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Is Public Access to Civil Service Policy Advice Possible?

Proceedings of a Seminar

Held at the Royal United Services Institute, London
5 March 1996

Organised by
The Campaign for Freedom of Information

Sponsored by
The Association of First Division Civil Servants

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CONTENTS

James Cornford

Chairman, Campaign for Freedom of Information

Welcome everybody to this seminar which is on the question of advice to Ministers by civil servants, and whether this should be available under any freedom of information legislation or other kind of rules. This is clearly a question which is much in the limelight as a result of recent events, but it is an old familiar question to anybody who has been concerned with freedom of information. And of course, it is a matter of central importance to the sponsors of this seminar of whom I would like to thank now; the First Division Association who have sponsored the seminar, whose members are directly and acutely affected by these issues, and whom I think we could forgive for being a little alarmed or uneasy about the way in which the conventions of the constitution are being rewritten on the hoof, for instance, in the remarks by the Cabinet secretary to the Scott Enquiry about the difference between accountability and responsibility. There seemed to be some black holes opening out in the fabric of the constitution here, which leave civil servants rather badly exposed and these are the issues in a sense which we need to address today.

I would like to welcome all the speakers and thank them very much for being here. I am particularly grateful to the Minister, Roger Freeman, who has not only found time to speak to us but will also stay to listen and take part in the discussion, which I take to be an earnest of the seriousness with which the government takes these issues. The format we are going to follow is that each speaker will speak for about ten minutes and there will be an opportunity directly after each speaker has spoken for questions. But those should be questions of fact or clarification. I do not want those question sessions to drag out because there will be an opportunity to have a more general discussion in the last hour of the seminar, in which all the speakers will be on the panel and you will be able to address questions and remarks and comments to them.

The first speaker is Roger Freeman, the Chancellor of the Duchy of Lancaster, a position to which he was appointed in July 1995. He has held previous ministerial office: responsibility for the Armed Forces, the Department of Health, the Department of Transport, and as a Minister of State for Defence Procurement. He has a wide, if rapid familiarity with Whitehall. Of course, now he is the Minister responsible for the Civil Service, and among his responsibilities is responsibility for these two things linked together in the press release from the Department, 'Open Government and Market Testing'. Mr Freeman.

The Rt Hon. Roger Freeman MP

Chancellor of the Duchy of Lancaster

James, thank you very much. I much welcome the opportunity to participate in this seminar, listening to all the other speakers and then participating in the concluding session. You will forgive me if I have to go at one o'clock because I have to go to the House of Commons to host a lunch, but I dare say everyone else will be expecting us to wind up at one o'clock.

I intend to comment on the Scott report and also the question of a freedom of information act, in just a few minutes, but first I want to deal with the core subject of the seminar itself which is public access to policy advice.

At the time of the 1993 seminar which William Waldegrave addressed, the Code of Practice on Access to Government information existed only in preliminary draft form as an annex to the White Paper. Since then, that code has been written up into final form, agreed fully within Government and so far as possible outside, and has been in operation for coming up to two years.

Last spring the government published a first annual monitoring report covering the initial nine months of its operation. It will shortly be publishing, later this week I expect, a second such report covering the whole of 1995. So we now have some - though not yet a huge amount - of experience of how the Code operates in practice. Now I should add that the Code passed its only significant test of independent scrutiny successfully about nine months ago, when the Nolan Committee first report noted that "a common statutory framework might be too inflexible to apply to a wide range of public bodies performing very different functions". "We believe", the quote goes on, "that more experience in operating the government's openness code is required before major changes are considered." Indeed, the committee went rather further and supported the Code's extension across other areas of government, in particular into certain types of Non-Departmental Public Bodies.

The code sets out what is, to my mind, a relatively simple and relatively defensible approach to the public disclosure of policy advice, the events of the last few weeks not withstanding. It does this by distinguishing between the facts, and analysis of the facts, behind major policy proposals and decisions, and internal discussion and advice, on the other.

It creates a clear presumption to disclose - indeed to volunteer - the former and makes the latter subject to a harm test - namely whether public disclosure of the information concerned would harm the frankness and candour of internal discussion. The initial distinction is important, because it is intended to combine the maximum public understanding of the Government's policies and the reasons for them, with protection, where necessary, of the confidentiality of the internal decision-making process within Government. This objective effectively defined in 1994 - and continues to define - the extent to which the Government seeks to make policy advice publicly accessible.

That is not to confuse policy advice alone with official information as a whole: in particular, the Government has introduced, or supported, numerous statutory and non-statutory measures designed to increase the public availability of information on public service performance on the one hand, and individual records on the other. By way of example of that in my own department, you only have to go back to last week, and our Next Steps Review 1995; effectively, 357 pages of performance data about government departments.

But to return to policy advice, three key considerations result from our approach.

Firstly, there is a continuing emphasis on consulting the public wherever possible, before policy is determined, in the light of the known facts and the existing policy framework. The traditional Green Paper consultative model, in a limited number of areas, has been replaced by a far more widespread and diverse span of consultation papers covering very many policy areas. There are a multitude of examples, many of which are included in the Annual Monitoring Reports. Last week, for instance, Sir Len Peach, the new independent Commissioner for Public Appointments established as part of the response to Nolan, issued consultative draft Guidance on appointments to Executive NDPBs and NHS bodies. The day after tomorrow sees the publication of another Nolan response - a Cabinet Office and Treasury consultation paper reviewing the legal framework of propriety and audit in public bodies. So this is clearly - far more than ever before - a key way both of involving interests outside government in the process of policy formulation and of providing public access to the facts and figures on which policy advice to Ministers is, or will be in due course, based.

Secondly, the Code commits the Government to publish - i.e. to volunteer - the facts and

analysis of the facts which were considered important and relevant in framing announced policies, and to give reasons generally with administrative decisions. The 1994 Monitoring Report listed examples of this in areas as diverse as the use of hydrocarbon propellants, the Rural challenge competition results and an environmental statement on the Channel Tunnel Rail Link. The 1995 Report will include a very wide range of more recent examples including data on drug abuse in Northern Ireland, research into the long-term effects on human health of exposure to sheep dips, and background material on vehicle emissions.

Thirdly, there is a presumption in favour of disclosing material which the Government has acted on, subject to limited exemptions of, for example, Cabinet or Cabinet Committee papers. For example, a joint DTI/DOE paper setting out the background to a review of the Non-Fossil Fuel Obligations and the promotion of renewables-sourced electricity. This was prepared in specific response to a query from the Combined Heat and Power Association.

In determining the scope of the policy advice category, and ensuring it remains in line with general government policy, the Code has two very substantial advantages.

First, it allows a second - internal - and third - independent - opinion on whether the harm test has been realistically applied, and the 'internal discussion' exemption properly claimed, in any refusal to disclose. In practice, only about 8% of requests under the Code have been refused, and only a very small proportion of this number have concerned policy advice. We can, however, already see from the Ombudsman's Reports how his decisions have at times both supported or overturned those of departments. For example, in a case of a 1988 enquiry into the proposed Birmingham Northern Relief Road Scheme, the Ombudsman rejected a claim under this exemption. By contrast, in a case of information relating to the repeal of the Northern Ireland broadcasting restrictions, he substantively - but not wholly - upheld the claim for exemption. While, therefore, our information is as yet very limited, it would seem that the Ombudsman is obliging departments to think carefully about their approach to the public interest on policy advice, and their use of the exemption against disclosure.

Secondly, it is a flexible approach - a word which I feel uninhibited about using since everything to do with the Code, including the White Paper from which it developed, and the Guidance on its interpretation, is very much in the public domain. In practice, what this means is that any policy change in related areas - as it might be in the conventions governing

answers given in Parliament, to take a topical example - can be fairly easily reflected in the way the Code is used and interpreted. Thus, for example, the Ombudsman has signalled his intention to review the workings of the Code from his perspective, in his 1996 Report, due out shortly; while the PCA Select Committee may also make relevant recommendations in its forthcoming report on open government. We stand ready in the Cabinet Office to consider whether and how any resulting proposals might be reflected in the Code, in a way we could not realistically do if we were locked into a statutory framework.

This thought brings me back to the beginning of my remarks, when I mentioned Scott. I could hardly avoid doing so in a discussion about access to policy advice within Government, and I should like to return briefly to the Scott Report. It has helped to put into context - to give depth to - some of my thoughts on the current arrangements for openness of the policy process, and on a Freedom of Information Act in particular.

Now, Lord Justice Scott did, of course, make a number of significant observations about disclosure of specific areas of policy advice in specific circumstances. The most obvious are the accountability of Ministers to Parliament through the answering of Parliamentary Questions on the sale of arms or defence-related equipment, and about the use of Public Interest Immunity Certificates in criminal trials. We shall be reviewing policy in these areas carefully and thoroughly in response, as the President of the Board of Trade and I set out in last Monday's debate.

Scott did not, however, speculate - unlike Lord Nolan - on whether provision of information by government would be better under a statutory regime. Of course, there have been a number of calls for a Freedom of Information Act.

But to imagine, as some have done, that Scott "proves the need" for FOI legislation, is to my mind wrong. To test this, simply try to imagine yourself trying to draft the appropriate statute. Suppose that you had been in the position, at some point in the 1980's, of a Government, of whatever political leaning, setting out to devise an FOI Bill. You would not, of course, have had the benefit of a three-year, one thousand eight hundred page, report highlighting the particular case of information on arms sales and related diplomatic activity. Instead you would, almost certainly, have looked across the field of Government activity in order to define those areas which, for national security or other compelling reasons, needed to

be exempt from the provisions of the Act.

In keeping with other statutory FOI regimes around the world, you would probably have exempted confidential policy advice to Ministers. But even if you had boldly decided to rely only on specified subject areas within that general category, you would have needed to start by determining particularly sensitive areas on which successive governments had routinely refused to give information to Parliament. And in the current version of Erskine May, you would have read that these included, and I quote:

> "...discussions between Ministers or between Ministers and their official advisors, or the proceedings of Cabinet or Cabinet Committees; security matters, including the operation of the Security services; operational defence matters, including the location of particular units; and details of arms sales to particular countries."

So a Freedom of Information Act would, almost at its starting point, have excluded sensitive policy advice in just those areas with which the Scott Report was concerned.

In winding up a debate last month on Ministerial responsibility, I said that the Government regard the Civil Service as a precious asset that other countries have good reason to envy, and I meant every word of it. But I am realistic enough to know that "the instinctive Whitehall reaction" - for which read, instinctive bureaucratic reaction - to an FOI act would be to turn the spirit of open government into an exercise in damage control. First, by thinking far more carefully about which material should be committed to a permanent medium at all. And secondly, by scrutinising the legislation, word by word, to ensure that nothing appears in court when it does not absolutely have to. To my mind that risks short-changing the process of current policy making, the future ability of historians to reconstruct the government's thinking in time to come, and the hope of further encouraging the spirit - as opposed to just the letter - of openness which has actually made considerable progress in government over the last two decades.

That is one of the key reasons why we have approached this question through the non-statutory Code, because we think that encouragement to be as open as possible with the public, as well as with Parliament itself, is a more productive approach of opening up government fundamentally, rather than just so far as the law requires.

But let me make it clear that our thinking has not come to a halt. There was no point in devising a flexible mechanism like the Code if we had no intention of ever changing it. We now have, in a variety of contexts, in addition to this seminar this morning, the PCA Select Committee, the Public Service Select Committee, the Nolan Committee, the Ombudsman, and the government machine itself, all involved, or gearing up to getting involved, in examining different aspects of openness and/or accountability and what changes need to be made.

This is an important and active debate, which is continuing in an area where the Government has already responded in a number of significant ways. In the words of the President of the Board of Trade last Monday, "the debate over the alternatives should continue and the Government will be willing to participate." I am sure there will be no shortage of suggestions, and look forward to this morning's contribution to that.

Christopher Price

Regarding the objections to the statutory framework, are you saying it is impossible to draft a set of rules which would give you the freedom to develop policy... (inaudible)?

Roger Freeman

Yes, of course it's possible to draft a statute, and there are examples around the world. I was making a point, I hope clearly, in my speech that those statutes in other countries, do exempt the very categories that some people are concerned about: access to government information, for example, intelligence defence policy advice to ministers. The three objections to a statute are first, that access by the individuals to the courts is expensive and can be time delaying. At present we have access to the Ombudsman, which is free. If you cannot get the right information from a department then you complain to the Ombudsman, and the Ombudsman, as I have indicated in my speech, has made several rulings requiring the departments to reveal information. So the first is ease and facility of access to the system.

The second is the reaction of the Civil Service itself to a statute as opposed to a Code, and I hope I was making the point clearly that a Code encourages you to volunteer information; not

necessarily the document, but the facts, the information. A statute would be seen, in my judgment, to the Whitehall machine as being threatening, oppressive, inflexible; and you would find that civil servants would not commit to paper - to writing, to minutes - as often as they would at present, information that they might feel had to be disclosed. In other words, civil servants would tend to retire into their shells.

Thirdly, we have, and it has been much criticised, but we do have the principle of Parliamentary control and Ministerial accountability to Parliament. In the field of Scott, we have initiated, and will take part in, a public debate about the Parliamentary conventions dealing with the disclosure of information about arms sales. If that needs to be revised I am happy to participate in the discussion. But the principle of Parliamentary accountability is that civil servants are responsible to Ministers and Ministers responsible to Parliament for answering questions and revealing information. If you shift that to the courts, you engender, you introduce a radical - in my judgment - constitutional change.

James Cornford

Our second speaker is Graham Mather, who is a member of the European Parliament and President and co-founder of the European Policy Forum. Before he disappeared into the darkness of Brussels, Graham Mather was better known to you all as the Director General of the Institute of Economic Affairs.

Graham Mather MEP

President, European Policy Forum

I would like to follow on directly from what Roger Freeman had to say; I would like civil servants not to retreat into their shells. My fear is that they are not very far out of those shells at the moment. I think it would be unfortunate if the question which arose from the last presentation got us bogged down in a debate upon whether a statutory or non-statutory framework is likely to change the culture of Whitehall. The Minister suggested that the move to a statutory system would have an effect of civil servants hiding their policy advice, making it more opaque, more difficult for historians. I fear that the whole culture of Whitehall is based on the presupposition that there is a large category of information whose disclosure would harm the frankness and candour of internal discussion, a phrase taken directly from the existing Code of Practice. Of course, this reasoning makes it possible to exempt from the Code of Practice not only proceedings of Cabinet and Cabinet committees, but also internal opinion, advice, recommendation, consultation, and deliberation, and also projections and assumptions relating to internal policy analysis, analysis of alternative policy options and information relating to rejected policy options.

So it seems to me that the difference between the existing Code and a projected statute in terms of categories of information which are hidden is not great, it is a false distinction. We have to go to the root of the question and ask "why do officials think it desirable to operate in an atmosphere of secrecy?" I suppose that question depends at base on whether or not one is satisfied with the functioning of Britain's policy making processes and with their result, and I put my cards on the table.

I declare quite frankly that the policy innovation process in my view is a sluggish one and an unimpressive one. Even if that is not the case, even if you disagree with that, it would be strange if secrecy was felt likely to improve either the range of options studied, the depth and fairness with which they are examined or the likelihood that information was available in good time to improve legislative efficiency. And if you want an indictment against legislative inefficiency, well, we have that marvellous report by the Hansard Society. The fact that much government legislation requires thousands of amendments to their own bills as they go through suggests that somehow the system is malfunctioning.

The relatively limited use made of the Code of Practice draws another question to our attention. Even with the help of the admirable guides produced by the Campaign for Freedom of Information, it seems to me unlikely that a great number of members of the public will trawl through the background materials, dodge the risk of having to pay quite large sums for information in some circumstances, and phrase their request cunningly enough to make any significant difference in much of Whitehall's work, the way in which policy advice develops. This will be especially the case if Whitehall shows a preference for 'precising' information rather than issuing original documents, another defensive technique.

So one is looking for a more rigorous system, a justiciable system in which greater openness in making policy is accompanied by what I think is important, a more clearly defined responsibility for particular decisions and for particular lines of policy advice. It seems to me the principle ought to be, when advice is good, individuals should glory in the responsibility for it. The worrying element about Scott, is that in its outcome it seems to be revealing an attitude of 'pass the parcel' responsibility among and between between ministers and officials, in which nothing can be pinned down. You, Chairman, mentioned Sir Richard Scott's concluding note, though not perhaps conclusion, in which he examined the Butler doctrine of a division between the responsibility and accountability of Ministers.

Now I would like to focus for a moment on this novel doctrine which Sir Robin has developed in the last two or three years; first, I gather at an FDA speech. Now Sir Richard says, and I quote from the Scott Report, that the kernel of Robin Butler's point I think, is that the conduct of government has become so complex and the need for ministerial delegation of responsibilities to and reliance upon officials has become so inevitable, as to render unreal the attaching of blame to a minister simply because something has gone wrong in the department of which he is in charge. Sir Richard adds, "For my part I find it difficult to disagree", and from this Richard Scott draws the limited conclusion that Ministers should provide full and accurate information to Parliament.

The problem goes deeper. I fear that Robin Butler's doctrine is one that allows the guilty or the incompetent to escape censure whether they are Ministers or officials. Because under it, a Minister is responsible only when some extra or super personal responsibility can be pinned upon him. As we know Ministers are reluctant to resign even when the barriers of secrecy can be pushed far enough aside to make it viable, that they are responsible in those terms. On

the other hand, the outcome of Scott seems to be that ministerial accountability is discharged simply by giving some information to the House. It need not be complete information, even if the information is misleading - and knowingly misleading it seems - no liability attaches, unless perhaps it is not given in good faith. To turn to officials; that they are not responsible for anything other than to their departmental superiors, who may or may not take any action. And they are certainly not accountable to Parliament. What's the result of all this? No one can be blamed for the sort of shortcomings we've seen. And how can open government tackle this problem?

I would like to conclude by making some specific proposals. First, and in the short term, it seems to me that the cases of civil servants criticised in the Scott Report should be examined in public by an independent tribunal. It would not seem to me right for the serious shortcomings in good practice, proper administration and fairness revealed by Scott to be swept under the carpet, either by taking no action or by dealing with the matter in closed internal proceedings. Civil servants across Whitehall have a proper expectation that those who transgress will face fair procedures and be judged against clear criteria. Second, the incentives for officials to reveal shortcomings should be increased. The Whitehall Code of Conduct suggests that civil servants should report a matter in which they are asked to act in a way which is illegal, improper, unethical, in breach of constitutional convention or a professional code; or which may involve possible maladministration, or is otherwise inconsistent with the Code. I think the requirement should be changed from 'should' to 'must', to give a clear obligation to officials to come clean about such practices. The quid pro quo is that official protection from wrongful dismissal should be increased along the models of the 1989 US Whistleblower Protection Act, to protect them when they do make such disclosures. These measures would assist in remedying abuses, but they would do little in themselves to overcome the poor quality of policy advice and the 'pass the parcel' problems I described a moment ago. And with Derek Lewis on the platform I think it is very important to attempt to establish where responsibility lies for which advice or decision in Whitehall.

So this requires a further change which seems to me to be more likely to be effective than a Code, statutory or otherwise on freedom of information. And that is the introduction of clear contracts between Ministers and their departmental or agency heads, which set out both in substantive and in procedural terms the targets, responsibilities, standards of performance and delivery expected of departments by Ministers. I think we need to sweep away the concept

that public administration is a closed continuum, and we should expect Ministers not only to know what they want from their officials and their departments, but how that is to be delivered, how it is to be measured, what is the delivery of results to be assessed against. It is a change which has proved enormously successful in New Zealand and it seems to me it automatically brings in its wake a resolution of the problems which continue to beset British government - poor specification of policy aims, weak or missing criteria, problematic lines of responsibility and accountability, and as a consequence, a pervading culture of administrative discretion and secrecy.

Gordon Robbie, *Copyright Unit, HMSO*

Mr Mather, you started your talk by referring to the Whitehall culture. Are you conscious that the Whitehall culture is not necessarily representative of the Civil Service at large?

Graham Mather

Yes, I think that is a very fair point, and I accept it immediately. I think best practice in contemporary government is fully compatible with openness, and with all the innovations in better consultation and communication which Roger Freeman enumerated in his remarks.

The problem I think we might agree on, is that first, when the system is put to the test, it's the old closed system which seems to come to public attention, and secondly those problems have now reached such a crisis point in a series of unsatisfactory experiences that public confidence in the way Whitehall works has been very seriously damaged indeed. And that damages civil servants, their professionalism, their standing, their perception, their interaction with the rest of society. So I very much hope that the sort of measures which I have tried to outline, which I hope are a balanced package, act to strengthen the position of responsible and professional civil servants and move away from a distortion of what they ought publicly to expect.

James Cornford

Derek Lewis, our third speaker, was the Director General of the Prison Service from January

1993 to October 1995 and before that had a career in the private sector with the Ford motor company and Granada. He is now Chief Executive and Chairman of UK Gold, the television company. He brings a particularly interesting perspective because he came into the public service from a background in the private sector, and he has been in the forefront of the agency development within the civil service.

Derek Lewis

Chairman and Chief Executive, UK Gold

I come to this issue as a very strong advocate of greater public access to information from and about government, and with the background of having been responsible for one of the largest of the Next Steps executive agencies for nearly three years. That experience has led me to conclude that executive agencies, which now account for over two-thirds of all the staff employed in the Civil Service, differ fundamentally from the central Civil Service policy departments - and that they must be treated differently in considering this question on the agenda today of public access to policy advice.

For the central policy departments the principal task is providing policy advice to ministers. I do see real problems with unfettered public access to the advice that they offer. There is a vital gestation period required in the creation of new policy and civil servants and ministers need the freedom to create ideas, cross-examine them and chew them over, and to change their initial views if that is to be effective; and to not have that opportunity, or to do so in the public gaze, would severely inhibit that process. There is a danger of policy advice simply "going underground", of there being un-minuted oral opinions and of the written material simply becoming a sanitised rationalisation of decisions that have already been taken. So I believe there must be limits in respect of that central policy advice.

But the situation for those running operational public services within executive agencies is very different. And it is different in two ways:

First, the underlying principle of executive agencies is that the agency is held responsible for the successful implementation of policies determined by ministers. And the chief executive is personally responsible for performance and results. If there are to be the necessary checks and balances in the system and if there is to be fairness, the converse must also apply. The chief executives and the boards of executive agencies must be free to make public their views and their advice on the operational implications of the policies that they are being required to implement.

If that is not done, the fundamental principle of ministerial accountability is, in my view, seriously undermined. Ministers, who accept responsibility only for "policy" matters, would

be free to impose half-baked impractical policies or to set wholly unrealistic performance targets, and then simply load the blame onto those running the agency for any failure to implement or to achieve - designating those things as mere "operational" matters. There is already a strong temptation to characterise the difficult issues as "operational" and that would be seriously enhanced. It would in effect give ministers authority without responsibility; and agencies responsibility without authority.

But there is a second and equally important reason why the public should not only have access to advice given on policy matters by the heads of executive agencies, but those individuals should be encouraged, and even obliged, to make their advice and their views known publicly. The public has a fundamental right to know what the professionals in charge of its major public services think about the significant policy issues. The public needs to know those views, if they are able to form sensible judgments about the policy decisions being taken by their elected representatives.

I believe for example, that the public has a right to know whether the top management of the Prison Service believes that all the security recommendations in the Woodcock and Learmont reports of last year make operational sense and whether the huge expenditures really offer the taxpayer good value for money. Prison escapes for example have already been reduced by 83 per cent in the last three years and are continuing to fall. The number of escapes by the most serious, Category A, prisoners is tiny and those are generally caused by failure to follow procedures, rather than any lack of resources. The Woodcock/Learmont recommendation will involve tens of millions of pounds of expenditure for every single Category A escape that is prevented. Such expenditure could only be justified by ministers if they put an exceptionally high value on the preservation of ministerial skins - higher, I suspect, than the majority of their electorate would. But the events of last year, and even last week, suggest that such inflated values may indeed apply.

By contrast let me take a police example. One simply cannot imagine a decision being taken on the introduction of CS gas for use by police officers without the views of chief constables and police forces being widely known. A very different world.

Chief executives must also be able to call a spade a spade in explaining the operational facts about their services, without the current ministerial censorship of answers to written

Parliamentary Questions and without the constraints that currently apply on giving evidence to select committees.

One of the greatest difficulties that I had in leading the Prison Service was that I was barred from publicly voicing my views on matters of prisons policy. And I was forced to walk a tightrope between being in effect government spokesman, and being the operational leader of the Service whose staff rightly expect their leader to act as their spokesman in these big public debates. As an example of how ludicrous that can become, I recall the occasion when I was summoned urgently to the Home Secretary to explain why I had allegedly agreed in a radio interview with the views of Lord Woolf and disagreed with those of the Home Secretary. Fortunately the transcript of that interview showed that I had diplomatically managed to agree with both and nuclear meltdown was averted at least for the time being. But I do not believe that it is in the interests of either the public, or the staff of organisations like the Prison Service, that anyone should have to perform that perilous balancing act.

Fortunately, during my tenure of office at the Prison Service, virtually all of the policy changes during that time were ones which I and the Prisons Board were able to endorse and had indeed initiated and recommended to the Home Office. But the fact that there was no outright conflict with ministers in these areas still left difficulties.

Take for example, the development of the private sector in the management of the prisons - that was deeply unpopular within the Prison Service, but was something that I and the Prisons Board considered essential if the Prison Service was to perform at the level that it should be performing at. We had to be in a position as an operational service to be able to tell staff that it was our policy and something we thought was right. As a result of that, we had to break with the tradition, and did say publicly, at the time the policy was introduced in September of 1993, that it was a recommendation that we had made to the Home Secretary and he had accepted. That was very important for the successful leadership and management of the service.

But while there may have been little difference on policy matters in the first two and a half years during which the Prison Service was an agency, I suspect that is becoming less true today. For example, the accelerated pace at which cost reductions are being required from the service and the prospective changes in sentencing policy, and growth in the prison

population, with the consequent risk to order and stability in the prison system, are areas where differences may well emerge. These make an independent voice for the prison service even more important.

So I believe strongly that chief executives of executive agencies should not only be allowed to give their views publicly on matters of policy and the operational implications of new policy, but it should be part of their duty to do so.

It is not actually as revolutionary as it may sound. It is already commonplace in public services outside the Civil Service. It happens, as the notice of this seminar made clear, in relation to the Bank of England; it happens in relation to the Criminal Justice system, to chief constables, to chief officers of probation and judges, all of whom are uninhibited in expressing their views on matters of criminal justice policy. And while that is often uncomfortable for government, I do not think anyone would dare to suggest that those individuals should be gagged in the way that chief executives of executive agencies currently are.

Those differences in treatment cannot be good for the public or the country. It means, for example, that the voice of the police dominates that of the Prison Service wherever the two impinge on each other. I do not think it is a coincidence that very recently we have seen a situation where the Prison Service is being required to take very severe cuts in expenditure at the time additional money is being provided for additional police officers - despite the scepticism indicated by a recent Audit Commission report about the effectiveness about additional officers. It is a case of who shouts loudest, and those who are gagged are in a situation where it becomes "no contest".

There will be those who argue that for people in charge of executive agencies to speak publicly on policy matters would bring destructive and unacceptable conflict between agency heads and their ministers. I believe that is grossly overstated. One of the signs of a mature democracy and sound government is that it can survive, and indeed thrive on reasoned public debate. One of the sadnesses of recent years is that we have seen the standards of public debate deteriorate in some areas, the use of consultation actually decline, and a growing desire to stamp out expression of opposing views or anything that might be seen as a criticism.

On the contrary, I believe giving heads of agencies the public role I have described would lead to more informed public debate, greater accountability and greater responsiveness to the public, and that would be for the benefit of all. There would be no diminution of the right or authority of ministers to take the final decisions on policy and to insist that those policies are carried out. But there would be a greater obligation on ministers to provide effective leadership for the operational services for which they remain ultimately accountable. Not all ministers understand that it takes more than an order to achieve a result. It requires motivation. People will perform impossible tasks, often doing things with which they disagree, if they are properly led and motivated. That requires ministers to understand how people work, it requires proper care and consultation, it requires painstaking explanation and communication and it requires support and leadership by example. Only if those requirements are met will governments achieve the performance that they rightly expect and the public deserves from its services. It is, for example, enormously to the credit of successive Prisons Ministers that they have recognised this need and have provided high-profile and generous, but well-deserved, support for the Prison Service, often in difficult times. Knowing that their agencies had their own public voice on these matters would put salutary pressure on all ministers to provide that leadership.

But won't all this lead to furious public rows and breakdowns in relationships between ministers and executive agency heads? Sometimes probably, yes - but I believe it would be very occasional and it can already happen, as I found last October. But provided the structure is right, then I believe it will be rare. It does not happen often between the Home Office and chief constables. It is generally avoided by the Chancellor and the Governor of the Bank of England. But there is a lesson to be learnt from those two examples; and that is that the constitutional relationship between the minister concerned and the agency needs to be put on a statutory footing and there needs in each case to be an independently appointed board that has the responsibility for the appointment or removal of the chief executive of that agency.

Within the criminal justice system, I hope that the principle of public expression of views by those running operational services could be extended more widely to incorporate the Criminal Justice Consultative Council. That is a body set up as a result of the Woolf Report to improve co-ordination between the different branches of the criminal justice system. It has been very effective in doing so, by bringing together the heads of each of those agencies. But

it can do more by providing a coordinated professional view of the implications of criminal justice policy before legislation is presented to Parliament. I believe the CJCC should be required by statute to comment publicly on all new criminal justice legislation before it could go to Parliament and should be free to recommend policy changes when it identified a need. If that had happened, the U-turns and the botched planning that have characterised the blizzard of criminal justice legislation in recent years might have been avoided.

So to return to the theme of the seminar, I am very much in favour of the maximum freedom of public access to policy advice. I accept, reluctantly, that it has to be restricted when it comes to advice provided by the central policy departments. But in relation to executive agencies, chief executives and their boards should be authorised, encouraged and even required to make known publicly their views and their policy advice. Only in that way will the necessary checks and balances be created and will the public be put in their rightful position of being able to judge properly the merits or de-merits of policies introduced by the government of the day. For this to happen there need to be the statutory safeguards in the constitutions of agencies, but nothing that goes beyond the sort of arrangements that already exist for other public services. The unacceptable alternative, I believe, is that we will increasingly see agencies being led by a group of emasculated political poodles. The time has come I believe to remove the gagging orders that effectively constrain those who lead some of the most important public services in the country.

Anthony Barnett, *Charter 88*

I was just going to ask why you ring fence, after your excellent presentation, the policy making of the top civil service. Is it not surely the case in all organisations, that oral discussion is necessary to chew over and to precede the development of policy papers. That is not necessarily the unhealthy driving of processes underground, where you've already got policy papers presented as options. This, surely, should in fact be open on the lines you have presented.

Derek Lewis

I just feel from my own public and personal experience, there is a process where ideas start, where the initial ideas are not well thought through, they need to be committed to paper so

that people can look at them and think about them, and those ideas will subsequently change, and people need to feel free to change their views, not to have to explain why what was said, two weeks ago is now no longer their view and may not be their view in another three weeks time, as the generation of new ideas and new policy proceeds. I think it would be inhibiting on those who have that task within that very closed group of the Minister and the policy making team immediately surrounding him or her.

James Cornford

Our fourth speaker is Robert Maclennan, who has been a Member of Parliament for Caithness and Sutherland since 1966. He held office during the last Labour administration between 1974 and 1979. He then became founder member of the Social Democratic Party, and is now President of the Liberal Democrats. He speaks for the party on constitutional affairs, National Heritage and broadcasting in the House of Commons.

Robert Maclennan MP

I want to begin with a confession, which is not just good for my soul, but explains why I find this the most difficult subject on the constitutional reform agenda. The confession is that I find my mind has moved very rapidly over the last years over these issues.

I am no longer satisfied by the officially set out Liberal Democrat policy on Freedom of Information. We have of course committed ourselves to a Freedom of Information Act and we have introduced bills into Parliament to give effect to that proposal. We do so because in part we conceive it as a means of delivering remedies to individuals for abuses of power and also to inform and improve the quality of debate and deliberation by those in public life and particularly by Parliament. But I think we duck the biggest challenge of all and let me just show you where.

It is in the precise sphere which has been highlighted by this conference. We have suggested that access to Cabinet papers would be denied for a limited period of five or ten years and that certain other matters should be held to be confidential. Cases where disclosure would seriously impair defence, security or international relations, hinder the solution of crime or impede law enforcement, allow an unfair advantage to competitors of a company or business concern, or constitute an unwarranted invasion of an individual's privacy. These are the generally accepted exceptions in most countries which have freedom of information laws. The access to Cabinet papers after five to ten years seems to me now to be indefensible, not least because of the revelations of recent months, about the working of Cabinet.

The two compelling arguments which force one down the road of greater disclosure of papers of government, are the change in the perception of the role of civil servants viz-a-viz ministers which has come about in the last quarter of a century from the sort of classical exposition elegantly described in the Franks report on Section 2 of the Official Secrets Act, which really explained the conventional view that civil servants were merely responsible for giving advice and Ministers were responsible and accountable to Parliament. The change which has come about in that conventional doctrine has been almost institutionalised in the last decade and has been defended at the highest levels both of the government and the civil service. The change in the division between Ministers who are accountable but not responsible and civil servants who are responsible but not accountable. It seems to me that is

a wholly unsatisfactory position in which to have found ourselves in, and indeed it was that which caused me to initiate the debate to which Roger Freeman referred in his remarks in Parliament. The development of the doctrine of ministerial irresponsibility, if I may put it pejoratively, seems to me to make it essential that we should have the material to enable us to judge just the extent of the actual involvement. The doctrine of the unaccountability of the civil service seems to me, for reasons which have been eloquently addressed by both Graham Mather and the last speaker, no longer to be appropriate because of the second change in the last ten years, which is the establishment of a distinction, a clearer distinction than ever existed in the past, and not just a theoretical distinction, between the provision of advice and the conduct of the executive business, of the government by civil servants and by executive agencies.

Consequently, I have come to the view that it is necessary to allow greater access to papers, to working papers and to matters which are put before Ministers. There are of course precedents even within our own constitutional arrangements. The National Audit Office has virtually complete access to the working papers and any papers they chose to investigate as likely to throw light on the conduct of business. I think we now have to have similar access and similar disclosure. The government's steps towards the introduction of a Code of Practice on Access to Government Information, is I believe, a valuable opening of a chink in the armoury which has been traditionally erected against disclosure of this kind.

But we can be under no illusions about the limits of that step. Even from the initial months of its operation it is clear that the capacity to delay in response to requests for information, the capacity to charge extortionate prices for the delivery of information and the capacity to rewrite the contents of the information and not to reveal the actual documents, seems to me to be so powerful as to enable the government in fact to reinforce secrecy rather than to open the door.

So although I accept that there are certain discussions of policy that will be conducted at the highest level of government and by officials orally, when putting their views on paper might raise questions, which are beyond the scrutiny of a body such as the NAO or the Parliamentary Commissioner, or any other commissioner entrusted with the task of deciding whether certain narrowly defined exempt categories of information should be withheld, I none the less think we will have to enact an FOI Act which allows access of that kind, in

which the burden of proof will rest firmly upon those who seek to withhold information that it would be against the public interest very narrowly defined, to refuse to disclose. And that an official or body that is set up, should in fact be set up by Parliament and not by government to decide objectively whether or not the narrowly defined areas for exclusion should be permitted to operate.

James Cornford

I know that this is called policy making on the hoof. It is encouraging to know that it is not just the government which does that.

Our next speaker is Peter Mandelson who has been Member of Parliament for Hartlepool since 1992 and previously was the Director of Campaigns and Communication for the Labour Party and is now the Shadow civil service spokesman in the House of Commons and has the onerous duty of chairing the Labour Party's general election planning group.

Peter Mandelson MP

As every one knows, policy making on the hoof is a very foreign concept to me!

I would like to say at the beginning, something about Derek Lewis. I think we have discovered a sort of silver lining in his unfortunate sacking, and that is that, and I say this with tremendous respect, I think we have discovered somebody who, given the highly intelligent and cogent contribution that he made this morning, is going to be somebody who is going to make a powerful contribution to debate about public life and standards in the public services in the future. Whether or not one agrees with everything that he said this morning, I do not think anyone could doubt the weight and the importance of what he had to say.

Having said that, let me just jar the proceedings on a somewhat more adversarial note and say something about Roger Freeman's remarks at the beginning. I do not quite know, although I think I have reached a conclusion, on what says more about the Government's attitudes to open government: either their record on disclosing information about sheep dips, vehicle emissions, or the Birmingham Relief Road, or the chapter of events that was chronicled and revealed so graphically in the Scott report. I would suspect it was the latter which says more about their attitude and approach to open government than any information which they have revealed about vehicle emissions. And I really cannot forswear recalling Scott at the outset on the question of ministers' duty to provide as full information as possible about the policies, decisions and actions of the Government. Scott said, at K8.1, there was example after example of "failure by Ministers to discharge that obligation". And again at D1.165 "...where disclosure might be politically or administratively inconvenient, the balance struck by the Government comes down, time and time again, against full disclosure". I think that is a very important indictment of the government, and I think it bears very heavily on all of us who are in public life and aspire to be in government. I think that far from - in the light of what Scott said - concluding as Roger Freeman did, that Scott demonstrates that there is no need for freedom of information legislation, I think that the only right conclusion you can reach from Scott, is that further legislation is required.

I am not saying that it would be an infallible bulwark, but it would however, I think, be a very important counter pressure to the tendencies and habits of that deep seated culture,

mixed with the more recent habits which have been picked up from Ministers who have been in office for too long. I think we do need that counter pressure in government. It does seem that neither the Questions of Procedure for Ministers or the 1994 Code of Practice on Access to Official Information is any protection against behaviour in government which tends to be cavalier at best, thoroughly lacking in candour at worst, and overall designed chiefly to appeal to sophists, if that is not too insulting to those high minded individuals.

Let me just say something about the 1994 Code, which was produced in response to criticisms of excessive secrecy in government. William Waldegrave, I suppose somewhat ironically in light of subsequent revelations, was its author. And he predicted that it would lead to a new culture of openness in Whitehall. I do not think anyone could make such a boast for that Code. In so far as anyone knows of its existence, and most people I come across do not - it does seem to be a fairly closely guarded secret in itself - it really has done nothing to alter the evasiveness, bordering on deceptiveness, of Ministers' answers to parliamentary questions. Vast swathes of government business are exempt from disclosure within the Code, including any information which would, I quote "harm the frankness and candour of internal discussion", which is a fairly sweeping catchall, if ever I heard one, and this of course includes factual reports on which advice is based, communications between departments and public bodies, including supposedly independent industry regulators. I think the *Economist* got the Code fairly well and fairly accurately when it said of the Code: "it is so full of loopholes, and its procedures so cumbersome, that few people, apart from the desperate or determined, would bother to invoke it by taking it all the way by complaining to the Ombudsman."

So in the light of that, what is the way forward and what about the core issue of official advice to ministers? There is no doubt in the Labour Party's mind, as I have already said, that freedom of information, that very important concept and principle - and the Code that has paved the way - does now require statutory underpinning. Eighty one per cent of the public would seem to agree with that proposition, and that is pre-Scott. I suspect that post-Scott, public opinion would be nearer 95-96 per cent. All proposals, however, for legislation in this country, and elsewhere as far as I know, have exempted policy advice by officials from the purview of such legislation. Now my instinct is that in principle that must be right. I think that Government decisions, and the basis on which Ministers take them, are the responsibility of Ministers, not officials. I therefore think we have to be extremely cautious and very

careful before we start edging civil servants, their practices and the advice that they give to ministers, further into the public domain. Because I think that the effect of that, on ministerial responsibility could be quite substantial. I am not absolutely convinced, as some fear, that the publication of official advice would lead to a deterioration in the quality of advice, if it were disclosed. I tend to think the more public scrutiny there is the more thorough people tend to be in what they say, and the arguments that they draw up. But the basis of independent, impartial, public services is political neutrality. I think this is an extremely important principle and what that means is, officials not being drawn into political controversy. That is what political neutrality really means. Whilst I think additional questions arise about this in the case of the executive agencies, which Derek has quite rightly raised and which I want to come on to in a moment, whilst you could say that in the case of policy advice submitted by particular individuals - and in the case of submissions to ministers you could remove the names and protect the individual - I think that rather misses the point of what is being proposed. Surely the very point is that if you are going to reveal policy advice then a concomitant of that is that those who submit the advice should be questioned and cross examined, and if they are cross examined that means they catch political flak inevitably, as sure as night follows day. They become, in the process, not just answerable but responsible too and that is, I think, the important point that Derek was raising. It would create huge and recurrent dilemmas for officials if they were exposed to examination in this way, and I think that it would make Derek's broadcast and his problems between Woolf and Michael Howard a very timid outing indeed considering what could flow in very many other cases. So I think crossing this line is really not attractive to the Labour Party.

We would like to see ministers retaining responsibility, because we think the doctrine of ministerial accountability is absolutely essential to the operation of Parliament. I think it would be difficult, if not impossible, to reconcile this doctrine with Derek Lewis's view that agency heads should replace ministers more in the firing line, in explaining, justifying and giving an account of what the civil service is doing. I accept the argument that agencies have been given much more operational freedom and I think this is desirable. It has brought enhanced managerial effectiveness to very many parts of the civil service which were previously denied it. But I am not sure whether just getting on with a better job, as they are doing, necessarily means they should also have to defend and justify what they are doing to Parliament and the public in the way that has been proposed.

It is true in principle that the more scrutiny the public services come under, the more self aware they are, the more pressure is on them to get things right. I think that is a very important pressure to place on public service performance and I think that that is important for the public. The problem is that while officials become more exposed, I think that we can see ministers increasingly ducking away, and edging themselves away from the proper public accountability and examination which is rightly theirs.

So in sum, the main point that I would want to make is, first of all that the existing Code certainly needs to be bolstered, needs to be promoted vigorously, needs to be interpreted more liberally. There has to be a presumption of people's right to be informed in reality and not just in word as Roger Freeman described. In time I believe it needs to be underpinned by legislation, to create the pressure and habits of disclosure which are presently missing in government. I think we do need to see more Green and White papers, because I think they are the best vehicle for releasing information which relates to policy options. And I think the example of the criminal justice legislation was a very good example in this context. I think there has to be greater explanation and justification of how government operates, the impact of its decisions, the seeing through of its policies once agreed. All that is very desirable. But we do have to balance the exposure of executive agencies to outside scrutiny with the maintenance of continuing ministerial responsibility for what happens in government.

I do not believe that open government legislation can provide a substitute for ministers who should behave with integrity and with honesty and openness in government. I think the Prime Minister alone has the responsibility for setting the standard on this and he should do so regardless of whatever legislation exists. Ministers and officials must know that the Questions of Procedure for Ministers is not an elastic, expandable, flexible friend and people must know that any lapses in operation will simply not be tolerated by the Prime Minister of the day.

Lastly, I think that the maintenance of a permanent principal public civil service is paramount. I do not want to see an Americanisation of the machine, the introduction of political appointees at the top levels of the civil service, which is what I fear would happen as the civil servants edge more and more into the open and the limelight.

But lastly, Parliament has the greatest responsibility of all to exert itself. Parliament is the people's champion, Parliament is the public watchdog as Bob Maclennan has said and I agree

with him entirely on that. Parliament has got to be more professional, more vigorous, more pressing of the executive, if the processes and procedures of government and the policies that are drawn up in the public's name are to be better understood and brought more routinely into the public domain.

Andrew Levi, *Diplomatic Service Association*

You mentioned Scott quite a lot at the beginning of your presentation. I wonder what principles a future Labour administration would apply to the release of diplomatic and intelligence information.

Peter Mandelson

I do not believe that such information which relates to the conduct of foreign policy and in particular involves intelligence material which affects both national security, or commercial confidentiality in the business of trade, should routinely be made public.

Adam Raphael, *The Economist*

You drew a fairly sweeping veil over all policy advice to Ministers, but I wonder whether you think a future Labour government should allow analyses of policies to be published. For instance, a good example last week was the Channel Tunnel rail link, the cost and benefit analysis which under pins the government's decision on that, has not been made available. It may be made available eventually. Would a Labour government make that sort of analysis available or would it cloak it under the secrecy of that counsellor's policy advice and therefore would not be made available?

Peter Mandelson

No. I hope I made, but if I did not let me repeat, the very important distinction between the sort of factual reports and background to the evaluation of policy options and decisions taken by Government on the one hand, and the rather more intimate policy advice submitted to

ministers by senior officials. I think you can draw the line, you can make a distinction between background information and specific individual policy advice. It is on that basis I would like to see the Code bolstered and more liberally interpreted. I would also like to see Green papers and White papers used as a vehicle to bring more relevant information into the public domain in order to inform public debate. So the public, as well as Members of Parliament, can make more informed choices and judgments about the range of proposals that are set out in those papers.

James Cornford

Now we come to our next speaker who is entirely impartial, independent and objective. One of the most astute, I think, and sophisticated of our political observers - Peter Riddell who is now the assistant editor and political columnist on *The Times,* but who many of us have read for many years in the *Financial Times* in various capacities, as economics correspondent, as a political editor at Westminster, as a Washington based editor; and who's most recent book is called "Honest Opportunism: The Rise of the Career Politician". Who are you talking about?

Peter Riddell

Political Editor, The Times

Yes, it was devised in fact by F.E.Smith, James, seventy years ago or seventy or more years ago, before there were many career politicians, although he himself was one of the classic examples of it, but it has a nice ambiguity in it. It's one of titles which unfortunately gets mangled. The 'honest' appears but it is everything from honest opportunities through the spectrum. I think I should learn to have simple titles like Peter has in his new book, even though that has certain ambiguities - and the subtitle about 'Can New Labour Deliver', with a question mark. At this stage in the seminar I thought it was more use...

Peter Mandelson

The answer is quite unambiguous, I think you will agree; £7.99 in all good book shops.

Peter Riddell

There are piles of them in the book shops!

Peter Mandelson

Plenty of copies available!

Peter Riddell

I thought that at this stage of the seminar, and Maurice suggested to me, that I should look at it very much from the press's point of view, so I do not want to particularly cover any of the points which have been discussed by the previous speakers, not because I necessarily disagree with them in any way. In fact I agree with a large amount of what has been said earlier. But in particular I think from my own perspective as a journalist to see how the conventions operate at present; Maurice particularly suggested looking at how the conventions on confidentiality of civil service advice and collective responsibility are applied or waived during briefing the press.

I think there is an interesting distinction there, because it is assumed that the convention on collective responsibility is almost the same as that on confidentiality of civil service advice; they are not at all. One of the interesting things in the discussions so far this morning has been essentially to look at what happens with individual departments, and Derek Lewis understandably has in relation to the Home Office. My experience is that many of the breaches of the convention have not been in relation to what has happened within individual departments, but in the case being put by departments in relation to the inside Whitehall arguments and debates. I have found, from my experience as an economics journalist and a political journalist, that on the whole civil servants' briefing - and I'm here talking about press officers, other officials one meets - and I'll come on to the special adviser category shortly, I think that they are under appreciated and a highly significant category in this argument - on the whole those who are officially authorised to speak on behalf of departments do not breach the conventions on revealing which deputy secretary said what, or what under secretary said that within their own departments. What they frequently breach are the conventions of collective responsibility.

Now of course the greatest culprits in that, and I suppose they are self authorising, are of course politicians themselves, who do it all the time. In about an hour's time I am having lunch with a senior minister. I would be startled if he did not immediately breach the doctrines of collective responsibility. Indeed he would be the only one who I have ever lunched with who has not. Not much point in discussing it with him unless he was going to do it. (*laughter*) But we are not talking about ministers doing it on their own; 'self authorisation' I think is the phrase which was used at the time of the enquiry into Westland ten years ago, but in terms of civil servants and advisors doing it. The doctrine is certainly breached and frequently breached by official spokesmen for ministers and for other civil servants, but virtually always in describing their own departments' battles with other departments. Very seldom have I found it, unless one knows the civil servant particularly well, about the internal arguments within departments. Now a classic example of what does happen, and where it is absolutely breached, is every Autumn over the PESC [Public Expenditure Survey Committee] spending rounds. One of the most frequent examples you will get, quite officially - this is not from ministers but from the official press officers and from other civil servants and their departments - is their line against the Treasury. Indeed, looking at the building I am now looking at behind you, where Roger Freeman once worked,

one of the most regular battles is what is officially done by MOD civil servants, and indeed service chiefs themselves to defence correspondents in briefing in relation to the Treasury. This happens every year. We all know it as part of the theatre of the PESC round. This happens frequently. It is a breach of all the rules, all the conventions but it happens all the time.

Now the other category I would like briefly to refer to, is special advisors, because I think that is a most under discussed area, in which the conventions on confidentiality of advice and indeed collective responsibility are blurred and breached. Take an example in today's papers; most of the papers have stories about the informal discussions amongst ministers yesterday over a referendum on Europe. Some come directly from ministers who were voting at ten o'clock last night, I know. Others come from special advisors to ministers who are pushing the line of their bosses. That is why they are employed after all, to push the line of their bosses, to advance the careers of their bosses - unless they have suddenly got selected as Tory candidates, which a number have in the last few weeks. But the central function of that is that they can argue this is highly desirable; it is done by special advisors rather than by the chief information officers in departments, or other civil servants in departments. That is the special advisors' role. They can do it because they are political appointees; they will go when the minister goes, and so on.

But it does involve, quite frequently, a breach in the doctrine of collective responsibility and I think one should recognise that there is no paper involved in that, it is all conversations and so on. But in the reality of how the press learns about how the debate is occurring within government, which is what we are addressing this morning, this is not a matter necessarily of a document being sent over the road to the Cabinet Office for cabinet committee discussion. It is a matter of how the briefing occurs, of how the distinctions are occurring within government on those issues. How do we know that Kenneth Clarke is standing out against a referendum on Europe? It is not very difficult to find out if you make a couple of phone calls on that.

Now, two other points I want to address, and which come back to more of the mainstream of what happens. In terms of the provision of more information about the policy debate, I felt in looking at what has happened, is that in a sense Scott is the exception, and that what is interesting is what has officially been authorised by government over the last three or four

years. The government, I think, has a very reasonable record on this. It has released a lot of information about debates, of which by far the most important is the monthly monetary meetings between the Chancellor and the Governor. It is one of the most important constitutional innovations; there are faults in the system. Now I think the interesting point about that is what was regarded as completely unthinkable when I was an economic journalist fifteen years ago in the late seventies, that the discussions then between Chancellor and Governor should be revealed, is now part of the routine of peoples lives. It appears six weeks later, it appears after the following meeting and so on, but the markets and journalists have been able to absorb that information without creating vast turbulence in bond prices and so on. Not every meeting is there a big difference between Ken and Eddie and so on. That is no longer true. People have become mature and sophisticated in looking at it. To my mind it is the perfect example why the airing of differences can be absorbed, can be treated in a mature way.

Last week I was discussing this in a slightly different context with Peter Mandelson, and teasing him about why, perhaps, there was not a more open debate about Labour policy making on that, as an analogy to the government, and he made a point about the adversarial trivialising nature of the press, and I would freely concede that he has got a point there. There is a danger in our culture of treating every debate as a split, a row, an argument and he has a very fair point there, I do not dispute that. I think a lot of the press coverage of a lot of debate in government does not use the word debate, it uses the word row, and when there is difference in opinion it becomes a split. But I think the example of the publication of the monetary minutes does illustrate how these discussions on policy, very important ones, and few more important than on interest rates, can be treated in a mature way if it becomes part of the routine. I think one of the classic points is, if it becomes occasional, if it comes out as a secret, it is going to be sensationalised. But if it becomes part of the routine that we know more information, it will be treated in a much more mature way. I think to go back to what Roger Freeman was saying at the beginning, if you look at a lot of the information which has been released, particularly over the last four years, it has been treated in that way. It has been absorbed, it has become part of the policy discussion, so it is possible to do.

Those are the main points I want to make ,but just one final sentence on Scott. What I felt about Scott was that it revealed this wariness. The most revealing passages, I thought, were Geoffrey Howe talking about his reluctance to provide more information because it would be

distorted, misconstrued, etc. I think that the example of what has happened when information has been revealed, when it is robustly defended, as it would have to be in that case, it can be absorbed. People are willing to accept it because, after all, as I said at the beginning, that is what happens anyway through classic breaches of the collective responsibility and of confidentiality.

James Cornford

We now turn to the final and most impartial speaker, Maurice Frankel, the Director of the Campaign, who has no fixed position on this subject.

Maurice Frankel

Director, Campaign for Freedom of Information

I am afraid that time constraints prevent me from presenting the paper the Campaign has prepared for this seminar, but copies are available on the desk as you leave [**see appendix**]. Let me just run quickly through a number of points some of which have come up today. First of all, on Scott and Roger Freeman's point that the exemptions in a Freedom of Information Act would prevent us finding out the basis of the Scott report. That is true up to a point. If you look in particular at what we had in the Right to Know Bill, we certainly did have exemptions in all the areas that he mentioned. We also had a public interest test which said that where there was evidence of abuse of authority, or official negligence, or injustice, or danger to the public, or various other matters, a public interest test would be applied to exempt information which could then be disclosed on a balance of public interests. The clear implication was when something was going seriously wrong the exemptions would not stand necessarily, but we would begin to get the information coming out in something analogous to the way in which the Scott report operated. No one suggests we would ever get anything of that detail, but a process analogous to it on a much scaled down level would take place. That was what was envisaged in the Right to Know Bill. It is also to a degree envisaged in the Government's own Open Government Code. Nearly all the exemptions are subject to a public interest test which also implies that. So the basis for getting at this material does exist.

My main reflection on seeing how Scott was handled was this: that regardless of the rights or wrongs of the Government's conduct, there was never any sense that Parliament was primarily interested in ensuring we got the truth. What Parliament was primarily doing was protecting itself, or the Government was protecting itself politically and the Opposition was doing the opposite. There is no sense Parliament was demonstrating itself as being an appropriate forum for getting the truth. It was a forum for demonstrating whether or not ministers could carry political support. It was entirely swayed by the nearness of a general election, the size of the majority, whether or not the Conservative Euro-rebels were on board or off board, whether the Ulster Unionists were on board or off board; depending on those kinds of configurations we may or may not have had different outcomes - nothing to do with an enquiry into the truth. This seems to me to be the point of a Freedom of Information Act. It would not be enforced in Parliament. This seems to me to be the saving grace of a Freedom of Information Act. We would take the ultimate authority for those decisions to a

body which is more or less immune to the considerations which actually dominate these great debates in Parliament, and that is to an independent commissioner, with the power to make binding orders.

Now you might ask what is the difference between that and the Ombudsman who supervises the current Code? The Ombudsman in many ways is very impressive, but at the end of the day if a disclosure that the Ombudsman is urging could lead to a Minister losing his job, we know the kind of responses and the issues that will predominate, and they will not be whether or not the public ought to be told the truth. That is why I think it needs to be dealt with ultimately in a body which is immune from those political considerations and considerations of embarrassment.

Let me just address some of the points about the legalism of a Freedom of Information Act. I am one of the rare people in this country who have been using the Open Government Code of Practice. I have stacks of letters which display every bit of legalism in response to this non-statutory, flexible, culture-changing Code, that one could possibly have under the most rigid inflexible lawyer-ridden legislation. To just give you one example, we have one complaint in with the Ombudsman which has been there since April 1995. Its coming up to eleven months. I hope to get an answer on whether our complaint is upheld within a year. Now the reason is not that the Ombudsman is slow, or he has not got anything to do. The reason is that he is getting the sort of reaction from Whitehall, in responding to his requests, I surmise, that the most legalistic lawyer-ridden system would provide. So I am most reluctant to accept this distinction between freedom of information legislation and the voluntary flexible Code of Practice, because my experience is that it is not all that flexible.

I think that one of the great defects of the Code is, on the face of it, that it makes it clear that nobody is going to get any documents out of a government department. That seems to be a great weakness. The Ombudsman has challenged this, to his great credit, and he has made it clear that if you get your complaint up to him he is going to be putting quite a lot of pressure on for disclosure of documents. But that is nowhere on the face of the Code. Last week I was talking to a very senior lawyer in private practice, who knows this area well, who was asking me, "How do I get this particular piece of information?" and I said, "Have you thought about the Code?" "Oh," he said, "there is no point in bothering with the Code, no documents!" Now these are subtleties of knowing what the latest state of play is, which are not on the face of the Code, and no one knows about them.

Let me just talk briefly about the subject matter of this conference. One of the benefits of the Code of Practice is a commitment to publish internal guidance used by departments. The Cabinet Office itself was the first off the mark in publishing a very substantial piece of internal guidance on the Code of Practice, which I think is greatly to its credit. The contents of the guidance on the other hand, I am afraid, do not entirely support Roger Freeman's suggestion that there is a great culture change already underway. I will simply read to you some selected extracts on this subject of disclosure of advice. The government is committed to publishing the facts and analysis which lead to major decisions. I quote from the internal guidance, "It is not necessary to swamp Parliament and the public by an indiscriminate approach to this requirement." Now that seems to be classic Sir Humphrey-speak, about not giving the public too much information. Next there is a warning that advice should not be disclosed for various reasons, in particular because it could prejudice working relationships, especially if it led to dissenting or differing views being quoted in political argument to attack the policy or action. Fair enough, standard view. Next paragraph: "It is not the intention however to withhold this class of information only where internal differences or disagreements could be revealed." So, having identified the main purpose as being to avoid disagreements being exploited politically, it immediately goes on to say: do not for a moment imagine you are free to disclose this information when those circumstances do not apply.

It then goes on to talk about expert advice, which is something we sought in the Right to Know Bill. It says, "Expert analysis is a systematic part of the process of policy formation. It could be damaging to internal candour to disclose it." Now what we tried to do in the Right to Know Bill was to say, "Let us take certain categories of information which are not of this quality of opinion and advice and recommendation which are so sensitive and which are much more objectively based, and let us have them out. Let us have the projections based on facts. Let us have the evaluations of the factual information. Let us have the expert advice." Peter has mentioned the minutes of the Chancellor's meetings with the Governor as a prime example of this. The reason we have got it, I think, is that the Chancellor's nature is such that he is prepared to defend what he does against someone else who has a different point of view. The reason we actually do not get this material in other areas is not to do with these great Whitehall conventions, it is to do with the fact that ministers are not prepared to defend their position on rational grounds. Actually they want the freedom to ignore a valid case for reasons which they are not prepared to rely on or to refer to. Let us start with the Chancellor's meetings with the Governor and go by analogy. Let us have the Chief Medical

Officer's advice as a matter of routine. There is no requirement that the government must automatically do everything the Chief Medical Officer tells it. But the government ought to have a reason for not doing something when there is a firm recommendation. I would like to know what has been said about Gulf War Syndrome on the basis of expert analysis. I would like to be reassured that there is not some piece of expert analysis there which says, "this is the cause" which has been resisted for fear of opening the door to compensation claims or for compensation claims which will affect our American allies as well, and all these kinds of things.

So let us take these great categories of information, which we can define as being less susceptible to the kinds of political pressures that may affect the directly political advice, and have them out in the open under the terms of legislation, or under the Code if necessary. They are not offered under the Code at the moment. So that the ministers will then be free to protect the narrower class of information, but not this basic analytical information.

James Cornford

Chairman, Campaign for Freedom of Information

Thank you very much. Please bear with us while we reorganise the platform because we are going to have the participatory part of this meeting now. We have three quarters of an hour in which to discuss with the panel, and if people are in a hurry to get away, now would be a good time to go, rather than later. Could I summon the minister back on to the platform? Could people indicate to me that they wish to speak; identify yourself and could you perhaps identify which member of the panel you would like first to answer your question.

Vernon Bogdanor, *Brasenose College, Oxford*

My questions are really related mainly to what Graham Mather has said. I used to take the view that candour and non-partisanship precluded civil service advice being released under freedom of information doctrines, but I gather that this applies in New Zealand which has a system very similar to Westminster, which has a Code, admittedly a Code - it is non-statutory - but where civil service advice is released not during the process of policy formation itself,

but immediately after the policy is finished. The world has not fallen in, most civil servants welcome it. Civil servants' advice is not normally put, I think in political terms. It is not put in the form of, "I think railway privatisation to be a good thing or bad thing." It is not in those terms and leads on the whole, so it is said, to better quality policy making. I personally believe it strengthens rather than weakens ministerial responsibility; because the weakness of this concept in the British system is that we have no mechanism to use to deal with ministers who seek to evade it. And that is part of the lesson, I think, of the Scott report.

My second brief question relates to that and to what Graham said about civil servants. I am thinking here of the case of Mr Higson, who took the view that letters he was being asked to draft for ministers were giving information that was untrue, and the minister concerned, William Waldegrave, said it was not untrue, and Sir Robin Butler agreed with that, but Scott says that this was untrue. I wonder if the mechanism we now have, which is the appeal to the Civil Service Commission, is strong enough to deal with case of Mr Higson who resigned from the Foreign Office and is, I gather, now unemployed.

My third brief question is about the contracts that Graham suggests, which I think I used to be perhaps more sympathetic to than I am now, because it seems to me that in the very sensitive agencies such as the prison service, where the minister may think he needs to intervene in a very detailed way, these contracts would cut him of from that. I think the question raised really is that in those agencies where you can have contracts, why not make them into quangos, non-departmental public bodies? And the question then arises in these very sensitive agencies such as the prison service, perhaps child support agency, as to whether they should be agencies at all, or can be agencies at all and whether that has been well thought out. Thank you.

Graham Mather

First point we agree. Second point on the civil service commission; I originally thought that that would be strong enough. I now doubt, as my presentation suggested, and I think the dithering over the question of disciplinary issues which is currently prevailing indicates that other people are not really sure how best to handle this. I'm not sure I have a worked through answer but I suspect it does require greater independence, and again it in turn requires a justiciable disciplinary code with fewer of the weasel words in it. So I think there, going

statutory, forces you to adopt a more robust and satisfactory system.

The point on the contracts; I think that again if you look at what a contract will do for you, it will not resolve every issue, it will not solve every disagreement - and Derek Lewis set out why that must be. But it will at least force both parties, the head of a department to feel a stronger sense of responsibility for what that department delivers, and a stronger incentive on Ministers to think longer ahead about what they expect, what they hope for as I said, both substantively and procedurally, and I would not have thought that could do any harm in the prevailing circumstances. A last quick word if I might, because special advisors got mentioned and they are rather relevant to this. I think it would be a shame if the fact that special advisors are outsiders got lost in this business. I see in today's newspapers it is suggested that they should not be able to get new jobs outside for up to two years and they should be treated just like full time civil servants in that regard. I think that would be very unfortunate because it would mean that people who were coming in from outside with specific expertise would be much less keen to take on the job to become like civil servants. I was not sure whether Peter Riddell was being 'pro' or 'anti' special advisors in what he said but I took it as 'pro'. They are a force for greater openness and disclosure and that is a good thing.

Roger Freeman

Briefly on New Zealand, I must say I was not aware of that system, although perhaps Mr Bogdanor, because of his role with the Public Service Select Committee, might not be the right conduit of information. I will certainly make some enquiries. I would be surprised if it was as full and open as some have called for in terms of the publication in the media of the policy alternatives, but it certainly is experience worth looking at.

Mr Higson. Yes. Under the new rules which I introduced several months ago he could have gone first to his Permanent Secretary and then straight to the Civil Service Commissioners to complain. I think that clearly is better protection than the situation that prevailed before.

On agencies. Yes. If it does have an independent statutory existence, unlike agencies which are part of the Civil Service, then clearly greater public debate as Derek has called for might well be appropriate. I was, as the Public Transport Minister, responsible for British Railways

and certainly the Chairman of British Rail never felt constrained about not necessarily agreeing fundamentally with a key tenet of government policy, but would express his views on aspects of policy constantly. That is very different from an agency and I see no reason why - we have a hundred and ten agencies - why some of them perhaps should not become non-departmental public bodies with the concomitant right of Chief Executives to speak more publicly.

Now, on special advisors. The rules which I introduced yesterday, simply ensure that special advisors are in the same position as civil servants and Ministers. That is, they must wait for up to two years in those circumstances where they have confidential private information which they could use in employment after they left. I do not think those rules are a great constraint, but I think they are necessary in terms of improved propriety in public life.

Derek Lewis

May I say a word about the question of contracts for agencies? They do exist. They are there in the framework documents, the business plans and the corporate plans of agencies, and targets are set by Ministers for each of those agencies. Interestingly in the case of the Prison Service over the last three years, all bar one of those targets has either been met or exceeded. So they are a necessary condition, but they are not, I am afraid, a sufficient condition to ensure the effective operation of entities of that nature, and there are undoubtedly some agencies that are more politically sensitive than others. There are some where it is difficult to decide whether there is a need or simply an irresistible temptation for Ministers to interfere in the day to day operation of the agency, but I do think that points very strongly in the direction of creating the statutory water between Ministers and the agencies and may in certain cases indeed, need the creation of non-departmental public bodies of some form because there is no sensible reason, in my view, for entities like the Immigration Service or the Prison Service to have any different constitutional arrangements than organisations like the Police or the Probation Service or the Bank of England.

Deborah King, *Hillingdon Law Centre*

This is a question to the Minister regarding the Gulf War Syndrome. We are in a position where we have seen in the papers that members [of the armed forces] who were volunteers at

Porton Down with chemical testing have been refused information about chemicals which have an adverse affect on their health up to twenty and thirty years later; and with regard to the Gulf War, having an impact on women's children as well as potential chromosome defects.

Is it legitimate to refuse to disclose details about, for example, the chemical composition of Naps tablets, when a woman would now have to make a decision whether or not she wants to have another child, instead of potentially leaving it for ages, waiting via the civil justice system for a public interest immunity certificate to arrive eventually, on grounds of so-called national security, when on a practical basis we do not know, for example, whether or not Iraq has been supplied with the same chemical tablets from the same supplier? We have no knowledge as to whether or not there is a genuine security risk as the result of this disclosure.

Does not that have an impact on an old constitutional principle that justice delayed is justice denied? Also does not it have an impact on Ministers constitutional obligations to ensure a right to a fair trial under the European Convention? Does the Minister, in essence, think that he has public support over his government's decision to refuse to provide information to victims of Gulf War Syndrome?

Roger Freeman

Well, I am not familiar with the precise details, but the general principle employed by the Ministry of Defence, quite rightly in my judgment, is that there should be as full an examination and as full a disclosure as possible. I cannot for the life of me understand what interest there would be in the government for a conspiracy to hide information about a syndrome if it existed. Because sooner or later it would become commonplace, it would become knowledge. Both ministers and civil servants and officers would be deemed culpable of withholding information. So there is nothing to be of benefit to those who are seeking to withhold any information about a syndrome. I think the Ministry of Defence has tried to go about it in a methodical scientific manner, trying to identify if there are any common themes or threads of medical evidence available. And if there are specific concerns that you have about non-disclosure of information about individuals who have been treated at Porton Down, then if I can be of assistance in getting the answer to the question I would be delighted to do so.

Deborah King

Perhaps if I could come back on that? Given that we are in a position where some people are taking cases with regard to Porton Down, about testing that occurred many many years ago, regarding their lack of ability to claim disability benefits now, that relate to respiratory problems allegedly caused by chemical and biological tests that they were exposed to; surely that is proof enough that disclosure ought to be presumed. If that is an old situation where there is no disclosure of the chemical and biological constituents at Porton Down, then logically that is proof that non-disclosure is occurring regardless of the highly public campaign that is being run in relation to the Gulf War now. Those individuals are subject to an injustice in relation to that as well. So all I am saying, Mr Chairman, is that the Minister is aware, or the government is certainly aware, of old cases where disclosure has been refused. I appreciate his offer to say "Let's take up current cases," but that has clearly been breached in the past.

Roger Freeman

My offer remains for you to write to me personally at the Cabinet Office, 70 Whitehall. Address it to me for the attention of the Minister, otherwise it will get diverted into the civil service system... (*laughter*) and you might not get a full and open response.

Richard Norton-Taylor, *The Guardian*

This is addressed primarily to Roger Freeman, but also to Peter Mandelson, and Robert Maclennan, on the difference between accountability and responsibility, which I think, James, you mentioned, about the black hole which emerged really from Sir Robin Butler's new constitutional doctrine and at the very end addressed by Scott in his report. We know that no minister has resigned after the Scott report, and I would really like to ask the Minister first, whether he agrees with Sir Robin Butler's notion that accountability is a 'blame free' word as he put it in the evidence to the Scott enquiry? Since no ministers resigned, do you think that civil servants strongly criticised in the report should be disciplined, and whether we will know whether they have been or not?

Roger Freeman

As far as Sir Robin Butler's thesis is concerned, I do not think you can fairly attribute it to him. I think it is common sense that ministers are clearly accountable to report to Parliament, and answer properly and fully, subject to the Parliamentary conventions which may need to be changed at the margin; which may need to be changed. We have clearly indicated our willingness to review 'Questions of Procedure for Ministers' and indeed the Government's approach to Erskine May's exclusions as to what Ministers should or should not say. That is an offer on the table, and I look forward to debating that with the Public Service Select Committee, of which Mr Bogdanor is one of the advisors. I think it is important we revisit it. Times have changed. As to your point about civil servants, there is no attempt by Ministers to dump responsibility on to civil servants named in Scott. If the civil servants have performed in good faith and within the guidelines of Government policy, then there can be and will be no disciplinary procedures against them. What departments are doing now is reading the report carefully to discover if any civil servant's action falls outside those limitations, those criteria which I have just indicated. If a civil servant has acted negligently, in bad faith, in contradiction to government policy, then it may be that departmental disciplinary action is needed; but I would hope frankly that in the interests of the Civil Service as a whole that that procedure, unlike the recommendation, I think it was Graham mentioned this, I do not think that should be done in public. I think it should be the normal process, with the normal safeguards offered by the civil service in such disciplinary proceedings. But I have no idea whether there will be any proceedings as a result of the examination of all of Richard Scott's report; but it is conceivable that there might be.

Robert Maclennan

I do find it rather surprising that Roger Freeman should speak about changes at the margin in this area being all that is required, when there has been such a remarkable delision over the years since the time I entered Parliament thirty years ago. I do believe that the denial of responsibility and the acceptance of accountability is bringing the whole basis of Parliament and Parliamentary democracy into disrepute, and it is not a matter that can be tinkered with at the margins. If ministers are found to have erred, then it is not necessarily a resigning matter, and that I think is what perhaps has confused the issue post Scott.

But it is, it seems to me, appropriate under our system for ministers to admit that they have erred. I have very limited experience, and at rather a low level for five years being a junior Minister. My debut was the introduction of something called the Tea Prices Number 2 Order, and there was curiosity about what had happened to the Number 1 Order, which no one had heard of. Well the actuality was that some civil servant had cocked it up. In fact it was not possible to proceed with the Number 1 Order because it made no sense in law. There was no doubt in my mind that I was accountable and I was also in a true sense responsible. I had to explain that there had been an error, and I did not find it pleasant to explain it. But nobody suggested I should resign, although one or two people thought it was an opportunity for mirth, as did I.

It is this absolute unwillingness to accept that the buck stops anywhere that I think is bringing our system into disrepute, and nothing that Roger has done or said removes that anxiety.

Peter Mandelson

General observations. If civil servants do wrong, then that should not go unchallenged. I think that is obviously the case. I would not want a principle erected that civil servants can do anything and not face disciplinary proceedings, but that is absolutely not the point we are talking about. We are talking about a particular set of circumstances in which ministers have clearly failed to take any responsibility for their actions, and I think we have to understand the political context and professional environment within which officials were operating. I think that if having themselves got off scot-free, Ministers were then to sanction disciplinary action against particular civil servants as a result of Scott, I think they would be greeted with public derision. I think they would be greeted with a mixture of laughter and contempt, and I do not honestly think for one moment that even these ministers would have the barefaced gall to proceed against civil servants when they themselves have so manifestly failed to take any responsibility or blame for their actions, and actions which they required officials to take to sustain their positions and their policies.

As for Robin Butler's term, I do go along some of the way with Robin when he talks of ministers not being responsible for every last dot and comma which is placed on every document in every part of Whitehall. He is very fond of quoting Herbert Morrison in this context, who said that officials can not be responsible, ministers can not be held responsible,

for every last stamp licked in Whitehall, and certainly should not be forced to resign if the stamps are put upside down on the relevant envelopes, but they were. They were responsible but should not resign if the stamps were placed upside down on the relevant envelopes. I am sure that is right, but I think that what, Richard, you have quoted, is a form of words clothed as a doctrine, to protect current Ministers in their reluctance to take the blame for anything, and I do not think that it is therefore a doctrine which can be sustained.

Roger Freeman

I am sure that Peter would not wish to mislead us. Of course Ministers do not institute disciplinary proceedings; as you know Peter, that is not their function or their power or their right or their responsibility. It is the civil service themselves, the Permanent Secretary and the Civil Service Commissioners who will... you may laugh

Peter Mandelson

Roger, I do hope that your tongue is placed very firmly in your cheek when you say that. Do not Ministers who have absolutely no...

Roger Freeman

This is an extremely serious issue.

Peter Mandelson

It is not party political. It is a political observation none the less.

Roger Freeman

No, it is not a political observation.

Peter Mandelson

Yes it is. I am making a political observation about the track record of Ministers in this context.

Roger Freeman

It is an observation of the truth; you can not convince people of the truth. Ministers do not institute disciplinary proceedings. Do not distort deliberately the...

Peter Mandelson

They create the environment within which these decisions are taken, Roger, as you well know. That is what Scott is all about.

James Cornford

We are not going to have any more of this discussion, it is beginning to sound like the House of Commons. (*laughter*)

David Lowry

I am an independent researcher. I work with politicians including Llew Smith, MP for Blaenau Gwent.

I want to preface my question with reference to an answer in Hansard today which is very relevant to today's proceedings. Graham Allen asked the Deputy Prime Minister what consultation he had had with the Secretary to the Cabinet concerning the Government's response to the Scott enquiry, and where and when such consultation took place and the answer was very helpfully, "Successive governments have not disclosed the nature or the specific sources of the advice they receive from the civil service", so the current position seems to prevail as of today at least.

I want to try to address the question of the title of the seminar which is, "Is public access to civil service advice possible?" The answer to that obviously is "Yes, now" because of what Scott has published in his two thousand plus pages report. I want to turn to an extract of the report. For Scott aficinados it is page 715 of Volume 2. The reason why I turn to it

specifically; it is the recording of Scott on an exchange between Mr Waldegrave's civil servant advising him and Mr Waldegrave's decision on the basis of the advice he was given. And I think the civil service in this case comes out in a good light and I think the Minister comes out in an extremely bad light. Interestingly enough this particular exchange has not been reported to my knowledge in the mainstream press, and I am interested to know why it has not in any case.

Basically what happened was that Mr Waldegrave's nuclear specialist adviser told him that an application for a furnace made for export to Iraq in the week running up to the invasion of Kuwait by Iraq. The week following, the Cabinet having been told by the infamous Iraq note that Iraq was developing a nuclear weapons procurement programme, the adviser tells him there could be three possible uses for this furnace, one of which, I'll quote it, "could none the less enhance Iraq's nuclear or missile capabilities". The very next day Mr Waldegrave's private secretary recalls in a minute following, "Mr Waldegrave again thinks that action is clear, we will have to let the furnaces go. We are unable to stop the export of screwdrivers on the grounds that they may be useful for bomb making. The only option would be to invent a whole new category of potentially nuclear related machinery, the export of which we could stop world wide. (It would be impossible to single out Iraq and we cannot sensibly do this in time for this case)". And Scott was going to point out that the actual application was dropped because of the invasion of Kuwait and the implementation of total export ban to Iraq. And he also goes on to point out two pages later that that particular piece of decision making by the Minister ran counter to a government position on the nuclear non proliferation treaty which forbids Britain to help any other country making nuclear weapons.

Now the question I want to put to the Minister, and Peter Mandelson and Robert Maclennan if they want to also comment. We have a case here where civil servants set out policy options and advice to minister; he listened and decided his view: "I will go ahead." The decision of the Minister meant it was counter to a government commitment to an international treaty, and yet the outcome is that absolutely nothing has happened as a result of it. Now I'd like to know what can be done when we actually have a documented case of sensible advice from a civil servant, I think, of poor judgment by a minister, but no action at all.

James Cornford

Could I make a general remark? Could you keep your contributions from the floor - that was a very interesting case - but we only have twenty minutes left, and if people could think of one question rather than three, and put it very concisely. I now have half a dozen people wanting to get in.

Roger Freeman

Well, I think the simple answer to your question is that the new Code does protect the rights of civil servants. If they are being asked to do something that they believe is improper, or their Minister is behaving improperly, then there are clear lines of appeal, not only to the Permanent Secretary, but to the Civil Service Commissioners. Now that seems to have been broadly accepted and welcomed by the civil service.

David Gladstone

My name is David Gladstone. I am formerly of the Foreign Office, and I suppose its all right for an ex-civil servant to join in this very interesting debate. I have about a dozen observations or questions I could happily put, but Mr Chairman in line with your injunction I shall confine myself to one observation and one question.

The observation is that I as a civil servant would find it quite hard to remember many cases when I would have minded if the advice I gave had been published very soon afterwards. May be this is because I was not operating in terribly sensitive fields, and obviously there were cases when I drew on very sensitive information which would have been excluded, but it is not I think true to say that in all cases freedom of information legislation would cause civil servants to crawl back into their burrow shells and not say anything.

And following on from that, my question which is really devoted to all the panel, and perhaps to the Minister particularly, is "Isn't there a kind of halfway house, which could be usefully explored?" We are talking about freedom of information; what we have at the moment is a thirty year ban on freedom of information. The advice I did in fact give, good or bad, is locked away for thirty years. I think it would be entirely sensible to look again at the thirty

year rule, and for myself I would be perfectly happy to reduce that rule to say five years. But if that is thought too drastic, would it not achieve a lot of the aims of this debate if we were to reduce it to, say, ten?

Roger Freeman

Well I am not sure there is any scientific basis for thirty years or for twenty five years or twenty or ten. I note your contribution to the debate on this subject which I'm sure will continue in Parliament and in the Select Committee. On advice: yes, perhaps ninety per cent of it is uncontroversial, perhaps ninety per cent of it released immediately would not compromise the traditional prompt and impartial and objective and very often critical advice from civil servants. My concern is where you draw the line. Perhaps in the circumstances you have just indicated there should be prompt voluntary release by the department concerned if there is any question or interest in the subject, but I think to legislate to say that all information and all documents are immediately available, I think that would have a serious implication for government.

One area where I do agree with Peter Mandelson; it is quite interesting to see the prospect of a Labour Government coming closer and closer in Peter's mind, how close his approach and mine is to the overall field of freedom of information, and how perhaps Bob will not mind me saying this, how rather remote perhaps his approach appears to be to the realities in my judgment - I am not being critical - I am just I hope being objective, to the way in which government operates. And it may be that the only difference between Peter Mandelson and myself, that I noted, and I listened to his speech very carefully, was that he thought at some stage in the future he would like to put the Code of Practice on a statutory basis. I think that was the essence of what he said, and he thought that there might be some changes at the margin, in terms of the disclosure of certain documents, particularly documents that came from an objective source like the Chief Medical Officer. Now that does not sound to me like great radicalism, it sounds to me like a government in waiting.

Peter Mandelson

I hope that all the journalists pencils are well sharpened, in retrospect. I will not seek to

embarrass Roger by thanking him for that early endorsement of a coming Labour government. However James, can I just make the point that I think that the difference between a woolly headed Code shot full of holes which has been described in the way that it has, as I quote in the Economist, is a long way away from the sort of Code underpinned by legislation that I was describing, or the commitment to freedom of information legislation which it is the Labour Party's policy to introduce. There is a world of difference between those two things, just as I hope and anticipate there will be a world of difference in the attitude, the ethos, the culture pervading Ministers over the next Labour Government in contrast to these. Because I just make the point again and again and again: officials are one thing, pieces of legislation are another, and at the end of the day the standards of government, the style, the ethos of government start and end with the attitudes of Ministers. It is the attitudes of Ministers which have got to change, it is the standards that they uphold, the way in which they faithfully operate the 'Questions of Procedure for Ministers' which I think is of absolute and central importance and which as I have said, Tony Blair has already remarked, he will not keep people in his government who are guilty of lapses in the way that others have been, and I think that will make the world of difference to the operation of government much more than any Code and any Act of Parliament.

Robert Maclennan

The old views about the civil servants relations with the Ministers are gone, and gone for good, and Roger Freeman is absolutely refusing to recognise that we are not in the world of the sixties and seventies. The granting of authority to agencies has changed the relationship. This erection of a new doctrine of ministerial accountability but not responsibility has made it quite impossible to go back to the old Franks formula. I would say however, that even when Franks formulated it there were other views around; the views of people very closely involved such as Sir William Armstrong who took the firm view, in a book he published as long ago as 1970, that it would be acceptable for civil servants' views on policy option proposals to be published, and to be published with their names attached. It is neither heretical, nor is it out of touch to suggest such a view.

Jane Peretz

I am a very recent ex-civil servant. I wanted to comment primarily on what Maurice Frankel was saying. What we are talking about this morning is clearly two issues. There are issues for resolving individual grievances such as the Gulf War syndrome type of situation. But there is also, and this is what most people have been focussing on, the nature of the political process itself. Certainly in the United Kingdom the nature of the political process is very closed, compared to the United States, and I am thinking here about social policy areas, not Scott type territory. It was the social policy area that I worked in, and I have to say, with all possible sympathy for the Freedom of Information Campaign and the value of a freedom of information act in the context of resolution of individual grievances, I am much less clear about how much impact it will have on the nature of the policy process.

People have mentioned a number of reasons and I simply wanted to refer to another possible one. People have referred to matters of ministerial style, and they have referred to restrictions on people within various parts of the public sector speaking out. But I think there is also, that perhaps the striking difference with the US, in my own particular experience of having worked recently on a bill and been in close contact with American colleagues who worked on a similar bill there, is essentially the lack of counterparts, in the British system, the lack of resourcing of particularly the Parliamentary side of things, the bill committees and so on.

Even where there is a willingness to be open about policies and so on to quite a substantial degree, questions do not get answered unless they are asked, and one is very frequently, I am sure most civil servants have been in the position, of having an answer ready to the really difficult question or the best answer you could produce to the really difficult question, and just not having the really difficult question appear.

So as I say, my comment was essentially about the importance of counterparts for freedom of information essentially in the role of actually asking for the precious material.

James Cornford

Thank you. I think that is a a very interesting observation and I think those of us who have attempted to be counterparts, outside as it were, in opposition to the civil service outside are

very conscious of our lack of access to information. As one of the conditions it makes us ineffective.

Mike Bartram, *National Consumer Council*

Just to say that in Local Government, the Local Government Access to Information Act section 100(d) gives the public a right of access to information that has been relied on to a material extent in the producing of reports, so a lot of that is going to be policy advice. The Government reviewed the workings of the Act last year in relation to local government and decided that it was working very well. I wonder what lessons we can learn for central government from that. Anyone can answer that, but especially the Minister.

Roger Freeman

If I could offer a brief comment. Having been in government for ten years now, in five different departments, I have seen a welcome increased openness, a presumption now, where possible, to publish Green Papers, consultation documents. Perhaps some people will argue that we have too many consultation documents. It seems a natural part of the process which mirrors local government, because local government does not have the extent of the civil service machine that Whitehall does. I have not found a natural presumption to prevent Parliament obtaining information, to prevent their being an informed debate about policy, where there are perfectly legitimate different attitudes in public.

And if I might say so, as I said earlier on, you have new Labour anxious to win a general election, cautious about a major change in the way in which information is circulated, around Whitehall and outside Whitehall, and I understand that. I think that the government is not given sufficient credit for the changes that have occurred over 16 years. I think when we come to write the history of the 1980s, let alone the 1990s, there will be clear and measurable progress as Peter Riddell, who has gone, objectively was kind enough to indicate. We have clearly got further to go, but progress is being made in the right direction.

Graham Mather

Just to say, I think Whitehall, in general terms, could apply to itself that which it enforces by

law on local government. Typically, local government operates under rigorous statutory requirements. Typically, Whitehall will bend over backwards to avoid having any statutory requirement, whether it is civil service conduct, freedom of information or whatever, applying to itself.

Just going back on the last question, when I was on the Monopolies Commission I used to visit a lot of factories, and sometimes you would congratulate people at the factory for having hit a target or delivered a result or hit a budget or whatever, and one day some one said something which has stuck in my mind. He looked at me and said, "Well in this company there is no future for people who do not deliver in accordance with those targets and responsibilities." I have never heard any official ever say anything like that, and it seems to me that unless that responsibility link can be connected to performance, Whitehall condemns itself to under-performance. Because it is when the responsibility is there, as Derek Lewis has demonstrated, that there is confidence in the policy. And as the former Foreign Office official at the back said, he had no hesitation in having his advice published. As I tried to say in my remarks, where the advice is good and the responsibility is there, officials can glory in the responsibility and the openness and that I hope is where we are going to try to get.

Elizabeth Symons, *General Secretary, Association of First Division Civil Servants*

Graham, I think you have confused again, not for the first time today, Whitehall and Westminster. I do not think Whitehall is so very reluctant to bring in so many statutory measures. Certainly as far as the FDA is concerned, representing as we do the overwhelming majority of the senior Civil Service, we would prefer the statutory measures, and I think our sponsorship of today's discussion does demonstrate that we are very open minded on those things.

What I really wanted to ask, was to revert to the question raised by Richard Norton-Taylor, about the fact that it looks as though ministerial responsibility is now subsumed in ministerial accountability and to ask the Minister, when he says we must revisit 'Questions of Procedure for Ministers', what advice he would give to a civil servant in current circumstances. The problem that we have following the Scott report is that Scott agrees with Sir Robin Butler, that Ministers are not responsible for the paper clips and says that the responsibilities are very largely discharged by accountability. Now in those circumstances civil servants are still

working with paragraph 27 of Questions of Procedure for Ministers, which says the Minister is responsible. And does he think that it is realistic for Ministers to seek to draw the very sharp distinction which we saw drawn in October last year, which Derek Lewis has good reason to remember, the very sharp distinction between Ministerial responsibility for policy, on the one hand, and for operations on the other.

Roger Freeman

I think that there is a difference between accountability and responsibility because I think that accountability is not qualified. It applies, subject to the parliamentary conventions as I laid out in the debate, on the second of November, on Nolan last year.

The responsibility of Ministers to be accountable to Parliament is clear, well defined, may need to be revisited at the margins. Responsibility in the sense that the Minister says "I got it wrong, I apologise" because I unwittingly misled Parliament; that's a Ministerial statement. I can think of half a dozen over the last ten years, where the Minister apologises for an error. I apologised on behalf of government for the errors in the circulation of intelligence material in the 1980s. I made that quite plain in the debate, that government accepted responsibility collectively for that error. We have sought to put it right; I hope we have put it right. Doubtless the Public Service Select Committee and other select committees will look at that.

Ministers of course can accept responsibility, or have responsibility pinned on them by the prime minister for their performance - not just an individual act which involved bad management or bad discharge of Ministerial duties - but it can become cumulative and you get shifted in a reshuffle. So when someone says simplistically, "Well, when was the last Minister who resigned because he accepted personal responsibility for a major error and went at the dispatch box?" Incidentally, if you go back to the case cited, of Critchel Down, of course the Minister did not resign then because he accepted personal responsibility. He resigned because he did not have the support of his parliamentary colleagues. It was a bad example.

Peter Mandelson

Well what about Peter Carrington?

Roger Freeman

I will come on to Peter Carrington. Peter Carrington is a good example, and one where I think I cited that example in the debate. Clearly he felt he had to lance a particular political boil, with my own party, with the Conservative Party by accepting responsibility for events that led up to the invasion, and he resigned. But you would have to think long and hard to find examples, and I have been searching back in my mind for one example which is not a very good one, but the acceptance of responsibility can be manifest in a whole number of different ways, ultimately culminating in the resignation or involuntary retirement of that particular Minister.

James Cornford

I'm sorry but I have got to abuse the privilege of the chair; I enjoy doing that. I am going to allow the impartial observer on the right hand side to address a question to the Minister and that will be the last question. I apologise to those people whom I recognised but have not been able to bring in.

Maurice Frankel

Well I wanted to raise the specific topic of our seminar because I was interested and impressed by the way the Minister described the exemption in the Code of Practice on access to advice, because he said the exemption applies to internal opinion, advice, recommendation, consultation, deliberation, *"where disclosure would harm frankness and candour"*. Within the case law there may be cases in which disclosure within those categories could take place on the grounds that it would not harm frankness and candour, which is not quite the impression one gets from the analysis which seems to build up argument after argument about why that could never happen.

But the specific question I want to put to him is first of all, whether that interpretation is strictly right? That information may be disclosed from those categories provided one could show that to do so would not jeopardise candour; that's the first question. And the second is,

whether he can speculate, going over his own experience, not recent material which may be difficult but perhaps five or ten years ago from different posts, of examples of materials which fall within these categories, where he feels it would be possible to disclose without causing serious damage to candour.

Roger Freeman

Yes, I think the answer to that is an area where I and my department will reflect further. It was a point raised by Mr Bogadanor. It was a point raised at the back by the former civil servant diplomat. What I am concerned about is a general presumption of disclosure in all circumstances of advice. I think that that would screw up the system, but I quite accept the challenge, to think through examples where that might not endanger the smooth working of the central government machine and I think therefore this seminar has been helpful in identifying that particular niche of concerns.

James Cornford

Now I am going to call on the President of the First Division Association who has sponsored this seminar - I think it is the second or third we have held together, we hope progress has been made as the Minister has indicated - to say a word to bring it to a close.

Martin Brimmer

President, Association of First Division Civil Servants

The one thing I am not going to do is to make a speech, because it is time for lunch. It would though be wrong not to say a very sincere thank you, first of all to the Minister, because civil servants do know what pressures ministers are under and how much time they have, and to give up a whole morning shows how much you view the importance of this subject. Also to your two colleagues in the other political parties, again the same things go for that, because again civil servants do see members of the opposition very occasionally, even if they are not

currently allowed to say they can. Actually you can from the first of January so it was alright to have you here.

Can I also thank Graham Mather and Derek Lewis as well. I think this has been a great success as a conference. We held it because we wanted to get more arguments about this very delicate subject, and we wanted to develop our policy accordingly. A lot of what has been said today does come back to the question which Liz asked: "What exactly is ministerial accountability and ministerial responsibility now?" and "what is the position of the civil servants under it when they owe their duty, for all practical purposes, to the government of the day?"

We will return to this, I think, with a conference in June or July and hope very much that every one here will come to to it, but could everyone first before they come to that one, thank the speakers in the usual way for what they have said this morning.

~ ENDS ~

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"Is Public Access to Civil Service Policy Advice Possible?"

Paper by Maurice Frankel
Director, Campaign for Freedom of Information

at a Seminar organised by the Campaign for Freedom of Information and sponsored by the Association of First Division Civil Servants

March 5 1996

'The advice and recommendations exemption...ranks as the most controversial clause in the Access to Information Act. From early debate to this day, critics have attacked its broad language which can be made to cover - and remove from access - wide swaths of government information. The Standing Committee voiced its opinion that the exemption 'has the greatest potential for routine misuse'.

Information Commissioner of Canada, Annual Report, 1993-94

The internal discussions which precede the government's policy decisions rarely see the light of day. The Scott hearings themselves were an almost unique exception. Generally, civil servants are prohibited from answering a select committee's questions about discussions between officials, exchanges between departments or the advice given to ministers[1]. MPs tempted to pry into this forbidden area find that Parliament's rules prevent them from even tabling such questions[2]. If documents containing advice are sought during litigation, public interest immunity certificates arrive on the judge's desk urging him not to order disclosure.

Freedom of information (FOI) laws overseas also invariably include an exemption for policy advice. But such exemptions do not necessarily protect the entire class of internal working documents from disclosure.

Those countries which have legislated generally adopt one of two approaches. In some cases, particular categories of information (such as technical advice) are excluded from the scope of the exemption. In others, the government can withhold advice only if it can show that its disclosure would be contrary to the public interest.

The Right to Know Bill

The Right to Know Bill, introduced by Mark Fisher MP in 1993 and drafted by the Campaign for Freedom of Information, exempted policy advice from access. But

[1] *Departmental Evidence and Responses to Select Committees*, Cabinet Office, Machinery of Government Division, December 1994, paragraph 67

[2] 'Questions are not in order...which fall within a class of question which a Minister has refused to answer...Among the subjects on which successive administrations have refused to answer upon grounds of public policy are discussions between Ministers or between Ministers and their official advisers or the proceedings of Cabinet or Cabinet committees', *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 21st edition, London, Butterworths, 1989.*

significant areas were excluded from this definition. The exemption did *not* apply to the analysis, interpretation or evaluation of factual information, to factually based projections or to 'expert' advice. This would have permitted access to a considerable volume of analytical material while protecting recommendations, advice and exchanges of opinion. The Bill also contains a public interest test, which permitted exempt information, including policy advice, to be disclosed where abuse of authority or other wrongdoing had occurred and disclosure was on balance in the public interest.

The Right to Know Bill's exemption was as follows[3]:

Policy advice

21. - (1) Information is exempt if it consists of -

(a) the advice, opinion or recommendation tendered by any person in the course of that person's official duties for the purpose of the formation of policy within a public authority; or

(b) a record (other than a record which has been officially published) of any deliberation or decision of the Cabinet or of a Cabinet committee.

(2) Information is not exempt under subsection (1) above insofar as it consists of -

(a) factual information;

(b) the analysis, interpretation or evaluation of, or any projection based on, factual information;

(c) expert advice on a scientific, technical, medical, financial, statistical, legal or other matter other than advice which is exempt under section 20 *[legal professional privilege]* above;

...

(4) In this section -

"factual information" includes any statistical data and the results of any measurement, test, study or survey; and

"expert advice" means, in relation to a matter, any advice, opinion or recommendation which is tendered by a person on the basis of that person's qualifications and experience relating to that matter.

Disclosure in the public interest

30. - (1) An authority shall give access to a record containing information which is exempt under sections 16 to 26 above where there is reasonable evidence that significant -

(a) abuse of authority or neglect in the performance of official duty;

(b) injustice to an individual;

(c) danger to the health or safety of an individual or of the public; or

(d) unauthorised use of public funds

[3] The text is taken from the Bill after amendment in Committee

has or is likely to have occurred and if in the circumstances giving access to the information is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so.

The 'Open Government' Code of Practice

The government's own Code of Practice on Access to Government Information, exempts 'internal discussions and advice', broadly defined, from access altogether. The Code's exemption applies to:

> 'Information whose disclosure would harm the frankness and candour of internal discussion, including:
>
> - proceedings of Cabinet and Cabinet committees;
> - internal opinion, advice, recommendation, consultation and deliberation;
> - projections and assumptions relating to internal policy analysis; analysis of internal policy options and information relating to rejected policy options;
> - confidential communications between departments,public bodies and regulatory bodies.'

It seems unlikely that this would permit access to the classes of information specifically provided for by the Right to Know Bill's policy advice proposals. Indeed one of the Bill's disclosable areas - projections - are explicitly excluded from disclosure. The Code does provide that, once decisions have been announced, the government itself will voluntarily publish 'the facts and analysis of the facts which the Government considers relevant and important' in relation to that decision[4]. But this would be the government's own selection of relevant information.

The Code does however contain a 'public interest' test which would permit exempt information, presumably including internal advice, to be disclosed where: 'any harm or prejudice arising from disclosure is outweighed by the public interest in making information available' - a valuable advance.

Objections to disclosure

There are three principal objections to the disclosure of advice. First, it is argued that advice would be less candid if officials knew that it might become public. Second, that exposing the inner working of the deliberative process to critics may be harmful. Third, that officials might be seen as being responsible for decisions taken

[4] Code of Practice on Access to Government Information, paragraph 3(i)

on their advice, undermining the principle that ministers, not their advisers, are responsible for decisions. This could also - it is suggested - lead to individual civil servants coming to be seen as so closely identified with contentious policies that when a new administration took office their careers might be blighted.

Candour

The need to ensure that officials are frank in their advice is regarded by Government as the overriding basis for confidentiality. It is identified as such in the Code of Practice on Access to Government Information where the broad exemption for 'internal discussion and advice' is entirely justified by reference to 'frankness and candour'. This is confirmed in the Office of Public Service's guidance on the Code which states:

> 'The justification for confidentiality of internal opinion, advice, recommendation and deliberation is the need to ensure that matters can be discussed candidly and frankly within government, and a full record kept without taking account of the possibility of publication within the closure periods for public records'[5]

This may be significant, since as the cases described below indicate, the courts have often questioned whether the real effect on candour will be as great as the Government fears. However, it is certainly possible that officials might indeed be less willing to criticise ministers' proposals if their advice was likely to be made public, and quoted against the minister by opponents of the policy. This could lead to political pressure on civil servants not to offer advice in terms which could be exploited by the opposition. If officials thereby became less willing to criticise the weaknesses of proposals, policies may be implemented without proper internal scrutiny.

As Sir Robin Butler, the Cabinet Secretary, told the Scott enquiry:

> 'I think the Minister is entitled to not have Parliament and the opposition saying: "We think that the advice you got from the Permanent Secretary was better than the decision you took."The Minister has a right to reach that decision himself, and then defend it and not to, as I say, have what advisers put to him exploited and thrown against him by his critics.'[6]

However, it cannot be assumed that openness would necessarily lead to any change

[5] Office of Public Service and Science, *Code of Practice on Access to Government Information, Guidance on Interpretation*, paragraph 2.9

[6] Transcript, 9 February 1994, page 46

in the *substance* of advice, as opposed to the tone in which it is presented. It is hard to imagine such factors leading a professional civil service to substitute uncritical praise for serious evaluation. Indeed, anticipation of public scrutiny may reinforce pressure for rigorous evaluation and analysis, rather than undermine it.

Nevertheless, the case for a considerable degree of confidentiality in this area is difficult to refute. No organisation would find it easy to expose its half-formed thoughts to intense critical scrutiny before it had itself considered whether the proposals were feasible or desirable. Certainly, no government is likely to tolerate legislation which demanded total openness in this area - and no Freedom of Information law overseas does so.

Candour in court

The candour argument, invariably appears as one of the grounds on which public interest immunity is sought in legal proceedings. As a result it has attracted the (often sceptical) attention of the courts. In the 1968 case of Conway v Rimmer, the House of Lords rejected the idea that the public interest in preserving confidentiality could be justified by the need to protect candour.[7] Lord Upjohn noted that the case for confidentiality:

> 'has nothing whatever to do with candour or uninhibited freedom of expression; I cannot believe that any Minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject, such as even the personal qualifications and delinquencies of some colleague, by the thought that his observations might one day see the light of day.'[8]

In Burmah Oil Co v Bank of England the House of Lords considered whether to order disclosure of high level policy discussions about the price which the government should pay for oil shares purchased as part of a rescue effort. Lord Wilberforce accepted that disclosure of officials' differing views about the policy to adopt 'could well deter frank and full expression' in future'[9]. However, the opposite view was forcefully expressed in Lord Keith's judgment:

> 'The notion that any competent and conscientious public servant would be inhibited at all in the candour of his writings by consideration of the off-chance that they might have to be produced in litigation is in my opinion grotesque. To represent that the possibility of it might significantly impair the public service is even more so. Nowadays the state in

[7] The actual justification was held to be the need to prevent 'the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind'. Lord Reid, [1968] AC 994

[8] [1968] AC 993-4

[9] [1980] AC 1112

multifarious manifestations impinges closely upon the lives and activities of individual citizens. Where this has involved a citizen in litigation with the state or one of its agencies, the candour argument is an utterly insubstantial ground for denying him access to relevant documents.'[10]

A recognition that openness may sometimes lead to better advice appeared in an appeal court judgement in a case brought against the Department of Health by haemophilia sufferers who had contracted Aids from contaminated blood. Lord Justice Bingham referred to the issue of candour:

'The weight of this consideration depends very much on the subject matter in question. It does not seem to me to have substantial weight in relation to the subject matter with which this case is concerned; indeed, apprehension that these documents might become public before expiry of the 30-year rule might even have prompted greater candour.[11]

The Scott enquiry heard from Mr Andrew Leithead, an Assistant Treasury Solicitor and head of DTI Litigation section who played a key part in the handling of the PII claims in the case. He:

'accepted, however, that it was unlikely that a Minister or civil servant of whatever level would feel inhibited from "fully and frankly expressing his views in a discussion as to policy by the possibility that such discussions would be disclosed in legal proceedings if they pass the appropriate threshold relevance test".'[12]

Where 'expert advice' is concerned, the suggestion that openness could undermine candour is even more unlikely. In these areas, the adviser is giving a professional opinion in the field of his or her expertise, based on knowledge of the scientific, technical, medical, financial, statistical or other issues involved. This point was addressed at length in a 1990 High Court action brought by the manufacturer of an oral tobacco product ('Skoal Bandits') which had been banned as a carcinogen. The Secretary of State for Health had refused to reveal to the company the scientific advice which led him to this decision. Lord Justice Taylor said:

'The only reason advanced by counsel for the refusal of disclosure, other than the existence of an inflexible rule to that effect, was that the members of the C.O.C. [the Committee on Carcinogenicity of Chemicals in Food, Consumer Products and the Environment] might feel inhibited in expressing their views if they could be identified by those affected.

I find this unconvincing. The C.O.C. members are scientific experts of integrity and standing. Their function is to apply their expertise to the evaluation of scientific evidence,

[10] [1980] AC 1132
[11] re HIV Haemophiliac Litigation, Royal Courts of Justice, 20.9.90
[12] Scott Report, Volume III, paragraph G13.96

> to reach conclusions and make recommendations. I cannot believe that they would be affected by the suggested inhibitions. Even if there were anything in the point, it could be overcome by suitable editing or blacking out of names. The Secretary of State did not even vouchsafe a summary of the Committee's reasons - only the conclusions.
>
> One cannot help feeling that the denial of the applicant's request was due to an inbuilt reluctance to give reasons or disclose advice lest it give opponents fuel for argument. One can understand and respect the need for Ministers to preserve confidentiality as to the in-house advice they receive on administrative and political issues from their civil service staff. But here, the advice was from a body of independent experts set up to advise the Secretary of State on scientific matters. I can see no ground in logic or reason for declining to show the applicants the text of the advice.'[13]

Such 'expert advice' is precisely what the Right to Know Bill proposed should be available.

The Chancellor's monthly minutes

A substantial question mark about the Whitehall conventions on policy advice was raised by the Chancellor of the Exchequer's decision, in April 1994, to publish the minutes of his monthly meeting with the Governor of the Bank of England. The minutes are published six weeks after the meeting, by which time the following meeting has already taken place.

The innovation had a particular purpose: to demonstrate to the markets that the Government was serious about its inflation policy, and would not sacrifice long term economic objectives for popular pre-election interest rate cuts. The published minutes would show whether the Chancellor was carrying the Governor with him in his proposals. Where there was disagreement, the minutes were intended to demonstrate that the Chancellor nevertheless had an economic - as opposed to a vote-winning - justification for his strategy. He would not be prevented from acting for overtly political reasons, but the basis of his decisions would become clearer.

Some commentators initially shared the traditional Whitehall view, that publication would destroy candour and that minutes would prove bland and uninformative. In fact, significant differences on sensitive economic questions have been revealed. The minutes were described in the *Financial Times* as "remarkable for their candour".[14] A *Times* leader noted: "Instead of papering over disagreements with platitudes, the

[13] R v Secretary of State for Health Ex parte United States Tobacco International Inc [1992] 1 All ER, 224-5
[14] 'Minutes reveal sharp rift at the top', Graham Bowley & Philip Coggan, Financial Times, 14.4.94

minutes are impressively clear and sharp".[15] After observing the initiative for over a year, William Keegan, the *Observer's* economics editor, and an initial sceptic, reported that 'the essential truth about the position - the mood of the meeting - *did* come out in the minutes...The curious thing about our present Chancellor and Governor is that they tend to say what they mean and mean what they say'.[16]

Could not a similar degree of openness apply to the government's other technical advice? The medical advice on issues such as the causes of Gulf War syndrome or the spread of BSE could equally be disclosed. This may of course put the Government under pressure where the advice indicates a case for action which the Government has not taken. But Ministers would not be forced to accede to their advisers' recommendations. They would, however, be under entirely legitimate pressure to explain the reasons - which may be other than scientific - why action has not been taken.

Political neutrality

Another objection to revealing policy advice is that this might jeopardise the political neutrality of the civil service. The problem here is that the civil service is not 'neutral'. It serves the government of the day, though the secrecy is such that the nature of this role is usually not apparent. According to the Treasury and Civil Service Committee:

> 'Some [witnesses] questioned whether political impartiality in a British context amounted to much more than an avoidance of identifiable political allegiances, given that civil servants owe a loyalty to the Government of the day and have to take account of the political stance of the Government in their actions. It has been contended that "Ministers want, and have always wanted, partiality...'Impartiality'...is simply the assumption that civil servants are prepared to be partial to whichever party forms a government."[17] It has also been suggested that civil servants are required to demonstrate "a chameleon-like behaviour", comparable to "the neutrality of the barrister who serves every cause in turn regardless of the rights or wrongs of the cause"[18]. Others emphasised that there was more to impartiality than service to Governments of different political persuasions. Civil servants should strive for objectivity, an objective sense of the national interest, an avoidance of the partisan or doctrinaire.[19] The requirement to retain the confidence of possible future administrations should represent a clear constraint on the nature of the commitment which civil servants give to any one Government. [20]

[15] 'Minutes of Interest, The Times, 14.4.94
[16] 'Ken and Eddie's double act brings the house down', William Keegan, Observer, 30.7.95
[17] Dr Keith Dowding, HC (1993-94) 27-III, pp 23-24
[18] Prof. Fred Ridley, HC (1985-86) 92-II, QQ 525-529
[19] Sir Brian Hayes, HC (1993-94) 27-III p 6
[20] Treasury & Civil Service Committee, 5th Report, Session 1993-94,The Role of the Civil Service, HC 27-I, paragraph 66.

Given that ministers move seamlessly from the development of policy to its political management it is difficult to see how their advisers can avoid being drawn in after them. Officials are responsible for writing ministers' speeches and articles and drafting answers to parliamentary questions. They may do so in line with ministers' instructions and expectations, and it may be the minister's name that appears above their words, but it is nevertheless a politicised task, involving the protection of policies against political criticism.

Whether this role could continue if internal discussions were no longer confidential is uncertain: it may be that these tasks would have be undertaken by political appointees. However, the Right to Know Bill's approach would not itself challenge this arrangement. Draft PQs and similar materials would be regarded as advice and be protected from disclosure. Such material might only be disclosed where it fell within the Bill's 'disclosure in the public interest' provision[21] - though this would only be likely to occur in particular circumstances, for example where some abuse of authority has occurred.

Select committees

Much of the previous discussion has described the approach taken to the disclosure of advice in court. But similar tensions occur in Parliament. The rigour with which Government defends itself against MPs' pressure for insight has sometimes infuriated select committees. In 1989, the House of Commons Defence Committee, which had been looking at the future of the brigade of Gurkhas, reported:

> 'We regret to have to report that the Ministry of Defence has not been willing to give us all the evidence necessary for our inquiry. In the first place, witnesses would give us no information about the progress made by the Ministry in considering the future of the Brigade. They would not tell us, for example, whether the Brigade's own study had been completed, nor what progress had been made with the Ministry's study, nor whether the Chiefs of staff had yet considered the question, nor even whether matters had yet been considered at a senior level in the Ministry of Defence. There is no element of national security involved in this; and even if there were, we would, as always, be prepared to take classified evidence.
>
> The Ministry's refusal to answer on policy options caused us greater difficulty. We were told that the conventions of giving evidence to Select Committees prevented our being given information about policy options, and the Ministry was prepared to answer only 'in respect of factual material and where there is an existing Government policy.

[21] Right to Know Bill, Clause 30

> We recognise no 'convention' that Select Committees should not be told about options for future policy. We emphasize that in our inquiry we were not seeking to know the advice which officials give to Ministers, but to discover the financial, administrative and policy implications of options for the future of the Brigade of Gurkhas. We do not accept that the Government should attempt to shield matters from Parliamentary scrutiny merely because Ministers may later require advice on those matters, or because decisions have yet to be taken.
>
> The Ministry put particular difficulties in our way when we attempted to discover, as a question of fact, whether the Government had investigated the possibility of deploying Gurkhas to a country where they had not so far been stationed. Our exchanges the MoD are set out in Appendix E and elsewhere in our inquiry. No Minister or Permanent Secretary would for a moment themselves tolerate such answers from the Department; but such answers are evidently thought good enough for the House of Commons.'[22]

The breadth of the net thrown around Whitehall's internal deliberations prompted the House of Commons Procedure Committee to comment, in 1990:

> 'We doubt whether the fabric of constitutional government would suffer fatal injury if witnesses were more forthcoming about the level at which decisions are taken and the extent of the involvement of different Departments.
>
> Similarly, with very few exceptions, it is difficult to see why, without breaching the confidentiality of advice to Ministers, Committees cannot be told, in purely factual terms, what options are under consideration, as well as their cost implications. We regard as unsustainable the Government's argument that experienced and trained officials cannot distinguish between the *subjects* on which Ministers have sought advice, on the one hand, and the *substance,* of that advice, on the other.'[23]

Class claims

The remarkable feature of the Government's approach to policy advice is that it requires that the entire *class* of advice be protected, regardless of whether any individual document is sensitive. The object is to create a disclosure-free zone, in which officials know that their remarks - however innocuous - will not be revealed. To defend this zone the Government may resist the disclosure of any item of advice or opinion, even where in reality it has no objection to its release. This is a point frequently made in relation to PII. A typical extract from a judgment reads:

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[22] House of Commons, Defence Committee, First Report, Session 1988-89, *'The Future of the Brigade of Gurkhas'*, HC 68.
[23] House of Commons, Procedure Committee, Second Report, Session 1989-90, *'The Working of the Select Committee System'*, HC 19-I, paragraphs 159-160.

> 'It is not contended by the Crown that there is anything in these documents which if disclosed would be detrimental to the public interest, only that they belong to a class of documents the production of which would be injurious to the public interest and that taken as a whole they should not be produced'[24]

The approach is found too in the Government's attitude to disclosure to Parliament and the public. The guidance on the Open Government code explains that one reason why advice is protected is to prevent differences of opinion between officials or between officials and ministers being revealed, as this could:

> 'prejudice working relationships and effective discussion of policy, especially if it led to dissenting or different views being quoted in political argument to attack the policy'

Yet it immediately adds:

> 'It is not the intention, however, to withhold this class of information only where internal differences and disagreements would be revealed'[25]

The paradox is that the public may be denied *uncontentious* information, which it could be easily given, in order to protect the government's ability to withhold *contentious* information at some future date. But the idea that this provides officials with certainty that they can speak frankly at all times, does not withstand examination. Even where PII is claimed in litigation, the courts often order the disclosure of advice - as happened in the Matrix Churchill trial and in several of the cases described above. Actions for damages and judicial review are no longer rare events, and civil servants must already know that, even in the most sensitive areas, their advice may have to be revealed. It may also come to light as a result of investigations by the Parliamentary Ombudsman[26] or the Comptroller and Auditor General[27] or by the time-honoured route of a leak.

Sir Richard Scott noted how documents of little policy significance came to be swept up into the expanding category of materials for which PII was claimed in the Matrix Churchill trial. Mr Leithead told the enquiry:

> "in practice, when one is dealing with PII claims, one tends to take a rather sort of generous view...generous to Government departments. Anything that involves advice to Ministers or

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[24] Burmah Oil Co v Bank of England [1980] AC 1094

[25] Office of Public Service and Science, *Code of Practice on Access to Government Information, Guidance on Interpretation*, paragraphs 2.10 and 2.11

[26] The Ombudsman has a statutory right of access to departmental papers, including those relating to the formulation of policy (though not to those of the Cabinet or Cabinet committees).

[27] Particularly if the official who serves as the department's Accounting Officer has objected to what he regards as improper expenditure. See *'Pergau Hydro-Electric Project'*, Report by the Comptroller & Auditor General, HMSO, 908, October 1993.

documents preparatory to such advice is considered to be within the class"

This exchange then followed:

Question: Is this approach bred of a desire for convenient administration? You said it would be very difficult to work it on any other basis?

Answer: I think so, yes.[28]

Scott clearly despaired of seeing any change to this approach. So long as class claims continued, he concluded:

'Whitehall departments will inevitably seek to bring within the recognised classes an increasing range of documents. I do not believe that the instinctive Whitehall reaction to seek to withhold Government documents from public inspection is likely to change.'[29]

One of Scott's recommendations is that 'class claims' should no longer be used in criminal trials. Instead, he proposes that any PII claims should be justified on the basis of the documents' specific contents[30]. While this recommendation refers only to criminal prosecutions, the reasoning leading to it throws doubt on the justification for withholding policy advice as an entire *class* from Parliament and the public too. Commenting on the arguments which the Government puts forward - both in legal proceedings and in relation to public disclosure - Scott concludes:

'As to the "policy" class of documents, is it justifiable for the Government to seek to protect these documents from disclosure on the ground that the protection of the class is "necessary for the proper functioning of the public service" or on the ground that the candour with which advice is given to Ministers would otherwise be inhibited? *I find it difficult to accept that these are satisfactory grounds for a class claim in the first place.*'[31] (emphasis added)

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[28] Scott Report, Volume III, page 1375
[29] Scott Report, Volume IV, paragraph K6.16
[30] Scott Report, Volume IV, paragraph K6.18
[31] Scott Report, Volume IV, paragraph K6.25