possible he would introduce amendments to ensure that, as far as

[65] The order of clauses was later changed, and what was clause 13 is now section 2 of the FOI Act.

> concerned central government, only a Cabinet Minister could override the *decision of the information commissioner* after a collective process had taken place.' [col. 890]
>
> 'If the Minister *overrides what is said by the information commissioner,* he or she must explain why. The Minister must have the support of Cabinet colleagues and his or her decision is subject to judicial review. It is for this House to decide whether or not Cabinet Ministers would *regularly overrule the information commissioner* and persuade all their Cabinet colleagues to take a political risk in relation to this matter.' [col. 891]

116. At Committee stage in the Lords on 25 October 2000, Lord Falconer said:

> 'There will be a limited, defined, restricted override…We believe that in such cases, which will be those dealing with the most sensitive issues, it should be a senior member of the Government, able to seek advice from his Cabinet colleagues, who should decide. Cabinet Ministers are accountable in a way *which the commissioner cannot be*. It is right that responsibility and accountability should rest at that level for this aspect of the freedom of information regime.' [col. 442]
>
> 'The clause is drawn in this way because the circumstances in which it will be necessary for the Cabinet, in effect, *to override the information commissioner* are not predictable from where we stand at present' [col. 445]
>
> 'it is worth noting that the effect of this provision is not that *any decision of the information commissioner* can be overridden: the only decision *of the information commissioner that can be overridden* is one on the balance of the public interest under Clause 13. If, for example, the *information commissioner* determined that something was not covered by an exemption, then the ministerial override would never apply.' [cols. 445-446]

117. Finally, at Report stage in the Lords on 14 November 2000, Lord Falconer said:

> 'the Government believe that there will be certain cases dealing with the most sensitive issues where a senior member of the Government, able to seek advice from his Cabinet colleagues, should decide on the final question of public interest in relation to disclosure. We believe that Cabinet Ministers are accountable in a way in which *the commissioner* cannot be. It is right that responsibility and accountability should rest at that level for this very important aspect of the freedom of information regime.' [col. 258]

118. The debate in both Houses therefore took place entirely on the assumption that the veto could be used to overturn decisions of the Information Commissioner - not the Tribunal, still less the High Court.[66]

[66] The High Court's functions under the FOI Act have since been transferred to the Upper Tribunal.

119. It may be that ministers themselves were not aware of this possibility. But if they were, they did not share their knowledge with Parliament.[67]

120. The only way in which Parliament could be assumed to have intended that the veto could be used against the tribunal or court would be if Parliamentarians were assumed to have worked this out for themselves, from the text of the bill, without the benefit of any indication to this effect from ministers.

121. However, Lord Neuberger supported by two other justices pointed out the Supreme Court had previously held that Parliament would not be assumed to have intended to interfere with fundamental rights unless 'it had made its intentions crystal clear'.

122. The Court of Appeal had held that fundamental rights:

> 'cannot be overridden by general or ambiguous words. This is because there is too great a risk that the *full implications of their unqualified meaning may have passed unnoticed in the democratic process*'. The text of the relevant provisions of the Act fell short of these standards.[68] (emphasis added)

123. The italicised words precisely describe what has happened in relation to the veto. Lord Neuberger concluded that FOIA itself 'falls far short' of providing the necessary clarity.

124. At the time of the FOI Act's passage, the proposition that ministers could veto decisions of the *Information Commissioner* had itself been controversial, not least because the government's 1997 FOI white paper had explicitly rejected it, saying:

> 'We have considered this possibility, but decided against it, believing that a government veto would undermine the authority of the Information Commissioner and erode public confidence in the Act.'[69]

125. The idea that the veto could also be used not merely against the Commissioner but against the *tribunal and courts* including the House of Lords, now the Supreme Court

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[67] The proposed arrangements for the veto changed during the bill's House of Lords stages. The initial position was that a government department had no right of appeal against a notice ordering disclosure on public interest grounds. Its only option would have been to exercise the veto. That was subsequently changed to the present position which allows departments to either appeal against such a decision or use the veto. (House of Lords debates, 25 October 2000, cols 444-5)
However, even as the bill stood during this interim stage, the possibility that the veto might be exercised against the tribunal or court should have been apparent to the government. A requester would have been able to appeal against a decision notice by the Commissioner which failed to order disclosure in the public interest. If the tribunal found in the requester's favour, the government is likely to have considered whether the veto could then have been used against the *tribunal* decision. If the requester lost an appeal to the tribunal but then successfully appealed to the High Court, the possibility of a veto against the *High Court's decision* should then have been apparent.

[68] Paragraphs 56-58

[69] Your Right to Know. The Government's Proposals for a Freedom of Information Act', Cm 3818, December 1997, paragraph 5.18

(which the Lord Chief Justice has confirmed to be the case[70]) would have been explosive. It is clear that Parliament had no idea that this was possible. The Supreme Court decision could not be said to disregard the will of Parliament.

126. We do not believe a veto should exist at all, particularly in light of the Act's elaborate appeals process. We note that on 4 of the 7 occasions on which the veto has been exercised so far it was used against a decision of the Information Commissioner which had not been appealed against to the Tribunal. In those cases the government had not attempted to secure the outcome it sought by use of the conventional appeal mechanism.

127. If a revised veto power is to be introduced, we do not believe it would be acceptable for the only substantive safeguard to be the standard judicial review test requiring merely that the minister's view should not be irrational. That is not a proper basis for overturning the considered decision of court or tribunal, reached after detailed consideration of argument and evidence. A more appropriate test, which accords weight to the degree of scrutiny and argument applied to the decision by the decision taker, is essential.

ENFORCEMENT

128. There can be substantial delays in dealing with FOI requests, both at the initial response stage and in completing internal reviews. Section 10(3) of FOIA allows the normal 20-working day deadline to be extended when considering the public interest test. The extension is not subject to any statutory limit, other than the requirement that it be 'reasonable in the circumstances'. This provision has clearly been abused on occasions. The former National Offender Management Service (an MOJ executive agency) in the past issued 12 consecutive monthly extensions under this provision, delaying its response to an FOI request by a whole year.[71]

129. We do not consider that the public interest test requires extra consideration time. The need to consider whether an exemption applies and if so whether disclosure on public interest grounds should take place are part of a single continuous process. No government department requires 20 working days to decide whether particular information relates the formulation of government policy – and then a further 20 working days to consider whether disclosure should take place on public interest grounds. If there is a case for extending the time scale it should be where significant

[70] Evans v Attorney General, [2013] EWHC 1960 (Admin), paragraph 8
[71] Information Commissioner, Practice Recommendation, National Offender Management Service, 10 March 2008

external consultation is involved, for example with third parties whose commercial interests may be affected by disclosure or where a request involves a substantial volume of information. The maximum extension should be specified, as has been done in regulation 7(1) of the EIR.

130. Delays in carrying out internal reviews are a greater problem, because there is no statutory basis for such reviews under FOI. This means the Information Commissioner has no power to take formal enforcement action against an authority for excessive or even deliberate delays at this stage.[72]

131. The MOJ recommended a statutory 20 day maximum extension to the public interest test in its 2012 report and similar statutory limits for internal reviews. The government did not accept these recommendations. It indicated in its response that it was minded to amend the Code of Practice under section 45 of the FOIA to suggest that internal reviews should normally be completed within 20 working days,[73] but has not done so.

132. We question the value of internal review. It may merely impose a further delay on the requester while reducing the pressure on authorities to reach a correct decision initially. MOJ statistics suggest that the requester's case is partly upheld at central government internal reviews in 13% of cases, and fully upheld in a further 8%.[74] We suspect that these 'successes' may be illusory and largely involve upholding complaints that time limits for initial responses have been exceeded

BURDEN

133. The Commission's call for evidence raises the question of whether the FOI Act creates a disproportionate burden on public authorities.

134. We believe the Act provides exceptional value for money. The most recent costing for central government bodies, referred to in the call for evidence, suggest the Act's annual cost to central government is £8.5 million. Moreover, the figures indicate that the volume of requests to central government bodies has grown by only 23% over 10 years, a surprisingly low figure given the Act's high public profile. We think the Act provides

[72] The government's response to the Justice Committee's report appears to have assumed that such a power exists. While that is the case under the EIR the IC has no such power under FOIA. See: Government Response to the Justice Committee's Report: Post-legislative scrutiny of the Freedom of Information Act 2000, November 2012, Cm 8505, para 28

[73] Paragraph 31

[74] Ministry of Juistice, Freedom of Information statistics: Implementation in Central Government 2014 Annual and October-December 2014, 23 April 2015, Table 13.

substantial benefits both in terms of improved accountability and scrutiny – and pressure on wasteful spending.

135. Following the Justice Committee's report on post legislative scrutiny of the FOI Act, the coalition government published proposals to amend the Act's cost limits, to make it easier for requests involving 'disproportionate burden' to be refused. The target of these measures was said to be requesters making 'industrial' use of the Act.[75] The potential measures largely involved making it easier for public authorities to refuse requests on cost grounds.

136. However, the measures proposed did not target individuals making excessive use of the Act. They would have applied to *all* requests including those from people making modest and occasional use of the Act. The main proposals involved reducing the existing cost limits (of £600 for government departments and £450 for other authorities) to some lower figures (which would potentially affect all requests); allowing additional activities to be included when calculating whether the cost limit had been reached; and permitting unrelated requests by one individual or organisation to the same authority to be aggregated and refused if the total cost exceeded the cost limit for a single request.

137. The last of these proposals could have meant that an individual or organisation might be limited to just a single request to an authority in a 3 month period. One request which fell just short of the cost limit might then have prevented the requester making any further requests to the authority until the end of the 60 working day period referred to in the fees regulations, which would presumably have been applied.[76] The impact of such a proposal on, say, a specialist journal or journalist whose work focussed on a particular authority, or a local MP or councillor, or campaign or amenity group, would be particularly severe.

138. Shortly after these proposals were published, the Upper Tribunal issued its decision in the *Dransfield* case, subsequently endorsed by the Court of Appeal.[77] The terms of this decision are strikingly similar to the terms in which the coalition government set out the case for changes to the cost limit. The Upper Tribunal held that the purpose of the Act's provision on vexatious requests (section 14(1)) was 'to protect the resources (in

[75] Government Response to the Justice Committee's Report: Post-legislative scrutiny of the Freedom of Information Act 2000, CM 8505, November 2012.
[76] The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, regulation 5(2)(b)
[77] Dransfield v The Information Commissioner [2015] EWCA Civ 454 (14 May 2015)

the broadest sense of that word) of the authority from being squandered on disproportionate use of FOIA'.

139. The consequence of that decision has been a redrawing of the IC's approach to section 14(1) which previously did not permit a request to be refused *solely* on the grounds of the burden it might impose on the authority. Where *cost alone* was the issue, the IC had held that an authority would have to demonstrate that the cost of locating, retrieving and extracting the requested information exceeded the section 12 cost limit. However, the cost limit did not permit the costs of processing a high volume of easily found material to be taken into account. A request for the entire contents of a filing cabinet could not be refused under the cost limit, since the cost of finding and extracting that information was negligible. The burden lay in its *processing* and in particular in identifying and redacting exempt information. The new approach has permitted such requests to be refused if those activities involve a disproportionate burden not justified by the value of the information.[78]

140. This approach has a significant advantage over changes to the cost limit, since it takes account of both the burden and the public interest involved in complying with a demanding request. By contrast, the cost limit takes no account of the public interest. It is a purely mechanical calculation based on the number of hours needed to deal with the request, which allows the shutters to automatically be brought down once the cost limit is reached regardless of value of the information.

141. We believe the present approach addresses the concerns relating to 'disproportionately burdensome' requests and that further action to deal with that issue should not now be necessary.

Charges

142. We would be particularly concerned by any move to introduce charges for requests. The experience under Ireland's Freedom of Information Act, in which the introduction of application fees led to an immediate crash in the volume of requests to one quarter of its previous level, is a particularly acute warning of the potential consequences of any such approach. Ireland has now abolished application fees.

[78] See for example FTT decision EA/2013/0270, Department for Education & Information Commissioner & McInerney, which involved a request for what turned out to be 25,000 pages of material about free school applications; and Information Commissioner decision notice FS50544833, which involved a request for metadata about all emails sent to or received by the Home Secretary during a one week period, including the sender's name, the date and time, subject and names of attachments.

143. When the UK Act was passed, the government originally intended to allow authorities to charge a fee of up to 10% of the estimated costs of locating, retrieving and extracting the requested information. It ultimately decided not to adopt this approach.

144. We understand this was because the cost of generating the invoice would normally have exceeded the costs recovered. It would also have exposed FOI officers to a substantial additional workload, of routinely estimating the costs of complying with every request received, generating invoices and keeping track of whether payments had been received and cheques cleared, before work on the request could commence.

145. Scotland's experience suggests that the UK decision was correct. Charges similar to those initially envisaged under the UK Act can be made under the Freedom of Information (Scotland) Act 2002. No charge is made for the first £100 of estimated costs, but thereafter 10% of the estimated costs of locating, retrieving and providing the information can be charged.[79]

146. In practice, virtually no charges are made. The Scottish Information Commissioner's statistics show that although Scottish public authorities received a total of 44,863 FOI requests in the year from October 2014 to September 2015, fees notices were served on just 64 occasions, that is in relation to 0.14% of requests.[80] That suggests that charges are not an attractive proposition for authorities, perhaps because of the work involved in administering them.

147. The call for evidence raises the possibility of a standard flat rat application fee, similar to the £10 fee that can be charged for subject access requests under the Data Protection Act. However, this subject access fee is likely to be abolished under the new EU Data Protection Regulation which is now being finalised.

148. An application fee for FOI requests, at whatever amount, would cause a number of difficulties.

149. It would conflict with the existing principle that all written requests for recorded information must be dealt with under the Act (or the EIR) regardless of whether the requester cites it. At present, someone who requests information automatically benefits from the Act's legal rights, even if the requester is not aware of those rights and does not refer to the Act.

[79] The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004
[80] https://stats.itspublicknowledge.info/report/generate

150. An application fee would lead to a two-tier system, distinguishing between those who formally exercise their rights and pay the fee and those who ask for information without citing the legislation. Authorities would presumably be expected to continue answering informal requests free of charge. They could hardly refuse to reply to someone who wanted to know why the service which the authority was required to provide had not been received and who wanted figures about the authority's compliance with standards. However, in answering such requests without a fee they would presumably be freed from the obligation of complying with the Act's requirements. This would permit them to withhold information even where it was clear that this could not be justified under any FOI exemption. That would be a particularly unattractive proposition.

151. Application fees would also make the use of email for FOI requests difficult. Applications might have to be made by letter with cheques, unless authorities provided the facilities for online payment and for matching payments to requests. Existing web-based facilities for making requests would presumably have to be adapted to comply. A resource such as the *whatdotheyknow.com* website, which has become a valuable source of information for public authorities as well as requesters would no doubt become defunct.

152. Fees would also deter those who made more than occasional use of the FOI Act. Anyone wishing to compare their authority's performance with those of neighbouring authorities would quickly find the prospect of multiple application fees a problem. The use of FOI to produce surveys, often of information which is relatively simple for authorities to provide, is likely to cease if requesters were obliged to pay a fee to each authority.

153. Such surveys have made a valuable contribution to public debate. For example:

> The All Party Parliamentary Group on Vascular Disease has produced a report, based on an FOI survey, comparing the rate of amputations for patients with diabetes by NHS trust and Clinical Commissioning Group. This showed that the likelihood of losing a limb because of shortcomings in the quality of medical care was twice as high in the South West as in London.[81]
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> An FOI based survey published in the British Medical Journal in 2014 revealed that nearly 60 per cent of NHS trusts were failing to routinely monitor several

[81]http://appgvascular.org.uk/media/reports/2014-03-tackling_peripheral_arterial_disease_more_effectively__saving_limbs__saving_lives.pdf

common hospital-acquired infections and 75 per cent kept no records of associated deaths.[82]

HealthWatch, the statutory consumer body dealing with the NHS and care services, used an FOI survey to document the fact one third of NHS trusts fail to formally record or investigate complaints about poor healthcare or mistreatment of patients made by visitors, contractors or other 'citizen whistleblowers'.[83]

An FOI survey of taser use by police forces found that 57 per cent of taser shots struck the chest area, although the manufacturer of the device expressly warns that the chest areas should he avoided because of the risk of inducing cardiac arrest.[84]

The Howard League for Penal Reform used an FOI survey to reveal that there were approximately 53,000 overnight detentions of children under the age of 16 in police cells in 2008 and 2009, some less than 10 years old.[85]

154. Finally, fees would substantially undermine the value of the Act in exerting pressure on wasteful public authority expenditure. The threat of exposure via FOI is a potent deterrent against extravagance. For example:

Glasgow councillors spent over £24,000 in three years visiting overseas flower shows. The councillors had attended horticultural events in Tokyo, Madrid, Barcelona, Paris, Amsterdam, Dublin, Belfast and the German spa town of Baden Baden. The Tokyo trip alone had cost over £6,500. An official claimed that the trips helped to keep Glasgow at "the forefront of world-class horticultural achievement". The practice stopped after the expense was revealed by an FOI request.[86]

Local authorities and NHS trusts spent £220m over 12 months buying and leasing luxury cars. One local authority hired a Lotus Elise while another leased a Jaguar XJ, the same model as the Prime Minister's official vehicle. Between 2010 and 2011, public bodies hired almost 600 Mini Coopers and more than 650 BMWs, and purchased 17 Audis. Sunderland was the biggest spending city council, spending more than £800,000.[87]

A FOI request has revealed that West Midlands police spent £19,000 on two Unmanned Aerial Vehicles, which according to a senior officer cannot be used at night or in the rain. Two of the high-tech machines were purchased at a cost of £8,502, while training cost a further £10,620. The force's response to the request admitted that no arrests have been made from their use.[88]

[82] http://www.bmj.com/content/349/bmj.g5656
[83] http://www.healthwatch.co.uk/news/those-who-witness-poor-care-being-denied-right-complain-nhs
[84] http://www.guardian.co.uk/uk-news/2013/jul/14/police-tasers-cardiac-arrest-warnings?INTCMP=SRCH
[85] http://www.howardleague.org/research_overnight_detention/
[86] Cash-strapped Glasgow council sends staff on £24K overseas jaunts to flower shows, Daily Record, 11 April 2008
[87] £220m for official cars, The Sunday Times, 7.8.11
[88] West Midlands Police's £19k drones 'can't fly in the rain', Birmingham Mail, 15.11.15

Durham Free School, which was open for less than two academic years before being closed by the Education Secretary, cost the taxpayer almost £1 million. In response to an FOI request, the Department for Education confirmed the School received £300,000 in pre-opening funding, the flat-rate grant given to all secondary free schools. In addition, £304,881 was spent on capital costs; £212,663 on construction works, furniture, fittings and equipment and ICT (the Department said much of the ICT equipment could be re-used); and £92,218 on legal and technical adviser fees.[89]

NHS England's axed patient feedback service, Care Connect, cost £1.2 million, an average of £1,600 for every patient query resolved during the pilot phases. The service enabled patients to use a number of channels: online, phone, text or social media, to ask a question, provide feedback or log concerns on their experiences of the NHS. It was due to be rolled out across England by February 2014. However, the service was never widely picked up by patients and consequently cost the NHS extortionate amounts per use.[90]

It cost Medway Council almost £350,000 during two school closures just to cancel existing photocopier leases.[91]

London Underground spent £933,000 in 2009-10 hiring fake passengers to observe the "ambience" at stations and to test the knowledge of staff.[92]

Speaker of the House of Commons John Bercow billed the taxpayer £172 to take a chauffeur-driven car from Parliament to Carlton Terrace, a journey of less than one mile. The data was requested by the Press Association under the FOI Act. The request also revealed that the Speaker spent £367 on being driven 34 miles to Luton to give a speech on how MPs were restoring their reputation after the expenses scandal.[93]

An NHS scheme to give patients more control over their personal care has resulted in millions of pounds being spent on luxuries such as summer houses, a boat ride and holidays, according to a widely-reported investigation by Pulse, a magazine for GPs. Information obtained by Pulse under the FOI Act showed that Clinical Commissioning Groups (CCGs) in England expected to spend £120m on 4,800 patients taking up the personal health budgets scheme this year. FOI responses from NHS Nene CCG and NHS Corby CCG revealed that patients had been funded to go on holiday, purchase an iRobot and build a summer house. NHS Kernow CCG spent over £2,000 on aromatherapy as well as allocating funds for horse riding and pedalo boating.[94]

The Government's policy of culling badgers to stop the spread of tuberculosis to cattle has cost £16.8m to-date, which works out at £6,775 for each of the 2,476

[89] 'The £1m free school (now shut), Schools Week, 15.5.15

[90] Axed patient feedback service cost £1.2m, Digital Health News, 16.11.15

[91] £350k just to take away photocopiers, The Medway Messenger, 23.9.11

[92] Rapid rise of the citizen shopper spies for hire, Sunday Times, 30.1.11

[93] John Bercow slammed by colleagues after claiming £172 on a taxi journey of less than a mile, Independent, 25.7.15

[94] Revealed: NHS funding splashed on holidays, games consoles and summer houses, Pulse, 1.9.2015

badgers culled. The information was obtained by the Badger Trust from the DEFRA via an FOI request.[95]

The Ministry of Justice paid Serco over £1m to run an empty secure unit for children over a seven-week period. Serco had been contracted to run the Hassockfield secure training centre near Consett since 1999. This expired in September 2014 but was extended by the MoJ before the unit closed on 20th November 2014, when the remaining children were moved elsewhere. However, Serco continued to be paid to manage what was by then an empty building until 9th January 2015. The money it received during those 50 days came to a total of £1.1m. The information was obtained under the FOI Act by Article 39, a charity which aims to protect the rights of children living in institutions.[96]

The IRIS recognition system, which scans the unique patterns of travellers' irises to confirm their identities, was so under-used that it cost nearly £2 per arrival. The system had been used just over 4.7 million times between 2006 and 2012. The technology cost just over £9m, the equivalent of £1.94 for each person that had used it. Earlier in 2012 year the government announced the system was being scrapped after revealing the software used was already out of date.[97]

Between 2012 and 2014, the London Borough of Tower Hamlets sold off more than 50 homes using out of date valuations, costing taxpayers thousands of pounds on each transaction, according to data released under the FOI Act. Tower Hamlets sold one two-bedroom flat in 2012 based on a valuation made seven years earlier, failing to take advantage of a 30 per cent price rise in the area over that period. It sold a one-bedroom flat for £42,000 when it was valued at £142,000. A two-bedroom maisonette was sold for £40,000 when it was worth at least £125,000. The London borough of Sutton also revealed that it had sold off several flats at a 70 per cent discount, allowing one tenant to buy a £173,000 home for just £70,000. Discounts of 70 per cent are allowed under the policy for tenants who have lived in their homes for many years, but critics of the policy insist they are too high.[98]

A council spent £330,000 in redundancy payments to 25 staff who were subsequently re-employed by the authority. One worker who agreed a redundancy package with Stoke-on-Trent City Council spent just 27 days away from the authority before returning to a new position. A further two workers waited just 32 days after agreeing a settlement before being re-employed. The council stated that redundancy agreement had now been redrafted to provide that nobody can return to work at the Council within a year and a day.[99]

Councils in England have inherited more than £30m debt as a result of schools converting to academies, FOI requests by the BBC have revealed. Under the academies scheme, when local-authority-run schools choose to convert to academies, councils pick up the bill for the costs of conversion including the cost of

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[95] Culling costs £6,775 per single badger, figures reveal, Daily Mail, 2.9.2015

[96] MoJ paid Serco £1.1m for running secure children's unit after it closed, Guardian, 21.10.15

[97] Revealed: failed airport eye scanners have cost £2 for every passenger who used them, The Independent, 1.5.12

[98] Council houses have been sold at 70% under their market value,Guardian, 11/09/2015

[99] Council spends £330,00 in redundancy payments then rehires staff 27 days later, The Daily Telegraph, 10/08/2011

any deficit and legal fees. The FOI responses showed that £32.5m has been spent by councils on clearing debts since the Academies Act was introduced in 2010.[100]

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[100] Schools converting to academies cost councils £300m, BBC reveals, BBC, 25.7.2015