Note of meeting Lord Burns and Information Commissioner, Christopher Graham,

Thursday 19th November: 1pm to 2pm

1. Also in attendance was Steve Wood, Head of Policy (ICO), Steve Jones and Narinder Tamana (Secretariat)

2. LB opened by thanking the Information Commissioner (IC) for submitting his evidence to the Commission. LB said that he had been reading the IC decision notices on s.35/36 as part of the research for the Commission. LB said he would also be reading the relevant Tribunal and Court Judgments in relation to the appeals on decision notices.

3. The following key points were made:

    a. The IC said that in the early days of FOI public authorities had lost many of the s.35/36 cases but there had subsequently been a change with public bodies winning the majority of cases at IC level. This was possibly due to a changing age profile of the information requested, improved training or experience within departments; the IC had also offered training to their staff following a consultation report from Robert Hazell; and revised guidance had been issued on section 35 and 36.

    b. The IC's updated guidance included steers on the safe space and the chilling effect. The IC's view was that the need for safe space tended to decrease as soon as the policy decision was made, but there were grounds for it to be in the public interest to withhold material after a decision. For example: a request for plans drawn up by HMT in 2008 to acquire toxic assets from UK financial institutions; and a request in relation to advice to Ministers and papers of Ministerial meetings about the amendments to section 37 of the FOI Act. The IC also said that the section 35 guidance sets out other considerations which may be taken into account when considering whether information was still sensitive after the safe space had come to an end.

    c. In terms of public interest, the IC tended to deal with this on a case by case basis and weighted whether the public interest in disclosure outweighed the public interest in maintaining the exemption. There were cases where the issue was of such public controversy that it added weight to the argument for the material to be released.

    d. The IC noted that the Coalition government had mooted extending the section 45 Code of Practice to provide guidance on exemptions. The IC had been concerned initially, but now thought that might be a proportionate way to address some of the issues raised in the call for evidence.

    e. The IC was of the view that Collective Cabinet Responsibility material was protected the majority of the time and this included for some time after a decision was taken. Where material was ordered for release, a relevant factor may be the passage of time in relation to the material requested. There had been a small number of cases when collective Cabinet responsibility had not overridden public interest for example: the 2003 Iraq War Cabinet minutes.

f. The IC considered that risk assessments were a broad category and would be difficult to define in legislation. The ICs approach on risk registers had been on a case by case basis and sometimes he had ordered disclosure and at other times he had been more persuaded that protection was necessary (e.g. the MoJ transforming rehabilitation risk register) where the focus had been on specific impacts.

g. The IC recognised that the veto had been used in limited circumstances in the last 10 years and therefore the fear during the inception of the Act had not materialised. The IC had only challenged the use of the veto in relation to HS2, and that was on a specific point about the environmental information regulations. In general terms the IC was of the view that the veto (with Judicial Review) was a more proportionate response to concerns following the Evans case than making the exemptions in section 35 and 36 absolute. The IC mentioned that the Scottish system did not have a veto power. The IC also acknowledged that if the veto was used earlier in the process then it may result in it being used more often.

h. The IC was concerned with: the delay by public authorities in meeting the 20 day limit for requests; delays to internal reviews; and unreasonable extensions of time to consider the public interest test.

i. The IC said that the call for evidence paper highlighted the various layers of the appeal system and he recognised the benefits and drawbacks. The IC was of the view that there could be rationalisation of this system as long as it was proportionate and in the context of the FOI Act continuing to apply under its core principles. The IC noted that under the Scottish system the IC's decision could only be appealed on a point of law to the Court of Session, and a similar system would help to streamline the appeals process.

j. Burdens on public authorities: The IC recognised that public authorities could make better use of the section 14 of the FOI Act regarding vexatious requests and had released revised guidance in 2013. The IC did not consider a fee for a request was proportionate method to deal with burdens on public authorities.

k. The IC mentioned that the Scottish IC had produced a report about public authorities added to the schedule under FOISA. They had then conducted case study about whether this had resulted in burdens but they had not materialised. In terms of publication schemes the IC considered that these aided in transparency.

Secretariat

November 2015