# The Campaign for Freedom of Information

Suite 102, 16 Baldwins Gardens
London EC1N 7RJ
Tel: 020 7831 7477
Web: www.cfoi.org.uk
Email: admin@cfoi.demon.co.uk

**POST LEGISLATIVE SCRUTINY OF THE FREEDOM OF INFORMATION ACT**

**Supplementary submission to the Justice Select Committee**

by the

**CAMPAIGN FOR FREEDOM OF INFORMATION**

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## Introduction

This submission addresses a number of points raised by witnesses during the Committee's evidence sessions, particularly in relation to the FOI Act's exemption for policy formulation. It also provides further details of excessive or wasteful spending revealed by FOI disclosures (Appendix A). These suggest that the Act is likely to play an important role in exposing and deterring excessive spending, which is generally not taken into account when assessing the 'costs' of FOI.

## The retrospective application of the FOI Act

Lord O'Donnell was highly critical of the fact that the FOI Act applied retrospectively to records created before it came into force. He described this aspect of the Act as "pernicious".[1] Mr Straw also suggested that it had been a mistake to allow the Act to apply retrospectively.[2]

In fact there was good reason for the FOI Act to apply retrospectively: it replaced measures that had already been in place for many years and which were themselves retrospective. If the FOI Act had applied purely *prospectively* it would have removed a long-established right to earlier material.

The Act replaced the Code of Practice on Access to Government Information introduced by John Major's government in 1994. This had been in place for 11 years by the time FOI came into force and from the outset had applied retrospectively. A similar retrospective code had applied to NHS bodies.[3] There had also been a retrospective right of access to environmental information under the Environmental Information Regulations (EIRs) 1992, which were replaced by the 2004 EIRs which also applied retrospectively. Ministers were fully aware of this rationale for applying the FOI Act retrospectively, as they made clear at the time.[4]

## Provide certainty in relation to government discussions

Lord O'Donnell argued that decisions on disclosure of internal advice should be taken on the basis of clear criteria which removed uncertainty and provided clarity as to whether particular material was disclosable or exempt.[5] He acknowledged that this would involve removing the public interest test from the section 35 exemptions.[6]

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[1] Q. 253
[2] Q. 332
[3] Code of Practice on Openness in the NHS
[4] At Commons report stage, Mr David Lock the Parliamentary Secretary, Lord Chancellor's Department stated: "Amendment No. 99 would effectively introduce a new exemption that would apply to information that was supplied to a public authority by a company or other commercial organisation before the Freedom of Information Act came into force. That formula is capable of extremely wide interpretation. The amendment would cut swathes through the Bill and would in part reverse the policy of retrospection in relation to commercial information alone, although of course clause 13 would still apply. That would be nonsensical, as information should already be available under the non-statutory code of practice on access to Government information that was introduced by the previous, Conservative Government." HC Deb 4 April 2000, col. 909
[5] Q.251 & Q.261
[6] Q.277

He suggested that some previously withheld or disputed material would fall into a disclosable category under this approach. We think that is unlikely. The certainty that would be achieved would be at the cost of removing from access virtually all unpublished material relating to policy formulation. (One exception would be statistical information about a decision that has already been taken, but this is already accessible under section 35(2)).[7]

A potential candidate for information that might be put into an "always disclose" category would be factual information relating to policy decisions. However, the government resisted such a move during the FOI Bill's parliamentary passage. Mr Straw, then Home Secretary, made clear that the government could not accept an amendment to this effect as the distinction between factual and other information was unclear. The amendment, he said, would require the disclosure of factual information on the costs of the annual departmental spending bids which would:

> "drive a coach and horses through any idea of confidentiality of collective decision making…all the factual information on public spending going before the Cabinet Committee would have to be made public…That is plainly the effect of the amendment."[8]

The result of this debate was to insert what is now section 35(4) into the Act. This modest provision states that, when applying the public interest test to section 35 information, authorities must have:

> "regard…to the particular public interest" in disclosing such factual information.[9]

However, even this provision illustrates the difficulty of attempting to divide information into classes that will be automatically disclosed or automatically withheld. The Tribunal has on occasions found that the public interest balance under s.35(4) favours keeping factual information confidential, because it cannot be separated from the associated advice. Thus in endorsing the withholding of a 2000 report on the criminal justice system under section 35(1)(a) the Tribunal observed:

> "Our conclusion applies to the factual elements of the Report, as well as the opinions and recommendations, because it is not possible to distinguish the two for separate consideration".[10]

Lord O'Donnell suggested that, as a quid pro quo for removing the FOI Act's public interest test "the full legal advice" for "all major policy decisions" should automatically be published.[11]

We wonder whether government, which has strongly resisted the disclosure of its legal advice under FOI, would regard this as feasible. The release of the actual legal advice on major decisions would presumably highlight any shortcomings in the government's position, which might be thought to increase the chance of legal proceedings being

[7] However, such information can be withheld under section 36(4).
[8] HC Deb 5 Apr 2000, Cols 1027 and 1030
[9] Freedom of Information Act, section 35(4).
[10] EA/2008/0030, Cabinet Office & Information Commissioner, 21.10.08, paragraph 37
[11] Q. 257

brought against it. The government has also argued that disclosing legal advice would result in a "chilling effect", undermining government's ability to obtain or record such advice in future.[12]

This approach would involve its own uncertainty, for example, as to what is a "major" policy decision. Decisions which the government regards as routine may be perceived by the public as "major" particularly if they are likely to have consequences which the government failed to anticipate.

The difficulty in anticipating the categories of information that could be selected for disclosure in advance, so as to avoid uncertainty, are underlined by Lord O'Donnell's suggestion that the legal advice on decisions to go to war would be an example.

Prior to the Iraq war it is most unlikely that this category of information would have been selected for routine publication. It was only the existence of the FOI Act which provided a mechanism for disclosure in the unexpected circumstances that then arose.

The next major controversy, which may lead to pressure for disclosure of different normally confidential information, cannot now be predicted. The FOI Act's public interest test is capable of addressing such issues as they arise. Lord O'Donnell's proposal is not. It would lead to the automatic withholding of all information not specifically selected in advance for publication – regardless of the weight of public interest in disclosure.

**What kind of class exemption is section 35(1)(a) intended to be?**

In his evidence, Mr Straw stated:

> "We sort of believed that in section 35 we were establishing a class exemption, but that has not turned out to be the case because of the way it has been interpreted by the courts."[13]

In fact it was neither the courts, nor the tribunal, but the government which was responsible for the present shape of section 35.

When the FOI Bill was introduced into Parliament, the public interest test was purely voluntary: the Information Commissioner would have been able to recommend but not order disclosure on public interest grounds. This attracted particular criticism. It meant that an authority which had made serious errors would be the final judge as to whether it was in the public interest to reveal those errors.

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[12] The MOJ's guidance on this issue states: "Disclosure of legal advice has a high potential to prejudice the government's ability to defend its legal interests - both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour. Neither of these is in the public interest. The former could result in serious consequential loss, or at least in a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because decisions themselves may not be taken on a fully informed basis…There is also a risk that lawyers and clients will avoid making a permanent record of the advice that is sought or given or make only a partial record. This too would be contrary to the public interest." Ministry of Justice, Freedom of Information Guidance, Exemptions Guidance, Section 42, Legal Professional Privilege.

[13] Q.343

As a result of this criticism the government amended the bill to make the public interest test binding – but subject to a ministerial veto. Mr Straw himself set out the rationale for this change during the bill's Commons report stage:

> "Originally under [clause 2][14] we proposed that the commissioner would have a power to make a recommendation for disclosure, but not an ability to order it....As a result of many representations...I recognised the concern in the House about the fact that in the scheme of a statutory right to know it looked slightly odd that there should be provision only for the commissioner to make a recommendation. It was up to the public authority whether to accept it....
>
> As a result of the representations, we have in many ways fundamentally changed the structure of [clause 2], except in one respect. We have strengthened the tests - that is a matter for another debate in respect of factual information - but we have made it a duty, not a discretion, on the public authority to consider whether the public interest in disclosure outweighs the public interest in the matter not being disclosed. Where the public authority decides that the balance of public interest is in favour of disclosure, it is under a duty to disclose. If it comes to a contrary view, the matter can go to the commissioner and he can order disclosure. That is the scheme of the Bill. (emphasis added)"[15]

At second reading in the House of Lords, Lord Falconer, then Minister of State in the Cabinet Office, directly addressed what is now section 35:

> "[Clause 35] provides a class exemption for the formulation and development of government policy. It is acknowledged that government must have time and space to evaluate policy options and that the premature disclosure of information of this kind can hamper the effective conduct of government. Nonetheless, a great deal of information is made available already to the public and will continue to be made available. The public interest disclosure provisions in [Clause 2] will apply to this exemption and ensure that information will be disclosed where it is in the public interest to do so." (emphasis added)[16]

At Lords report stage the public interest test itself was amended so that instead of applying where the public interest in disclosure outweighed the public interest in maintaining the exemption, the onus was reversed. Information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

Lord Falconer explained that these amendments:

> "will put beyond doubt the Government's resolve that information must be disclosed except where there is an overriding public interest in keeping specific information confidential. Perhaps I may repeat that: information must be disclosed except where there is an overriding public interest in keeping specific information confidential." (emphasis added)[17]

[14] At the time this provision was contained in clause 13 of the bill but was later moved to clause 2. It is now section 2(2)(b) of the FOI Act.
[15] HC Deb 4 April 2000, cols 918-919
[16] HL Deb 20 April 2000, col 827
[17] HL Deb 14 Nov 2000, col 143

It is clear that the government intended, as a result of its own amendments, that information about the formulation of policy should be disclosed unless there was an overriding public interest in withholding it.

**The BBC's internal discussions**

Mr Straw suggested that the BBC:

> "has a total class exemption for the operation of its internal decision making"

and argued that the government deserved at least as much.[18]

The BBC's internal discussions are not subject to an absolute exemption. On the contrary, the Tribunal has required disclosure of the minutes of the BBC Governor's meeting which discussed how the BBC should respond to the Hutton Inquiry report.[19]

However, the BBC is only covered by the FOI Act in relation to information held "for purposes other than those of journalism, art or literature". During the Bill's parliamentary passage, the exclusion of these materials was explained by reference to the need to ensure that a journalist's notes or sources could not be obtained under the Act. In practice, the exclusion has proved far wider than that.

The BBC itself initially believed that this exclusion was only intended to apply so long as material was held *predominantly* for the purposes of journalism and that once any journalistic purpose declined to the point that some other purpose was then dominant the information would become subject to the Act.[20] This understanding was subsequently overturned by the courts which held that so long as information was held to any significant degree for the purpose of journalism it was outside the reach of the FOI Act.[21]

**The public interest test and policy formulation**

In his evidence, Mr Straw suggested that the section 35 exemption for policy formulation "can only apply while policy was in the process of development but not at any time thereafter." He added "That is crazy and not remotely what was intended".[22]

This is an incomplete account. The Information Rights Tribunal has interpreted the public interest test in relation to section 35(1)(a) as involving two elements. One takes account of the need for a "safe space" while decisions are under consideration. The other considers the "chilling effect" - the possibility that disclosure of particular information may have a longer term inhibitory effect on the willingness of officials or ministers to express or record such material. The first factor applies if a request is made while policy is being developed; the second does not.

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[18] Q. 344

[19] EA/2006/0011 & EA/2006/0013, Guardian Newspapers Ltd & Heather Brooke & Information Commissioner & British Broadcasting Corporation, 8 January 2007.

[20] EA/2005/0032, Steven Sugar & Information Commissioner & British Broadcasting Corporation, 29 August 2006, paragraph 123

[21] Sugar v British Broadcasting Corporation [2012] UKSC 4

[22] Q.343

In addition, section 35(1)(b) provides an additional exemption for information relating to “ministerial communications”. The definition of this term includes Cabinet and Cabinet committee proceedings.[23]

The Tribunal described the “safe space” argument in its first section 35 decision involving the then Department for Education and Skills:

> “The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy. We note that many of the most emphatic pronouncements on the need for confidentiality to which we were referred, are predicated on the risk of premature publicity. (emphasis in the original).”[24]

The Tribunal went on to explain that:

> “a parliamentary statement announcing the policy…will normally mark the end of the process of formulation”

Significantly, it added:

> “We do not imply by that that any public interest in maintaining the exemption disappears the moment that a minister rises to his or her feet in the House.”[25]

The effect of this provision is to make it extremely unlikely that policy discussions will be released while those discussions are still taking place. If a request is made *before* a decision has been taken, the ‘safe space’ consideration applies, even if – by the time the issue comes to the Commissioner or Tribunal – the decision has been implemented. This is because the public interest test is considered as it was *at the time of the request.* The Tribunal does not consider whether the information should *now* be disclosed but whether it should have been disclosed *at the time* it was requested (or, more precisely, at the time that it was refused).

The ‘safe space’ principle does not only apply *so long as the government’s decision is pending*. It applies indefinitely, in any case where the FOI request was made prior to the decision being reached. The passage of time between a request being made and an appeal about it being heard by the Tribunal does not make disclosure more likely.

The Tribunal’s approach to the ‘safe space’ principle has been endorsed by the High Court, in a case involving a request for the Office of Government Commerce’s ‘gateway review’ of the identity card programme. Mr Justice Stanley Burnton observed that:

[23] Freedom of Information Act 2000, section 35(5)
[24] EA/2006/0006, Department for Education and Skills & Information Commissioner & The Evening Standard, paragraph 75(iv)
[25] EA/2006/0006, paragraph 75(v)

"101. Having referred to the fact that the Identity Cards Bill had been presented to Parliament, and was being debated publicly, the Tribunal found that it was no longer *so* important to maintain the safe space at the time of the Requests. I have italicised the adverb because it makes it clear that the Tribunal did not find that there was no public interest in maintaining the exemptions from disclosure once the Government had decided to introduce the Bill, but only that the importance of maintaining the exemption was diminished. I accept that the Bill was an enabling measure, which left questions of Government policy yet to be decided. Nonetheless, an important policy had been decided, namely to introduce the enabling measure, and as a result I see no error of law in the finding that the importance of preserving the safe place had diminished. (underlining added, italics in the original)"[26]

The Tribunal's approach however adopts a note of scepticism towards the so-called "chilling effect" believing that civil servants' professionalism will prevent them from abandoning their responsibility to provide full and impartial advice in the face of disclosure.[27]

Thus, in the DfES case the Tribunal noted that:

"We have identified the wider effects of disclosure predicted by the DFES witnesses in some detail already. The issue for us is not whether frank debate, fearless advice, impartial officials, full record-keeping and ministerial accountability are worth preserving. All agree that they are. We have to decide whether or to what extent they would be imperilled by disclosure in this case."

"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."[28]

This approach was also expressly endorsed by Mr Justice Mitting in a High Court decision involving the Export Credits Guarantee Department.[29] However, in the ECGD case Mr Justice Mitting found that the Tribunal had wrongly treated the exemption as

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[26] Office of Government Commerce & Information Commissioner & HM Attorney General, [2008] EWHC 737 (Admin)

[27] For example: "We accept that there was a risk that the "indirect" effect described...would have resulted if this particular paper had been required to be disclosed under the Act in July 2006. But the evidence (of necessity) is evidence of a risk, not evidence of past fact, and the Tribunal considers that this risk was small and/or not a risk which ought to have weighed heavily in the balance for these reasons: (a) although we accept that there was a risk that Ministers would have started to require officials to draft papers like this one in a way which tended to make made them longer, more inaccessible and less frank and complete, it would not really have been in their interests (let alone the public interest) to do so and it may have involved a breach of the Ministerial Code of Conduct (…which unsurprisingly requires Ministers not to ask civil servants to act in any way which conflicts with their professional obligations as such); (b) any judgment as to the likely response of officials in the Cabinet Office to such pressure would have taken account of the expectation that they would continue to act with courage and independence and in accordance with their normal professional obligations as civil servants (and not, for example, deliberately leave important relevant considerations out of a Cabinet paper)." EA/2008/0073, Cabinet Office & Information Commissioner, 27 January 2009.

[28] EA/2006/0006, paragraphs 71 and 75(i)

[29] This case involved the Environmental Information Regulations 2004. The EIR exception which corresponds to section 35 of the FOI Act is regulation 12(4)(e) which permits an authority to refuse to disclose information to the extent that it "involves the disclosure of internal communications". A public interest test, identical to that of the FOI Act, applies under regulation 12(1). The EIRs also require the authority to "apply a presumption in favour of disclosure" (regulation 12(2)) a provision not found in the FOI Act.

setting up a hurdle which could only be overcome by proof that disclosure would cause "actual particular harm". This he ruled was not part of the statutory test.

He continued:

> "There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between. (emphasis added)"[30]

This decision, which is binding on the Tribunal, has frequently been cited in its subsequent decisions.

## Cases

A number of cases illustrating how these factors have operated in practice are summarised below. They do not include the relatively well known cases relating to the legal advice on the war in Iraq[31] or the NHS risk registers.[32]

Most of the cases involve ministerial communications. The final case involves a Cabinet committee paper, which may be of significance given the pressure for such papers to be excluded from the FOI Act altogether. The paper concerned has been disclosed and is attached at Appendix B.

## Decisions upholding refusals

### Nuclear power review

The Tribunal upheld the refusal to disclose the briefings provided to the then Prime Minister Tony Blair in connection with a 2005 energy review considering the role of nuclear power. During the consultation period Mr Blair gave a speech to the CBI in which he said he had seen "the first cut of the review" and that the replacement of nuclear power stations was now "back on the agenda with a vengeance". The timing of this speech led the High Court to rule that the subsequent decisions were unlawful. A second consultation then followed. Friends of the Earth applied for the briefings to Mr Blair's office before his CBI speech and repeated its request during the second consultation. The requests were made under the EIRs.

The Tribunal's decision, issued in October 2010, considered the balance of public interest at the time of the request. It found that there was a substantial public interest in nuclear energy issues and understandable concern, even

[30] Export Credits Guarantee Department & Friends of the Earth, EWHC 638 (Admin)
[31] EA/2008/0024 and EA/2008/0029, Cabinet Office & Information Commissioner & Dr Christopher Lamb, 27 January 2009
[32] EA/2011/0286 & 0287, Department of Health & Information Commissioner & Rt Hon John Healey MP & Nicholas Cecil

alarm, at the Prime Minister's announcement. Although Mr Blair was no longer Prime Minister by the time of the second request, all the ministers that had been involved were still active in politics and some remained ministers. Because the requested materials included the views of ministers the principle of collective responsibility was invoked, an issue of fundamental importance. The request was made at a time when policy was still being formulated and the materials, which included the views of ministers as well as discussion by officials of the options and risks involved, were entitled to be treated as confidential at the time of the request "and probably for a substantial time thereafter"(emphasis added). The documents were withheld.[33]

**The Birt Report**

The Tribunal found that the Cabinet Office had been right to withhold a 2005 report on the criminal justice system which Lord Birt, then a part-time unpaid adviser to the Prime Minister, had submitted to Mr Blair in December 2000. The Tribunal found important public interest considerations in favour of disclosure, including the contribution it would make to public understanding of the issues, the quality of the research supporting Lord Birt's proposals and the extent to which they had been reflected in a subsequent white paper. However, Lord Birt had been given the brief of producing "radical blue-sky thinking", the report contained some "strong opinions and particularly contentious recommendations", an accompanying letter from Lord Birt (also covered by the request) was a less balanced document containing "more direct language". The Tribunal found that, at the time of the request, "the public interest in maintaining the exemption continued to outweigh the public interest in disclosing it".[34]

**Data sharing**

The Tribunal upheld the Cabinet Office's refusal to disclose the minutes and other papers of the 'MISC31' cabinet committee established to examine data sharing in government. The Tribunal concluded: "policy discussions were ongoing when the request was received…coupled with the overall importance of…the principle of collective responsibility, the Tribunal is entirely satisfied that the balance in this case clearly militates against disclosure".[35]

**Gaelic TV**

The Tribunal found that ministerial communications relating to the establishment of a Gaelic television channel had been properly withheld from disclosure. The request had been made in 2005 and in part related to decisions determined by the passage of the Communications Act 2003. The Tribunal found that there would almost always be a strong public interest in exempting certain types of information unless there was "very cogent and compelling" evidence to tip the balance in favour of disclosure. It held that there was a strong public interest in protecting ministerial communications which involved the principle of collective responsibility even "where the disclosure of the information would reveal no more than the name of the individual who expressed a particular view, rather than revealing a novel or unusual view that was being considered."[36]

[33] EA/2010/0027, Cabinet Office & Information Commissioner, 4 October 2010.
[34] EA/2008/0030, Cabinet Office & Information Commissioner, 21 October 2008.
[35] EA/2008/0090, D Bowden Consulting Ltd & Information Commissioner & Cabinet Office, 26 August 2009
[36] EA/2007/0128, Scotland Office & Information Commissioner, 5 August 2008

### Sport on TV

The Tribunal upheld the Department for Culture, Media and Sport's refusal to release submissions from officials and ministers regarding the choice of sporting events that should remain available without charge on terrestrial television channels. At the time of the request in 2005 the information was nearly seven years old. The Tribunal found that the public interest in disclosure was not great and that there was "no consideration of sufficient weight in favour of disclosure to match the general good government reasons for maintaining appropriate confidentiality concerning the deliberative documents, in the form of Civil Service submissions". The Tribunal observed that neither the official nor ministerial submissions "disclose anything worthy of comment, let alone criticism" but added: "their anodyne content does not detract materially from the general principle that the convention of collective responsibility is entitled to the limited protection created by [section 35(1)(b)] which means that confidentiality should be maintained unless the public interest in disclosure at least equals the public interest maintaining the exemption".[37]

## Decisions leading to disclosure

### 'Reasonable punishment' defence

The Tribunal ordered the disclosure of documents relating to the Crown Prosecution Service's view on a 2004 change in the law on the corporal punishment of children. This had removed the defence of reasonable punishment where a child's injuries were serious enough to justify a charge of actual or grievous bodily harm. The government had argued that policy development was still underway at the time of the request, in 2005, because it had undertaken to review the position after two years. However, the Tribunal found that no policy formulation or development was then taking place. Statistics on the use of the defence were being collected, but these were for operational rather than policy making purposes. The case for a "safe space" if it still existed was reduced as was any "chilling effect". But the public interest in understanding how the government's decision had been reached was strong. There was also a strong public interest in knowing about the involvement of lobbyists with privileged access to government.[38]

At the time of the 2010 hearing it was still possible that lobbies on either side of the issue might attempt to reopen the question. But the Tribunal was required by law to consider the public interest at the time of the request. To the extent that the current position was relevant, it found that any current debate would be enhanced by the disclosure. Although a few pieces of information might involve the convention of collective ministerial responsibility the Tribunal found that "none of these refer to any sharp disagreements or embarrassing options being put on the table…none of these are going to make it harder for ministers to defend the Government line".[39]

### Asylum seekers' income support

The Tribunal ordered the disclosure of material relating to a 2004 change in the law abolishing the right of successful asylum seekers to seek back payments of income support. The documents involved civil servants' submissions to

[37] EA/2007/0090, Department for Culture, Media and Sport & Information Commissioner, 29 July 2008
[38] From the disclosed documents it appears that this is a reference to the National Society for the Prevention of Cruelty to Children.
[39] EA/2009/0077, Crown Prosecution Service & Information Commissioner, 25th March 2010

ministers and correspondence between the ministers affected by the proposed changes.

The Tribunal found a strong legitimate interest in knowing how a decision on a matter of substantial public concern was reached, provided disclosure did not damage efficient and cohesive government. It acknowledged the importance of collective ministerial responsibility, particularly in protecting divergences of opinion and even profound disagreements between ministers prior to a decision. But it considered it significant that the request had been made in 2008, four years after the decision; that the Blair administration which had been in office at the time had since been replaced by a one led by Gordon Brown, and that the ministerial exchanges were "constructive, civilised, mildly informative and of significant, though not overwhelming public interest". It concluded that the public interest in withholding the information was clearly outweighed by the interest in disclosing it.[40]

**Cabinet committee paper on the worker registration scheme**

The Tribunal ordered disclosure of a paper presented to a ministerial working group set up as part of the Cabinet committee system to support the work of the Asylum and Migration Cabinet Committee. The paper - attached at *Appendix B* - discussed the pros and cons of extending a worker registration scheme which allowed nationals of eight Central and Eastern European EU member states to work and reside in the UK only if registered. The paper was requested after the government had decided to extend the scheme.

The Tribunal found that the paper was of "considerable legitimate interest" to the public, directly affecting the lives of the EU nationals concerned and their employers and, less directly, the population at large. There had been no formal consultation exercise prior to the decision and no evidence that the question of whether to extend the scheme had been discussed at meetings of a Home Office stakeholder group which dealt with such issues.

The Cabinet Office explained that a paper of the kind in question was often produced when there was a disagreement between ministers. A well-informed reader might therefore conclude that such disagreement existed in this case, undermining collective responsibility. The Tribunal was not persuaded of this. It noted that the pros and cons of the two alternative options were set out neutrally and no views were attributed to any minister or department. It suggested that any remotely competent minister would be able to deal with the suggestion that the existence of the paper itself indicated ministerial disagreements.

A number of "unguarded" statements were said to appear in the paper which might either be harmful if disclosed or require future papers to be drafted in more guarded terms. The paper mentioned the possibility that the European Commission might bring infraction proceedings against the UK because of restrictions placed on the foreign workers claiming benefits. The Tribunal was not persuaded that the possibility of infraction proceedings would be increased by publication - or that such proceedings could be regarded as contrary to the public interest. The paper also suggested that the employer lobby, which opposed the scheme, had been 'contained and managed effectively' – a comment which the Tribunal found related to potential embarrassment rather than anything else.

[40] EA/2010/ 0011, The Home Office & Information Commissioner, 29th June, 2010

> It accepted that there might be a risk that disclosure would lead ministers to require that similar papers be more carefully drafted in future. This might make them longer, less accessible and less frank. But such changes would not be in ministers' interests and might breach the Ministerial Code. In any event, officials would be expected to be professional enough not to omit relevant considerations from such a paper.
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> Although the decision to extend the scheme had been taken, a further review was due to take place a year later. The Tribunal accepted that this meant that while the need for a 'safe space' had diminished it had not disappeared altogether. However, given the fact that the paper set out the arguments without attributing views to any minister or department, disclosure would be unlikely to adversely affect a future decision and on the contrary would contribute to more informed debate. The Tribunal concluded that the public interest in disclosure outweighed the public interest in protecting the exemptions for policy formulation and ministerial communications and ordered disclosure.[41]

We believe these decisions indicate that the Tribunal (and in turn the Information Commissioner) is sensitive to precisely the kinds of concerns expressed by government and balances these sensitively against the public interest in disclosure. To abandon that process in favour of 'certainty' would be to return to a pre-FOI position in which government's internal workings were automatically shielded from the public, regardless of the benefits of public scrutiny and irrespective of whether disclosure in any particular case would be harmful to decision making.

**The effects of charges in Ireland**

In his evidence to the Committee, Professor Robert Hazell of the Constitution Unit stated that following the 2003 introduction of fees under Ireland's Freedom of Information Act the level of FOI requests fell by almost a half.[42]

The figure cited by Professor Hazell is correct in the Irish context but potentially misleading in the UK context.

Ireland's FOI Act provides a right of access both to official information and to an individual's own personal information. The total number of FOI requests monitored by Ireland's Information Commissioner therefore includes what in the UK would be regarded as 'subject access' requests and dealt with under the Data Protection Act.

The charges introduced in Ireland in 2003 only applied to requests for official information; charges were not introduced for requests for personal files. Following the introduction of charges, the total number of requests (including those for personal files) fell by some 50 per cent. But the fall in the number of requests for *official information alone* was far more severe.

[41] EA/2008/0073, Cabinet Office & Information Commissioner, 27 January 2009.
[42] Q. 81

Ireland's Information Commissioner asked 37 public authorities to carry out month by month monitoring of the level of requests between January, 2002 and March, 2004 inclusive. She reported:

> While I expected to find a decline in usage of the Act I did not believe that it would be as immediate or as dramatic in scale as proved to be the case: between the first quarter of 2003 and the first quarter of 2004 the total number of requests fell by over 50%. In addition, I found that requests for non-personal information had fallen by 75% over the same period.[43]

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[43] Information Commissioner (Ireland), Review of the Operation of the Freedom of Information (Amendment) Act 2003. June 2004.

## Appendix A

### FOI disclosures relating to excessive spending

NHS trusts have been paying well above the going rate for basic repairs under PFI contracts. Payments include £466 to replace a light fitting, £75 to install an air freshener in a cubicle, £184 to install a bell in a reception area, £234 to install a whiteboard on a ward, £198 to fix a broken door handle, £242 to change a padlock on a garden gate and £962 to supply and fix a noticeboard. The PFI contracts prevent the trusts from using their own maintenance staff or seeking lower quotes from other firms.[44]

London Underground spent £933,000 in 2009-10 hiring fake passengers to observe the "ambience" at stations and to test the knowledge of staff.[45]

The Ministry of Justice is to press ahead with the survey costing £449,000 questioning prisoners about their quality of life, despite severe cuts in the department's budget. The cost of the survey, carried out annually, is a 6 per cent greater than the 2010 cost.[46]

The IRIS recognition system, which scans the unique patterns of travellers' irises to confirm their identities, is so under-used that it has cost nearly £2 per arrival. The system has been used just over 4.7 million times since 2006. The technology cost just over £9m, the equivalent of £1.94 for each person that has used it. Earlier this year the government announced the system was being scrapped after revealing the software used is already out of date.[47]

Local authorities and NHS trusts have spent £220m over 12 months buying and leasing luxury cars. One local authority hired a Lotus Elise while another leased a Jaguar XJ, the same model as the Prime Minister's official vehicle. Between 2010 and 2011, public bodies hired almost 600 Mini Coopers and more than 650 BMWs, and purchased 17 Audis. Sunderland was the biggest spending city council, spending more than £800,000.[48]

Private consultants are being paid £4,000 a day by the Ministry of Defence to help it cut the costs of its contracts. Under the agreement, eight consultants will also receive a 30% "success fee", pushing their daily pay to more than £5,000 each.[49]

Architects have claimed nearly £100m in fees from just 21 councils under Labour's multi-billion pound school-building programme. The highest single fee was £2.6m paid to the firm BDP for its work on a £36m school in Teddington, south-west London.[50]

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[44] Health chiefs count the cost of PFI deals. The Times, 23.12.11
[45] Rapid rise of the citizen shopper spies for hire, Sunday Times, 30.1.11
[46] This won't take long: £500,000 survey to ask prisoners if they like their life behind bars, Daily Mail, 2.3.11
[47] Revealed: failed airport eye scanners have cost £2 for every passenger who used them, The Independent, 1.5.12
[48] £220m for official cars, The Sunday Times, 7.8.11
[49] MoD pay advisers £4,000 a day for lesson in how to save money, The Times, 18.8.11
[50] Architects net £98m from schools, The Sunday Times, 5.6.11

Local authorities failed to collect £530m of council tax last year, adding to a backlog of unpaid tax that totals £2.5bn. A BBC investigation under the FOI Act confirmed that there is a backlog of £2.5bn of unpaid tax, dating from 1993 to 2010, across the 408 local authorities in Great Britain.[51]

It has cost Parliament almost £370,000 to rent 12 fig weeping trees for Portcullis House, the Parliamentary building in Westminster. The trees were imported from Florida and planted in 2001 and cost £32,500 a year.[52]

The NHS in Wales is spending nearly £750,000 a year on pay protection for administrators whose posts were made redundant during the 2009 reorganisation. In 2009, the seven NHS trusts and 22 local health boards in Wales were reduced to seven integrated health boards, to reduce bureaucracy. But around 120 managers who lost their jobs were kept on and, under an agreement, their salaries are protected for 10 years. The £750,00 figure represents the difference between what the officials are paid because of the salary protection scheme and what they would otherwise be paid for the jobs they are doing now.[53]

A council spent £330,000 in redundancy payments to 25 staff who have since taken new jobs with the authority. One worker who agreed a redundancy package with Stoke-on-Trent City Council spent just 27 days away from the authority before returning to a new position. A further two workers waited just 32 days after agreeing a settlement before being re-employed at the Council. The council stated that current redundancy agreement has been redrafted to provide that nobody can return to work at the Council within a year and a day.[54]

Kent County Council has been paying up to £1,250 a day each for six temporary staff who were brought in to replace directors who were made redundant. The highest paid temp is the families and care director at £1,250 a day, followed by the head of specialist children's services at £825 a day, and an official in the education and learning department at £780 a day.[55]

The Ministry of Defence has spent almost £600m from the military's equipment budget in the last two years to hire hundreds of outside specialists and consultants, routinely breaching government guidelines controlling this type of expenditure. An internal audit of signed defence contracts has highlighted numerous flaws and warned that control of the MoD purse appeared to be "poorly developed or non-existent". The report also stated that defence officials made little or no effort to ensure that contracts provided value for money. In 2006, the MOD spent just £6m. The sums have been rising dramatically year on year in part because of a new regime introduced by Labour in April 2009, which allowed senior defence officials to hire specialist, short-term help for "niche" tasks – without needing authorisation from a minister. In the first year of the new regime, spending jumped by £130m to £297m.[56]

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[51] £2.5bn of council tax remains uncollected, Daily Mail, 18.2.11
[52] MPs spend £400,000 of taxpayers' cash on 12 fig trees for their offices, Evening Standard, 14.2.12
[53] £750,000 a year wages bill for NHS managers who lost their jobs, The Western Mail, 07/11/2011
[54] Council spends £330,00 in redundancy payments then rehires staff 27 days later, The Daily Telegraph, 10/08/2011
[55] The temps paid up to £1,250 a day by council that's slashing hundreds of jobs (that's three times David Cameron's daily wage), Daily Mail, 21.6.11
[56] MoD spent £600m on consultants, Guardian, 17.11.11

Under Private Finance Initiative Schemes taxpayers are committed to paying £229 billion for new hospitals, schools and other projects with a capital value of just £56 billion. Under PFI, a private contractor builds a school, hospital or other asset, then owns it for typically between 25 and 30 years, effectively renting it to the taxpayer for that time. In exchange, the contractor has responsibility for maintenance. The PFI deals include:

- a hospital in Bromley, south London, which will cost the NHS £1.2 billion, more than 10 times what it is worth;
- an empty school which will cost taxpayers £370,000 a year until 2027;
- RAF Future Strategic Tanker Aircraft, the taxpayer will be paying around £10.5 billion for 14 Airbus A330 troop transport/tanker jets with a capital value of about £1 billion, though the deal includes maintenance;
- the National School of Government, Sunningdale, for a £12 million refurbishment, the taxpayer will pay £98.4 million.[57]

The Government has spent nearly £750,000 on tickets for London 2012, including more than £26,000 for the beach volleyball. The Department of Culture, Media and Sport bought 8,815 tickets in total to share across government departments. The allocation includes 3,000 tickets available for purchase by civil servants who have worked on the Games for more than a year. The rest will go to dignitaries, heads of state and global business leaders across the world.[58]

Reforms aimed at curbing the cost of "no win no fee" compensation claims brought by accident victims could inadvertently cost hospital trusts up to £200 million a year. Under the present system, NHS trusts can recover substantial costs - £196 million in 2010/11 - when they treat people who have claimed compensation for injuries. But the reforms in the Legal Aid, Sentencing and Punishment of Offenders Bill will restrict victims' ability to seek compensation and so the number of claims will drop, while the number of people requiring treatment from the NHS will stay the same.[59]

A survey used to measure participation in sport as part of the Olympics legacy plan has cost £22 million since 2005. The Active People Survey, commissioned by Sport England at a cost of £3 to £4 million a year, was used to track progress against the government's target of getting an extra two million people more active by 2013 as a result of Britain hosting the Games. But its methodology was criticised for failing to reflect the true picture of national activity and the target was dropped in early 2012.[60]

Private medical clinics treating NHS patients under contract have been paid millions of pounds a year for operations that were never carried out. Under minimum payment contracts independent sector treatments centres were paid a set amount regardless of how many operations they actually carried out. Two centres - Barlborough and Eccleshill - received £21 million more than the value of the operations they performed in the five years to April 2010. Nationwide the 25 centres are estimated to have been overpaid £260 million, or more than £50 million a year.[61]

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[57] Private Finance Initiative: hospitals that will bring taxpayers 60 years of pain, The Telegraph 24.1.11 & Public Finance Initiative: the deals, The Telegraph 25.1.11
[58] Government spends nearly 750k on Olympic tickets, The Telegraph, 7.11.11
[59] NHS 'to lose £200m' under civil costs reform, The Times, 6.9.11
[60] Olympic Games cash 'frittered' on £22m cost of legacy survey, The Times 17.1.12
[61] Taxpayers paid £50m a year for non-existent operations, The Telegraph, 15.2.11

HM Courts and Tribunals Service is spending £206,000 a month maintaining empty court buildings. In December 2010 it was announced that 142 courts would close to save money. It is understood that 121 have since shut, but only five sites have been sold as of February 2012.[62]

GPs will receive up to £115 an hour for commissioning healthcare services, on top of their existing salaries, under the NHS reforms. Under the reforms GPs will take control of purchasing care for almost all treatments for patients. Hourly rates for commissioning work vary from £48 in County Durham to £115 in Hertfordshire. In Wiltshire GPs will be paid an annual rate of £26,000 to cover their commissioning. The payments are to cover the costs of employing a locum GP to cover their work in surgeries while they are working on commissioning, but if locums are not required GPs will still receive the payments.[63]

The BBC spent more than £11 million transporting staff around Britain and putting them up in flats and hotels during the past two years, as part of its effort to move production outside London.[64]

The Ministry of Defence has spent £22million on vehicles for Afghanistan that have barely been used. It spent £220,000 a time revamping 100 Snatch Land Rovers. But they were banned from combat use as soon as they arrived amid fears that any further fatalities would result in a public outcry, after 37 soldiers were killed in the less heavily armoured version of the vehicle.[65]

Hundreds of millions of pounds have been spent on agency doctors so that hospitals can comply with the European Working Time Directive which limits the number of hours doctors can work. One trust spent £20,000 hiring a surgeon for one week and £14,000 on four days' cover for a gynaecologist. Another spent more than £11,000 on six days' cover for a haematology consultant.[66]

The NHS has written off at least £42 million in bills left unpaid by foreign patients who have received treatment. The biggest loss was at Guy's and St Thomas' NHS Trust in London, which has written off £6.2million since 2004.[67]

Some care homes are being overpaid because they are delaying informing councils when a resident has died. Even when care homes do inform the council of death, some councils are not updating their records promptly. Birmingham City Council has paid out £98,137 for 109 deceased residents and has not been repaid. The taxpayer is still owed £78,000 for another 39 deceased cases, including more than £7,300 from a home that has closed.[68]

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[62] Millions spent on empty court buildings, The Law Gazette, 23.2.12
[63] GPs 'will be paid twice' under NHS reforms, The Telegraph 31.12.11
[64] BBC spends £111m lending London staff to regions, The Telegraph, 22.1.12
[65] £22m front line vehicles barely used, The Telegraph, 21.1.12
[66] NHS pays £20,000 a week for a doctor, The Sunday Telegraph, 17.3.12
[67] £42m NHS tourists, The Sun, 19.10.11
[68] Care homes cash in on residents' deaths, The Times, 9.9.11

The highest earning GP in the country receives an annual salary of more than £750,000. The figure is his or her pre-tax income after all outgoings - including the salaries of all locums, nurses and receptionists they employ - have been taken into account. The unidentified GP from Kent is believed to be benefitting from a new contract that allows doctors to run several surgeries that receive income for providing extra NHS treatments. A second doctor in Birmingham has been found to be earning an annual sum of £665,000, while one in Essex was paid £412,400.[69]

The Ministry of Defence will spend a further £200 million on a fleet of spy planes despite scrapping the project three months ago. This will take the total cost of the nine Nimrod MRA4 reconnaissance and surveillance aircraft to £4.1 billion. The additional £200 million will cover remaining procurement costs but does not include compensation to BAE Systems for terminating the contract. The MoD spent a further £32.6 million on another cancelled project, an ambitious plan to integrate all military training at one site at St Athan in Wales. It was cancelled after its costs increased by 40% to £14 billion.[70]

More than £5m was paid out in consultancy fees over the planned Severn Estuary barrage which was later shelved amid concerns about the potential costs involved.[71]

Suffolk magistrates' courts are owed almost £5m in unpaid fines.[72]

The cost of placing troubled children from Birmingham in private care has more than doubled after the council closed four childrens' homes in the city. More than a quarter of places for under-16s were cut. From April to July 2010, the bill was £13,772,491 - the equivalent of £41 million a year, compared to just £18,434,830 for the whole of 2009/10. Children from the city have been sent to centres up to 470 miles away in Invergordon, Scotland, as well as East Sussex and County Durham.[73]

Rent and running costs are still being paid on an empty 999 fire control centre in Taunton, despite it not answering a single emergency call. The centre was earmarked to be one of nine regional fire control centres that would replace the 46 Fire and Rescue Services' local control rooms, but the project was scrapped in December 2010. It will cost at least another £5 million to rent the building from until August 2027, when the lease expires. Annual running costs include £346,000 for facilities management, £120,000 for utilities and £45,000 for rates.[74]

Newham Council has spent more than £18.7m refurbishing its new office block, called Building 1000, including almost £10,000 on five designer light fittings. The Council, which is facing the deepest spending cuts of any London borough – at 8.9% - is considering making 1,600 people redundant.[75]

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[69] Rise of the 'Super GP': The family doctor who earns £770,00 a year, Daily Mail, 4.11.11
[70] Bill for the Nimrod spy planes that will never fly soars by £200m, The Times, 17.1.11
[71] Severn Barrage plan 'cost £5m in consultancy fees', BBC, 23.2.11
[72] Suffolk magistrates' courts owed almost £5m in fines, BBC, 16.11.11
[73] Birmingham children's care homes and the £41million scandal, Birmingham Mail, 9.5.11
[74] Huge bill for empty 999 centre, Wells Journal, 5.1.12
[75] Newham Council's £111m building 'savings' claim mocked, BBC, 11.1.11

The road linking Cardiff city centre with Cardiff Bay will cost taxpayers as much as £189m over 25 years. Lloyd George Avenue that opened 11 years ago was built under the Private Finance Initiative. The original cost of the project was £56.63m. In addition the developers have maintenance costs of £19.6m and operating costs of £7.86m, making a total of just over £84m. Maintenance will revert to Cardiff council in 2025.[76]

It cost Medway Council almost £350,000 during two school closures just to cancel existing photocopier leases.[77]

The company in charge of Northern Ireland's public transport system is spending over £2,000 every day to compensate people injured by accidents involving its vehicles. Translink paid out £4,388,000 after 1,675 claims were successfully made against it between 2006/7 and 2010/11.[78]

Cardiff Council sold a 99-year lease on a shop for £10,000 to a councillor who subsequently sub-let it for an annual rent of £3,600. Before the deal was signed, a senior valuer at the Council warned that it did not represent good value for the taxpayer.[79]

Cornwall Council paid £5,000 sending its chief executive on a management master class at a “luxury hotel” in the US. Another member of staff flew to Manchester for a "bottled water" seminar in December 2009. The council spent nearly £3m on training and trips for staff and councillors between April 2009 and April 2010.[80]

A London council in one of the capital's poorest boroughs paid celebrities £42,000 to appear at events to "help motivate staff", including a £13,000 payment to Barbara Windsor. The council also paid former swimmer and TV presenter Sharron Davies £6,000 to appear at its annual staff awards ceremony in 2006. A spokesman for the council said it no longer hired celebrities for staff awards.[81]

A council which may be forced to axe hundreds of jobs spent £30,000 on staff ‘lifestyle’ schemes – including £5,000 to teach workers how to walk safely. Tameside council, which has warned that 800 jobs could be lost to save over £100m, hired a company to identify six ‘urban walks’ near its offices – and conduct risk assessments to check they were safe.[82]

Kent County Council spent £417,000 preparing a report on the potential impact of its plans for a huge lorry park to cope with Operation Stack, which involves parking channel-bound lorries on parts of the M20 when the Channel Tunnel or Dover ports are closed by bad weather or industrial action. Earlier in 2011, KCC said it had moved away from its original proposal and was instead considering a 'no frills’ option.[83]

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[76] Huge price of PFI-built road is revealed by Treasury, South Wales Echo, 7.9.11
[77] £350k just to take away photocopiers, The Medway Messenger, 23.9.11
[78] Translink pays out £2,000 a day in compensation claims, Belfast Telegraph, 19.1.12
[79] Audit Office rejects lease inquiry; Councillor got 99-year deal for £10,000, and then secured £3,600 rent a year from tenant, South Wales Echo, 21.1.12
[80] ‘Master class’ at top hotel in US cost council £5,000, West Briton, 27.1.11
[81] £42,000 bill for celebrities to motivate London council staff, Evening Standard, 1.2.11
[82] Tameside council spent £5k on staff ‘walking lessions’, Manchester Evening News, 21.2.11
[83] Bill for Stack lorry park study was nearly £500,000, Kent Messenger, 5.10.11