Note of meeting between Lord Burns and Lords Beith and Marks

House of Lords Thursday 12 November 11:00 -12:00

Attendees

- Lord Burns, Chair of the Independent Commission on Freedom of Information
- Lord Beith
- Lord Marks of Henley-Upon-Thames
- Vinous Ali, Parliamentary Adviser – Human Rights, Home Affairs, Justice and Civil Liberties
- Alexandra Avlonitis, Secretariat to the Independent Commission on Freedom of Information

1. LB opened the meeting by thanking Lords Beith (AB) and Marks (JM) for their attendance; he provided some context about the Commission's work and its terms of reference. LB discussed briefly the Justice Select Committee's findings in the Post-Legislative Scrutiny (PLS) exercise in 2012.

2. LB sought the views of AB and JM on whether the ministerial override should be restored or the Act amended to protect better, or to restore, the safe space for policy making? AB explained that the JSC had found little evidence to support the assertion that FOIA had inhibited the protection afforded to the 'safe space' for policy making nor to weaken Cabinet Collective Responsibility (CCR); he asserted that the leaking of documents; the increase in public inquiries and the publication of memoires by Ministers; Select Committee evidence sessions; and judicial processes, had unearthed information from the 'safe space' more so, or at least equally, to what the Act had. He felt strongly that the increase in public statements by Ministers or their staff about disagreements had been damaging to CCR, rather than the Act. AB went on to explain that where disagreements had been played out on the 'public stage' the argument for protecting cabinet documents would inevitably be reduced. There was some further discussion about the release of information in the Westland and Rowntree cases, and the erosion to sensitivity of that information over time.

3. AB warned strongly against amending FOIA to solve a perceived threat to the safe space when other routes of disclosure listed above posed at least as great a threat to safe space and collective responsibility. JM agreed and suggested that the safe space might be made more robust in general terms, rather than through amendments to the Act. AB and JM went on to discuss the positive impact that FIOA has had – both felt that the Act's 'balance sheet' spoke for itself, with far more positive benefits stemming from the legislation than negative. Waste of public money had been uncovered and deterred and individuals had gained access to information they needed to challenge injustice or unfairness.Examples such as MP's expenses were given.

4. LB pressed AB and JM on their understanding of the safe space, and the extent to which analogies could be drawn with the deliberative practices of other professions, aiming to understand in detail how long information might be considered sensitive for in policy terms. The group discussed generally the sensitivity of information, and AB and JM considered that the sensitivity of information might decrease over time.

5. LB asked whether the distinction between the sensitivity of information being produced before, rather than after, a decision was made was reasonable. LB pressed

AB and JM on the level of protection that should be afforded for deliberative space for policy officials in addition to that of CCR, the latter of which is recognised and considered highly by the ICO. They discussed the extent to which draft documents, including of speeches, should be subject to the legislation. The group agreed that maintaining the written record about how and why decisions were made was important and the safe space should not be undermined or decreased

6. JM suggested that if there were improvements to be made to the way in which the public interest test was considered they would be much better imposed through guidance than primary legislation.

7. LB asked about the precedent setting powers of the Upper Tribunal in the context of protection offered by the Act, and the pace at which that had developed. The group discussed the government's increasing 'success' rate at the Information Commission stage as less challenges were being upheld. JM suggested that this trend was an indication that the application of the existing test was improving in its predictability, although this would be likely to impact upon the slow growth in the body of law given that less cases were evidently being referred to the Upper Tribunal. JM warned against premature or extensive changes to the legislation, given that the jurisprudence around FOIA would inevitably take time to develop – indeed, making radical changes too soon would damage its progress.

8. LB noted the points raised by former Cabinet Secretaries during PLS about the uncertainty imposed by the Act. JM and AB agreed that predictability in the application of the test was important, but what was necessary for civil servants was knowing the Commissioner's likely approach to the existing test rather than applying a different or more restrictive test. JM felt strongly that this could be achieved through improvements to the Commissioner's existing guidance as to how the test would be applied rather than through primary legislation. The use of codes of practice or guidance was discussed in the context of a discussion about whether the correct approach for the tribunals was one based on precedent or on a case by case assessment. There was discussion about the different approaches taken by public authorities (more about precedent) and the ICO (a case by case approach).

9. The group discussed the restoration of the ministerial override. LB asked whether JM and AB agreed with the UKSC's judgement in the *Evans* case[1]; JM through that the existence of a veto was difficult to justify for constitutional reasons and believed the decision was right, although arguably it sat awkwardly with the legislation. JM suggested that the veto may have been a product of negotiation and compromise in the very late stages of the bill's parliamentary passage. JM went on to say that he felt the veto was wrong, as a matter of principle, because a judicial structure created to act as a check on executive decision-making should not be subject to a final overrule by the Executive; he would not support its restoration.

10. LB explained that on his reading of the evidence submitted to the JSC during PLS, requesters felt frustrated by the delays in resolving appeals under the Act; he questioned JM and AB on their views about this issue. JM explained that he thought the FTT was being used as a filter, and that unlike other areas (e.g. DWP claims), FOIA unnecessarily had three tiers of appeal - the ICO, the FTT, and then the UT. JM suggested that the Commission might look at ways of condensing the appeals process and encouraging public authorities to get it right 'first time around'. He thought a system might be devised by which there would be only one tribunal appeal

[1] [2015] UKSC 21

but whereby an Accountable Person (as defined by the Act) could seek the urgent resolution (i.e. request a response within one week) of the Supreme Court (or one or more members of the Supreme Court) where they felt that the (single-tier) Tribunal had decided wrongly on a decision about the public interest. He did not believe this appellate route should be available as an urgent appeal against an initial decision of the ICO, because that would avoid the tribunal appeal, which was an important part of the process.

11. Both AB and JM felt that the appeals system could be improved, but that it should not be abolished.

12. LB questioned AB and JM on whether they thought that information such as ministerial diaries should be released – they thought that information about meetings with external stakeholders should absolutely be subject to FOIA but accepted that the issue became more complex where the title of meetings might give some indication about what policies the department was developing.

13. In the context of burdens, JM and AB felt that public authorities could review and amend their processes for handling FOI requests to reduce the burden imposed on them by the Act. They noted that burdens could be reduced by effective publication policies which put more information into the public domain without the need for FOI requests. JM and AB were opposed absolutely to the introduction of fees for making FOI requests.

14. The group discussed generally the findings of the JSC, and the matter of extending the Act was raised. AB argued that it was essential for best practice to be followed by ensuring that, whenever the work of a public authority was outsourced or privatised, the private company or Voluntary body should be placed under a contractual obligation binding them to provide to their commissioning body all information necessary to meet any FOIA request and which would have been released had the function not been outsourced. The body would then be responsible, AB suggested, for answering and handling requests. He and JM thought that this would reduce the burdens imposed on private contractors whilst allowing the public to access critical information about the way that public services were being provided.

Secretariat
November 2015