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Wednesday 20 January 2016

Independent Commission on Freedom of Information

Panel:

Lord Burns (Chairman)
The Rt Hon Jack Straw
The Rt Hon Lord Howard of Lympne
Lord Carlile of Berriew
Dame Patricia Hodgson

Witnesses:

Christopher Graham - The Information Commissioner
The Rt. Hon. Lord McNally
Ian Readhead and Mark Wise - National Police Chiefs Council
Blanche Shackleton - 38 Degrees
Lord O'Donnell

Wednesday, 20 January 2016

Christopher Graham

(1.00 pm)

THE CHAIRMAN: Good afternoon, Commissioner.

CHRISTOPHER GRAHAM: Good afternoon.

THE CHAIRMAN: Mr Graham, very nice to see you and thank you for coming this afternoon. As you know, we issued a consultation document and I believe we've had a lot of interest in the work of the Commission. We've had a lot of very interesting evidence. Our timetable is tight, but we decided that it was important to hear from a selection of people who we thought would assist with the process and we're very grateful for your evidence. You're very welcome to make some opening remarks if you'd find it helpful, otherwise I propose that we go into questions. We have one hour for this session.

CHRISTOPHER GRAHAM: Chairman, all I would say is thank you very much for the opportunity of meeting the Commission. We've put in a very substantial body of written evidence. Our written evidence is very much based on our ten years' experience of the operation of the Act and I've tried to stick to the facts and leave the campaigning to others. And I'm very happy to deal with your questions.

THE CHAIRMAN: Thank you very much.

DAME PATRICIA HODGSON: Perhaps I might kick off then. Good afternoon. Your evidence makes clear your belief that FoI decisions should prevent

inappropriate secrecy in policy making but allow a safe space for deliberation and then in paragraph 20 you say that, although the need for safe space ends once a decision is taken, there may still be sensitivity even after that decision is taken. Could you explain the types of case in which this is likely to occur?

CHRISTOPHER GRAHAM: Yes. I think obviously we've been applying the legislation under the Freedom of Information Act over the past 10 years and we've been all of us learning, I think. We've published guidance for the application of the exemptions under section 35 and 36 and we're talking about the safe space which clearly Parliament intended should be there. Very often the difficult questions where you have to apply the public interest test are around the point at which that safe space, the opportunity for frank advice to be offered and for the deliberation around important decisions. The situation changes somewhat when the decision's actually been taken, but it doesn't mean that everything is then immediately publishable because, look, there's still no decision to be taken. It's very difficult to have some hard and fast rule about this. We look at it on a case by case basis as one would with all public interest test decisions. We would say that one would first need to look to see whether there are connected decisions which are still to be made and there still could be a public interest in non-disclosure, it would depend on the circumstances of what else was going on. You can't have a hard and fast rule about this. Presumably that's why Parliament didn't have some blanket absolute exemption. I think what the record shows over the past ten years is that the run of decisions by the

Commissioner and also by the Tribunal is increasingly in support of the safe space. If you look at the run of decisions around central government where section 35 might apply, I note that in 2015, 83 per cent of the time the Commissioner protected the safe space and didn't order publications and the figure for 2014 is 69 per cent. So I'm rather impatient with those who say that freedom of information is disaster because of all these difficult decisions being compromised because the legislation requires all these matters to be published. The legislation doesn't require that, neither does the Commissioner, neither does the Tribunal in very many cases.

DAME PATRICIA HODGSON: On the key question of different types of cases which may lead to a decision that they be opened up immediately after the decision is made, versus others where you've taken a different view and the central part of the description you just gave us, would it be fair to say that it might be hard for ministers and civil servants at the time to identify during their deliberation which way your decision would go afterwards about immediate release.

CHRISTOPHER GRAHAM: Well, I think inevitably the legislation has put the public service in a position where ultimately papers are going to be published and that might be earlier than the 20 year rule and I think everybody understands that. But I don't think that there's any evidence that that's providing the provision of frank advice to ministers, when the exemptions are clear in the legislation. I remember one of the witnesses you're talking to later, Lord O'Donnell, when he was cabinet secretary, said ‘My problems I never know who I'm writing cabinet minutes for.’ I think

that's putting it rather dramatically. The public service seems to continue, advice continues to be offered, but there's a lot of noise from senior figures saying “It's all terrible, the sky is falling”. If I was a junior civil servant, I might take a cue from the rhetoric around the legislation rather than legislation and realise that Sir Humphrey doesn't want me to write this down, but that's not what the law says.

DAME PATRICIA HODGSON: You say in part 13 of your evidence you explain change over time in the number of FoI appeals upheld and you say this is probably due to the Commissioner and departments getting a better understanding of the law and the answers you've just given have been about a dynamic understanding of it. In the light of that, and you say developing guidance has got clearer, do you think the section 35 and 36 are clear enough to start with?

CHRISTOPHER GRAHAM: Yes. I think the phenomenon that we saw with the Information Commissioner and the Tribunal ordering far more material to be published in the early years reflected the fact that quite a lot of the material that was being sought was already quite old but hadn't got through the 30-year rule, as it then was. It's also true that we were all learning on the job, both sides of the debate, both public authorities and the Commissioner and the Tribunal, and in 2011 we produced revised guidance on section 36 and in 2013 revised guidance on section 35. The whole thing has now settled down, so I think the point I'm making is that there's no case for rewriting the legislation because we've now got to a point where the -- and I can't generalise, because these decisions will always be taken on a case by

case basis. I know it's a cliché, but it's true, you're looking at the balance of arguments in each individual case. I think it would be a great mistake to go for an absolute exemption in areas where currently it's qualified by a public interest test and I think the evidence of the last five years is that everything has settled down and we really don't need to panic.

DAME PATRICIA HODGSON: Can I just push you on elements of section 35, looking at 1A, that protects information that relates to the development of formulation of government policy. As you have learned over time, has the drafting of that provision caused difficulty in terms of deciding whether information falls within the exemption?

CHRISTOPHER GRAHAM: I don't see that and at the background to all this there is the famous executive override and, if I or my colleagues don't get it and it's actually the Crown Jewels, then there is a provision for ministers to veto the decision of the Commissioner.

DAME PATRICIA HODGSON: You obviously feel confident in the way your guidance decisions develop. Do public authorities, do you think, find it difficult to decide if information is related to active policy formulation whether information is policy development or implementation?

CHRISTOPHER GRAHAM: I've seen no evidence of that, but I could wish that my operation at the Information Commissioner's office was resourced to the extent that one could be rather more active in the guidance that one gave public authorities. At the moment the grant-in-aid has been cut every year I've been Commissioner and as a result we simply stick to what we have to do, which is complaint happening. I think we can save everyone a lot of

time and effort if, for a very small investment, we were able to be out there giving more guidance, more workshops, more conferences and so on and, if people are in a muddle, we could very quickly sort it out. But my priority in the six and a half years that I've been Commissioner has been to make sure that we first of all got rid of the backlog of old FOI decisions and then we didn't allow it to build up again and so I haven't had any resources that I can spend on Freedom of Information to do that more useful proactive work.

DAME PATRICIA HODGSON: Is it your experience that public bodies often have to rely on a combination of section 35 and 36 to protect policy information?

CHRISTOPHER GRAHAM: Well, they often do. Whether they need to, I don't know. I think the point I would make to the Commission is the legislation is pretty clear. We all get it, I hope we all get it, and we can make it work and we do understand that there is a nervousness about really sensitive material being published prematurely and so there are a number of safeguards written into the legislation, not just the way in which these various exemptions, qualified exemptions, are stated, but also the fact that there is the executive override there in the background.

DAME PATRICIA HODGSON: Last one on safe space: is there any significant difference between the UK Freedom of Information legislation and the Environmental Information Regulation in terms of protection for safe space?

CHRISTOPHER GRAHAM: Well, it's expressed in a different way. The Environment Information Regulations do have an explicit presumption that

there shall be publication unless otherwise. They don't talk about exemptions, they talk about exceptions and the key exception, which would even be equivalent to our section 35 and section 36 in the Act, is regulation 12(4)(e), which protects internal communications. At the end of the day, when that is engaged, you're still back to the same sort of public interest test calculation, but the difference of opinion I had with the Secretary of State for Transport around the HS2 risk register really turned on whether communications between the Department for Transport and HS2 Limited could be said to be internal communications. I said not, the Secretary of State disagreed and that's now being sorted out at judicial review. The important thing to remember about the Environment Information Regulations is that it stems from a European Union directive which comes from the Aarhus Convention and, very importantly, the directive had no provision for an executive override. So many of the difficult cases we've had, HS2, many of the Prince of Wales' letters, were really matters that were covered by the Environment Information Regulations where the regime is a little different. One thing that I would be very concerned about is if there was much divergence between legislation covering environmental information and the rest of the Freedom of Information Act and, if one made changes to the Freedom of Information Act which were not reflected in the Environment Information Regulations and couldn't be, because they stem from European legislation, would make my job and the job of my colleagues very difficult. We'd be juggling two rather different regimes, because very often some of the most contentious matters that come our way are

manifestly environmental issues, which will be covered by the Environment Information Regulations.

DAME PATRICIA HODGSON: On the general point of the public interest test, should it be weighted to take into account, for example, grounds for suspecting wrongdoing where something has gone wrong in the decision making process?

CHRISTOPHER GRAHAM: I think you just have to look at the individual circumstances and list reasons for safeguarding the decision making process in future decisions and the reasons why there might be some urgent question that needed to be in the public domain. But it's very difficult to generalise. You have to think about individual cases and it's then a sum of all the arguments in favour and all the arguments against and sometimes there's a difference of opinion about whether there is an inherent public interest in non-disclosure in the sense of protecting the safe space. It's a factor one has to take into account, but at the end of the day it's a sum.

DAME PATRICIA HODGSON: You talked about getting clearer and more secure over time in your decisions. Why are the uphold record of ICO section 35 and 36 decisions by the First-tier Tribunal so different from the record for decisions in general? In other words, the percentage of cases that you uphold, not so high as -- I mean, what's the discrepancy between --

CHRISTOPHER GRAHAM: Well, I think you'd have to ask the Tribunal that. I can only speak for the decisions that I and my colleagues take at the ICO. Sometimes the Tribunal judges arrive at rather surprising decisions and that

can lead to a bit of a problem. The famous case of the Prince of Wales's letters, I have to remind the campaigners, who are very keen to quote this, actually started off, as far as the press was concerned, by not upheld decisions by the Commissioner. I ruled that the letters did not merit publication. It's not a very heroic thing to say, but that was my view. Now, the problem that we now seem to be in is that decisions were taken by the First-tier Tribunal and the Upper Chamber and the Court of Appeal and the Supreme Court and so on. The difficulty about the point at which the veto was applied relates to the veto being applied to a judicial decision. Decisions that I take are not judicial, but it's very difficult to veto a decision of the Commissioner with which you agree. So I suggest that the challenge for the Commission is to come up with an equivalent of the veto, which is an executive override that simply stops the matter being debated further, if it is of such crucial importance. It's basically a simple anagram. You simply turn veto into vote of confidence. You say I agree with Chris, if it's absolutely the Crown Jewels, and then that could put an end to the matter.

THE CHAIRMAN: The thing that we've noticed is that, you know, looking at the percentage of cases where you make a decision and then subsequently the First-tier Tribunal and the Upper Tribunal make a decision, but there seems to be more -- there seemed to be a large proportion of occasions where there's disagreement between you in relation to 35/36 than there is overall, to which the question is this a reflection of the extent to which the operation of 35/36 is more difficult than other parts of the legislation, while you're

uphold rates seems -- I mean, your overall uphold rate is, what, 80 per cent or thereabouts, when you go to the Tribunals, and yet in the case of the section 35/36, as indeed the evidence from the campaign pointed out, there are quite a lot of cases where there were differences of opinion with the Tribunals.

CHRISTOPHER GRAHAM: I suppose it's always the most difficult cases that will go to the Tribunal in the first place. If it was a no brainer, then it probably wouldn't proceed further. So that might explain the differences. I've seen evidence submitted to you by the Campaign for Freedom of Information, which analyses the Tribunal's decisions. We didn't seek to do that. We simply looked at our own records over the ten years. But I am aware that there have been occasions when the Tribunal has taken a different view, sometimes rather surprisingly, but these are always the most difficult decisions, I suppose.

LORD CARLILE: Your surprise at the different view taken sometimes by the Tribunal raises an issue about the layers of appeal and also the role of the First-tier Tribunal. Do you feel that the First-tier Tribunal is too close to a decision making process similar to your own and that in reality it is a layer that we could do without?

CHRISTOPHER GRAHAM: Well, it's always a full merits review, I think. The Scottish system is rather different. You can appeal against a decision of the Scottish Information Commissioner on a point of law, going to the courts, and that's quite attractive, but I don't kid myself that I might not land up with an awful lot of judicial review of my decisions if there wasn't the opportunity

to go to the Tribunal, so we might exchange one load of lawyers for another load of lawyers. I don't think it's a get out of jail free card. But, to the extent that it's not an appeal very often on a point of law but it's simply can we run the case again, I suppose that there is a bit of a problem there.

LORD CARLILE: Thank you.

JACK STRAW: Sorry, just as a supplementary point, do you know what the experience in Scotland is? I mean, in terms of where there's no intermediate appeal, the equivalent of the First-tier Tribunal? Is the Scottish experience regarded as satisfactory by your colleagues, more satisfactory than or less than satisfactory than the situation in England and Wales?

CHRISTOPHER GRAHAM: Well, we see the Scottish system working well, but, the point I've just made to Lord Carlile, if we avoided a lot of tribunal cases but landed up with a lot of judicial review cases instead, we would be no better off, nobody would be any better off. But where there isn't really a legal point to be argued, it's simply a question of setting someone else's judgment against the Commissioner's.

LORD HOWARD: But you would be better off, wouldn't you, in this sense, in that your decisions would only be appealed on a point of law and there wouldn't be a complete rehearing?

CHRISTOPHER GRAHAM: Yes. So even if it's judicial review, it's still a point of law. No, I take your point, but I think that the most controversial questions -- and it's always going to be very difficult to accept that the game is over -- the very fact that people have come to the Commissioner and

made a section 50 question very often just demonstrates that people won't take no for an answer. So, if they weren't able to go to the First-tier Tribunal, then we might very well be landed with more judicial reviews.

LORD CARLILE: But isn't the set of principles by which judicial review is managed, proportionality and reasonableness in a couple of words, ideally suited to the sort of review that should take place given that you carry out, on the evidence that we've seen, a rigorous factual assessment of each case? I mean, what is the point of having two factual assessments of each case? Is there one?

CHRISTOPHER GRAHAM: Well, I think it would be very arrogant of me to say that I've got magic powers and will always get everything right, but I suppose if there is the safety valve of judicial review, that might deal with situations where something's gone manifestly wrong. But certainly the system at the moment is very expensive for all concerned. It's very expensive --

THE CHAIRMAN: Yes, and time consuming.

CHRISTOPHER GRAHAM: Yes, time consuming. I have to put considerable resources into making sure that we're properly represented before the Tribunal, we make the best case we can in order to defend our decision. So I suppose if someone was looking for savings within the system, then adopting the Scottish system would be an improvement.

DAME PATRICIA HODGSON: Perhaps we could move on to collective cabinet responsibility. You say in your evidence that the public interest in that must be given due weight. You also say that, where cabinet material has

been ordered for release, it's because it was old, anodyne or does not reveal the nature of the discussions. So I would like you to explore for us a bit more how you explain the weight you place on letting people have that material, if it is of little value, versus the principle of the weight to be given to protecting collective responsibility.

CHRISTOPHER GRAHAM: Yes. Well, the *locus classicus* is a decision which was taken by my predecessor over the cabinet minutes of the decision to go to war in Iraq. This was a decision taken before my time, but I understand why that decision was taken and it was a decision that was supported when it went to the Tribunal, the First-tier Tribunal, but ultimately was vetoed, and I don't challenge the right of the Secretary of State, having consulted cabinet colleagues, to take advantage of that section of the Act to say that the executive override should win. But clearly my predecessor, Richard Thomas, felt that this was an exception in view of the gravity of the decision that was taken. I mean, presumably we'll know more about all of this when Chilcot finally reports, but that is very, very rare. I haven't had to face a similar decision and many, many other decisions, not of that seriousness, of course have gone the other way, not about cabinet minutes, but about very important difficult government decisions. So I don't think one should assume that because the Commissioner took a particular view in relation to the Iraq cabinet minutes, that's the way that these things always go, because they don't.

DAME PATRICIA HODGSON: No, quite, and you've answered my next question. But what I was really trying to get you to address was the weight

to be placed on the importance of collective cabinet responsibility and why you would think about releasing documents that were old or anodyne, because that weighs against collective responsibility, whatever your view of the nature of the documents you're -- you know, we're not talking about a controversial case like the Iraq case, but the normal process.

CHRISTOPHER GRAHAM: Yes. Well, these are always difficult cases and Parliament has not provided for an absolute exemption but a qualified exemption. A qualified exemption means that the circumstances of the individual case will have to be looked at and the public interest test applied. It's really difficult to come before a Commission and have some sort of general answer that deals with all the cases because the whole point is that every case is different.

THE CHAIRMAN: Well, a follow up on that question: I notice, and I've read a lot your judgments, and I have read quite a lot of the First-tier Tribunal decisions as well and it seems to me there is a ready acceptance about collective cabinet responsibility and the fact that cabinet ministers have to go out and defend policies that the cabinet has concluded. I mean, it would be very difficult if individual views that they'd expressed at the time were to be made public at the time that these interests are very live and yet you don't give the same weight to the discussions between senior officials and their ministers where very often they're in a very similar position, where the officials have to go and appear before select committees, they've got to explain government policy and, you know, is it really possible to have a system whereby, in that situation, that they could be cross-examined

about the advice that they had given, which might have differed from the decision that the cabinet minister subsequently took?

CHRISTOPHER GRAHAM: I mean, Parliament's passed legislation that makes it very clear that the documents will be published unless there is a very good reason why they shouldn't be and the doctrine of collective cabinet responsibility is one of the factors that we have to take into account. But I think we have to live in the real world and we're aware of leaks that take place, briefings, ministerial memoirs. So far as civil servants are concerned, I do see that they're in a difficult position. But, again, we're all -- I think we understand that civil servants have to go and bat for the policy that's been agreed. I don't think anyone would think that, because a civil servant representing their minister, they're necessarily passionately in favour of the policy that's been adopted, they're professional civil servants, they're arguing a case. What I would be concerned about was an absolute exemption applying in these areas, because I think that would get us back to the sort of-pre Franks Committee position where -- you'll remember the definition which Sir Martin Furnival Jones gave of what is an official secret, "anything that's in an official file", which was very easy in those days, and I don't think anyone -- I'm sure the Commission --

THE CHAIRMAN: No, I'm not at all suggesting an absolute exemption. I was just contrasting the weight that you give to collective responsibility by ministers as opposed to the weight that you give to the sort of quasi collective responsibility of officials who had to appear on behalf of the ministers but who may also have been involved in the decision making

process?

CHRISTOPHER GRAHAM: Well, I think one needs to give due respect to the safe space for the frank discussion of policy options and advice to be given and so on, but it's very difficult to see how you could operate other than with an absolute exemption unless you make a judgment and that's what we try and do.

DAME PATRICIA HODGSON: A couple of questions on risk registers. Does the ICO use risk registers and do you publish them?

CHRISTOPHER GRAHAM: Absolutely. Yes, I can --

DAME PATRICIA HODGSON: Thank you. You say that access to risk registers can provide the public with additional information about the progress of significant projects. Could you explain that, because one doesn't normally associate risk registers with project management. What do you have in mind?

CHRISTOPHER GRAHAM: The two cases I can think of where we ordered publication were concerned with the National Health Service and the Health Service reforms in the last Parliament, and that was resisted very strongly, and also the risk register around the HS2 project, and I just think we all ought to be grown up enough to recognise that a risk register is what it says on the tin. I would be very suspicious of managements that didn't maintain risk registers, which contemplated all sorts of unfortunate outcomes and they weren't properly mitigated. A risk register is a good sign and, provided the management have put in place what they would do if things went wrong, a risk register should be a reassurance, but it's something

about the word "risk" that has people running off saying, "oh, we don't want to admit to that, thank you very much".

But it's not hard and fast, and, again, I can point to a couple of applications for access to risk registers where we took a different view. One of them was the for Department of the Environment and Climate Change, when a risk register around carbon capture and storage was sought and we said no, and another one was with the Department of Work and Pensions around the application of the universal credit. So again, it depends, but I don't think that risk registers should be guaranteed to be private, because I think sometimes it will contain information that the public needs to know about.

DAME PATRICIA HODGSON: And do you think there's a distinction between risk registers and other forms of risk assessment, such as paragraphs in a submission outlining risks? I mean, to what extent can Government or a department or an organisation anticipate a distinction between the kind of assessment of risk that really wants to shake it down before you get to the mitigating stage and that there would be a sensible distinction between the two.

CHRISTOPHER GRAHAM: Well, that might well be covered by the exemptions dealing with advice to ministers or ministerial communications or safe space for frank advice and so on. So I don't see a red flag around the risk register saying, oh, not in front of the children. In fact, it is the "not in front of the children" attitude that I think was many years ago so corrosive and the achievement of the Freedom of Information Act is to put that one to bed

and I don't think any of us would want to get back to that situation where you were sort of infantilising the electorate, they weren't allowed to realise there were big and difficult choices that had to be made and different risks that had to be managed.

DAME PATRICIA HODGSON: Thank you. I'll hand over to my colleague.

LORD CARLILE: Thank you. Can I turn to some questions now about the veto, and I have regard particularly to paragraphs 42 and 43 of your written evidence. I want to ask you an open question first, Commissioner. If you were asked to advise Parliament on the veto on the assumption that it was going to remain in place in some form or another, what advice would you give, if any, as to changes in the way the veto operates?

CHRISTOPHER GRAHAM: The veto has operated with a policy agreed by the cabinet, which has a lot of talk about exceptional cases. The few vetoes that have come my way over the past six and a half years, I've racked my brains to find out what were the exceptional circumstances. I could see there were circumstances in which an exception was being made, but that's different. What has happened, when a veto has been deployed, then the Commissioner has made a report to the Justice Select Committee, but only in the case of the HS2 decision have I ever sought to challenge a veto and the reason I did in that case was because, as I'd tried to point out to the Secretary of State and to the Lord Chancellor at the time, you couldn't veto that decision because it was under the Environment Information Regulations and, look, there isn't a veto, and it was only after no one had listened to me that I landed up having to be in the most unfortunate position

of taking the Government to judicial review, because it seemed to me they were acting unlawfully. But by and large, we've reported to Parliament and we've just got on with it.

It's very clear to me that the point in the legislative debate, where the Commissioner was given an order making power, as opposed to a recommendation, was in exchange for the executive override being explicit. So the change I would want to see in practice, never mind the legislation, would be, look, if this really is the Crown Jewels, then get on and veto it at an early stage, don't go through tribunal 1, tribunal 2, the courts, and then deploy a veto, and the problem that we've got is with the judges, because they don't appreciate judicial bodies being met with an executive override. If you veto me that doesn't arise and I've suggested in my remarks earlier that you could have a sort of positive affirmation, *'Gad, sir,* the Information Commissioner is right*!'*, which would be indicating that this was a matter on which the Government would seek to apply the veto. That might involve a legislative change, I suppose.

So I think we've now all grown up a bit and it's not for the Commissioner to start screaming from the rooftops when the Government uses the executive override, which is clearly there in the legislation. The difficulty we've got is simply over this question of executive versus judiciary, and that wouldn't arise if the Government did their stuff earlier on.

LORD CARLILE: Does it follow from what you're saying that your recommendation would be that the veto should only be available at Commissioner stage and not a later stage, "only" being the important part of

the question?

CHRISTOPHER GRAHAM: Well, I suppose the courts have put us in that position, because the Supreme Court has indicated that doing it at a later stage is unlawful and, as I've said, in relation to the environmental information regulations, it isn't there at all. But possibly, whether it involves a change in the law, it's a question for ministers to decide whether they want to play that card. If they want to play that card, they ought to do it at the point where they're dealing with an executive body rather than a judicial body. But it would be a big decision and it's really got to be in cases that really are matters of high seriousness, not simply "we don't like this sort of thing and we wish it wasn't happening", which very often seems to be the case. But of course I can't know what the reasons behind the veto might be.

LORD CARLILE: The veto's been exercised, what, seven times in the last ten years?

CHRISTOPHER GRAHAM: Something like that, yes.

LORD CARLILE: Yes, and, as you pointed out, the HS2 case, the issue was a point of law, not a point of practice.

CHRISTOPHER GRAHAM: Yes. Absolutely a point of law. When my predecessor established this principle, that the Commissioner would make a special report to the Justice Committee, as it then was -- and that's what we've done. We've never sought to challenge the Government's right, a minister's right, to impose a veto, except in the HS2 case, and, as you say, that was on a point of law.

LORD CARLILE: Can we use the Prince of Wales letters case, just as a brief example. In that case, you, as you said earlier, upheld the decision of the public authorities, which of course made it impossible, at that time at least, for them to use the veto early. If the veto was limited to the ICO stage, then that would make it usable even where the ICO agreed with the public authority. Do you think that the practice of exercising the veto, availability of exercise of the veto, at that stage, never mind what the Supreme Court said, on the merits, is the appropriate stage for its exercise, if it's going to be exercised at all?

CHRISTOPHER GRAHAM: Yes, I do, because I think that it would focus the politicians' mind. It would be a very big step to say, sorry, this is going no further. You would have to be able to make the case that there was a really important matter at stake. It couldn't be "we don't like this sort of thing, so, tell you what, we're going to stop it". Very often the arguments that appear before the Commissioner but also before the Tribunal are not terribly persuasive, but, if ministers were going to have to play their card very early, they'd have to be pretty sure that they could then deal with the political flak. You wouldn't be getting flak from the Commissioner because that's not my job, but there might be quite a lot of fall out in Parliament, I suppose.

LORD CARLILE: Thank you. I was going to move on from the veto to appeals.

You've already dealt very helpfully with the difference between the system in England and Wales and the system in Scotland. Is there anything else

you would like to add in comparison between those two systems, because the implication of your earlier evidence might be that the Scottish system is tidier, quicker and more effective and at least as fair. Would you accept those propositions?

CHRISTOPHER GRAHAM: The Scottish system of course is on a much smaller scale, but they are able to do something I would dearly like to be able to see. There's much better information about exactly what's going on in Freedom of Information in Scotland, because every public authority reports into the Scottish Information Commissioner with their performance statistics and they're upheld and they're not upheld. I don't have that picture for the rest of the UK. The only figures that I've got are the figures from central government, which are collected. But we've got so many more public authorities it would be good to have that sort of information to hand.

I think the Scottish system certainly works very well and, once it gets going and everyone knows what the rules are, that works very satisfactorily, I think.

LORD CARLILE: On a separate point, I wanted to ask you about the internal review stage. Is it your view that the internal review stage really adds value or should authorities really be getting it right the first time without the need for an internal review?

CHRISTOPHER GRAHAM: Well a lot of the decisions first time round would be taken at a fairly junior level in the organisation and I think the internal review process gives organisations the opportunity for a second look, but it does

appear in certain circumstances that that can go onto the crack of doom, because there is no 20 working day limit on it and one does sometimes see situations where authorities get extension after extension after extension or explain that they can't attend to the matter because because because. I would have thought that eight weeks to give a definitive answer at public authority level would be adequate. So you've got 20 working days for the initial decision. I would then say that it would be reasonable to say a further 20 days for an internal review and that would give the authority eight weeks to get it right.

LORD CARLILE: As a general observation, is it your experience that internal reviews are carried out at a sufficiently senior level in the authority for it to be regarded as a genuine review?

CHRISTOPHER GRAHAM: Oh, yes, and indeed my organisation is a public authority under the Act and that's when I get called in on Freedom of Information requests that concern the Information Commissioner. Of course also at that stage you may be having to take decisions as a qualified person under section 36, which means that the matters are escalated. So, no, I think that internal reviews, so long as the system isn't abused, and just used as a reason for not taking a decision, you usually get better decisions as a result of a more senior figure being involved in the case.

JACK STRAW: Excuse me for interrupting, could I just ask you about the qualified person's provision, which is in section 36. Some of the evidence we've received suggests that that requirement for there to be a qualified person to make the decision is unnecessary and, interestingly it's not

required when it comes to statistical information. I wondered whether you had a view about that?

CHRISTOPHER GRAHAM: Well, I think it's -- I think it does involve the escalation of the issue. So the chief executive is aware of a difficult matter being considered and has to apply his or her judgment to the matter, and it's not simply a question of saying, oh, it's come to me, I'll just sign off and here we go, you've really got to engage your brain and work out whether you are persuaded by the arguments that you're being invited to consider. I think it's a good system.

THE CHAIRMAN: My experience of Whitehall was, for example, with parliamentary questions, written questions, that there was an escalation of procedure that was built into this process from the beginning, because obviously it was going out in the name of the minister, and I do worry that -- two things. One is that, by having this two stage process, you actually encourage people to say no at the first step on a belief that a lot of people will go away and only if they try hard would it actually go to the internal review, and then, you know, at a later stage it may be escalated up, as you say, with a qualified person, but why can't this be a seamless process whereby, you know, things that are sensitive naturally go up through the process from the word go. I think we have a lot of sympathy with you about the issue about how long many of these cases take, I mean, which is why we're pursuing this line of questioning. I mean, there are cases that are going on for years, which seems a very strange outcome for the notion of Freedom of Information.

CHRISTOPHER GRAHAM: Yes. Well, there are fewer cases that go on for years than there were six and a half years ago. Because we got rid of the backlog, public authorities know that we're on to the case much earlier and, as a result, the whole thing has speeded up and is much improved but it would be nice to think that, if decisions were taken at junior level in the organisation, they would be inclined to say yes to publication, what is what the legislation is supposed to be about. If more information was published proactively, it would be better and many of the stories we see in the papers about Freedom of Information are only stories because somebody said no. Usually, if you hit people with the boring facts, there is no story, but the great struggle that the Daily Bugle had to get hold of this information from the reluctant bureaucrats who wouldn't publish it is usually the only story there is.

LORD CARLILE: Public authorities, as you know, sometimes complain about burdensome experiences as a result of FoI. Do you think that there is a more effective mechanism that can be deployed to reduce those burdens or perceived burdens other than fees?

CHRISTOPHER GRAHAM: Well, fees would impose their own burden, because there's a cost in levying a fee, for a start. I think any fee that you contemplated would be unlikely to meet the costs of actually dealing with Freedom of Information requests and there would be a certain amount of cost in actually issuing the invoice. I wish public authorities would actually use the provisions of the Act to turn away some of the most burdensome stuff. We've got clear exemption in section 14 of the Act for the manifestly

vexatious request, but public authorities who are complaining about how terrible life is and how burdensome it is because of all of these sad, mad and bad people who are bombarding them with questions are most reluctant to use the section 14 power, despite the fact that our guidance is very clear, guidance supported in a decision of First-tier Tribunal only this week, who are very firm in their dismissal of a completely unreasonable obsessive requester, and public authorities just ought to be a bit braver about saying no.

LORD CARLILE: So you're saying that public authorities really don't quite understand fully the power they have to say no in cases where there are vexatious or unduly burdensome requests?

CHRISTOPHER GRAHAM: I think sometimes they just don't want the row, because there is a row: if you tell somebody they're vexatious, they don't take it well, to say the least. But if you constantly humour people by saying, well, actually information not held, rather than this is silly, go away, you can make a rod for your own back.

JACK STRAW: Mr Graham, could I come onto the issue of resources, because you said earlier on in your evidence that your budget had been reduced each year that you'd been in post. This is not a question about fees, by the way, but there are two parts to this. One, first of all, I'm not aware that we've had evidence from you, and apologies if I missed it, about your resources and either correct me, or if we could have that, that would be, I think, really helpful.

CHRISTOPHER GRAHAM: Okay.

JACK STRAW: And if you've got any evidence about what other comparable jurisdictions have in terms of resources, I think that would be very helpful.

The second is to ask whether -- you've made a lot about the fact that in Scotland they are better at receiving the experience of handling FoI and given guidance on it, I know it's a smaller jurisdiction, but it's also part of your problem that you don't have the resources to be able to act as a better coordinator and clearing house offer of guidance.

THE CHAIRMAN: Can I follow that up with -- did I interpret correctly that you're making a suggestion that in Scotland there was a better provision in non-central government public authorities, in terms of statistics, to the Information Commissioner in Scotland than we have in the UK?

CHRISTOPHER GRAHAM: I don't know whether it's under legislation, but every public authority in Scotland --

THE CHAIRMAN: Would you like to have that situation?

CHRISTOPHER GRAHAM: Yes, I would, and I think it would improve matters greatly. On the resources point, I'll certainly provide evidence to the Commission and try and get some international comparisons as well. The frustrating thing is that I do have the resources, I'm just not allowed to spend them on Freedom of Information. I have the resources on the data protection side, but I can't spend that on Freedom of Information without getting in trouble with the controller and Auditor General --

JACK STRAW: I was going to ask you that, because of course for data protection you've got the fees that -- well, individual applicants pay them, but data controllers pay to you.

CHRISTOPHER GRAHAM: Yes.

JACK STRAW: You would like the opportunity to vire between data protection and FoI, since they are two sides of the same coin, is that right?

CHRISTOPHER GRAHAM: And to some extent we can for back office costs and so on, but when I've got something that's specifically about Freedom of Information, even though information rights are increasingly a seamless web and I've been dealing with public authorities who are one minute making decisions about open data and the next minute deciding about transparency on the Freedom of Information side, and, because I can't vire between those two, I'm sometimes having to give money to the consolidated fund at the end of the year because I couldn't spend it, and I've got work that I would dearly love to do on the Freedom of Information side. For example, I mean, we've decided to just go ahead and do this this year, but for years we have had a very big and very successful data protection practitioners' conference. I haven't been able to afford to do a Freedom of Information practitioners' conference. Very often they're the same people, but please don't mention Freedom of Information.

JACK STRAW: Could we have a supplementary note about that as well, please?

LORD CARLILE: Just one final question on a fairly practical matter: redactions. Whenever a document comes out from the public services with any redactions in it, there's an immediate suspicion that something terrible is being hidden. On the other hand, there is clearly merit in, and indeed a duty sometimes, to remove personal data by redaction. Do you have

any advice to give to this Commission as to whether we should be making some suggestion about the way redactions are dealt with?

CHRISTOPHER GRAHAM: I think, if redaction is the price of the publication of 90 per cent of the document, then I'm all in favour of it and I think it's an important principle and, since I wear a data protection hat as well as the Freedom of Information hat, there are circumstances in which the personal information of individuals should be protected, it's specific in the Freedom of Information Act, and that's why the redactions are made. But you're right, if you see a document and it's full of black, you would assume that there is something to hide and it may not be something as innocent as the identity of particular civil servants who were at a meeting or giving that piece of advice. I don't think there's anything I can really suggest that will help the Commission, except for one thing if I may, if we're drawing to the end: I do hope that the Commission is also going to be looking at some of those outstanding recommendations from the Justice Select Committee, because there's work to be done particularly involving those contractors who are taking on responsibility for the public services that are not covered by Freedom of Information.

THE CHAIRMAN: Well, can I say that, although it actually is not part of our terms of reference, we have been looking at this and we will have something to say about it. I have one final question. What I've noticed is there's a very large difference between public bodies and the extent to which they automatically publish the questions and answers for Freedom of Information requests and it rather puzzles me why a lot of public authorities

are prepared to hand over lots of information without making it more publicly available. Do you have a view about that?

CHRISTOPHER GRAHAM: Well, they're supposed to maintain a log and, again, if I had the resources to do it, I would be chasing up more of these logs to find out what's going on. Many of the requests that I have to deal with as a public authority come to me on WhatDoTheyKnow.com and the publication there involves both the question and the answer and it's there for all to see.

THE CHAIRMAN: It's not always the case.

CHRISTOPHER GRAHAM: If you've actually concluded that, under the Freedom of Information Act, you ought to make something available, it makes common sense to make it generally available because then that gives you a reason for not having to publish it a second time, you just refer people to the lot.

THE CHAIRMAN: Okay. Well, thank you very much. It's been very helpful and that's been a very valuable discussion and, again, we're very grateful for the evidence that you have provided and we look forward to hearing on the suggestions that Jack has made.

CHRISTOPHER GRAHAM: Thank you for the opportunity to address the Commission and I will get the additional information on resources.

THE CHAIRMAN: Thank you very much.

Lord McNally

THE CHAIRMAN: Good afternoon, Lord McNally. As you will see from our agenda, we're having quite a busy afternoon trying to push as many people through as we can, but we're very interested to hear evidence. I said earlier, I don't think you were here, that we've had a lot of evidence and we've had some very good evidence and we would like to follow up some of those issues and we're very grateful for you coming this afternoon. I think Jack, you're going to start the questioning. Sorry, first of all, is there anything you wanted to say by way of an opening statement.

LORD McNALLY: No. From the way you were questioning, if there's something you don't ask me about, I'll tell you about it anyway. I think it's probably best.

JACK STRAW: Thank you very much, Lord McNally. Towards the end of the written evidence, for which, thank you, you gave to us, the penultimate paragraph, you've talked about your personal experience and then went on to say that:

"Since becoming the chairman of an arm's length body, the Youth Justice Board, I've encouraged open governance whilst on occasion invoking the Freedom of Information Act to protect information in the public interest."

Without obviously giving away what you've sought to protect, I was wondering whether, in generic terms, you could describe the information that you've sought to protect by --

LORD McNALLY: Yes, I mean, it's very simple. The Guardian were wanting to see the reports of our monitors in a secure training college which was in the

public eye, and I was happy to release the monitors report but in a way that made it impossible to identify the children in our care and I think that was -- and, to be fair to the Guardian, they accepted that that was a perfectly sensible redaction.

JACK STRAW: That presumably was a holding back information under data protection redactions, rather than under section 35 and 36 of the Act.

LORD McNALLY: I wouldn't claim to be -- I just thought it was common sense to apply it in that way.

JACK STRAW: So this reference does not refer to any --

LORD McNALLY: I mean, let me say, there were some people giving me advice saying that we should simply say no and that, I thought, would go to a lot of what you're discussing: that would only encourage the Guardian to think that we had something to hide, which we didn't, but the way we could present that, we had to comply with our duties to protect the children in our care.

JACK STRAW: So that particular reference was not a reference to requests for advice, internal advice, which you'll receive from the officials.

LORD McNALLY: No.

JACK STRAW: Let me just -- you would have heard Mr Graham talk about resources and I see you, during the period you were the minister for the Freedom of Information, responsible for their resources, so I accept that they were set obviously by the cabinet as a whole. What is your view about the level of resources available to the Commissioner and do you share his opinion that this restriction on the Commissioner using his income

stream from data protection, data holders, should be ended?

LORD McNALLY: I think it should be investigated and I'm worried, and I was worried when I was part of a government that was cutting budgets. There's two ways of getting rid of an inconvenient organisation. One is to abolish it and the other is to kill it by salami slicing and so I do think that, if we continue to believe in Freedom of Information, as I hope we will, that we make sure that the information Commissioner retains the resources to do the job properly.

If I may say so, as well, just to put it on the record, I think we have been very very well served by Chris Graham. He's shown a robust integrity in the way that he's done it, so that at various times he's successfully annoyed ministers and campaign groups which is usually a good test of somebody in his position. On the question of data protection, as he's rightly worried, we're all worried we will get hauled up before the Public Accounts Committee or some such body for misuse of public funds but it does seem to me -- I think it was you, Mr Straw, who said it was the same side of the same coin, that, if it were legal, I think it could well be a way forward in terms of making sure that resources were contained.

JACK STRAW: In the evidence you've put forward, and I think you said outside, you're --

LORD McNALLY: I must say, the evidence might just as much of a case have been a letter to the Guardian, but I thought, having gone to the trouble of writing it, I'd send it to you anyway.

JACK STRAW: That's right. I mean, I don't expect you to have changed your

mind between sitting here and writing to Guardian.

LORD McNALLY: But I'm not expecting it to go into academic analysis in this respect. It was just a --

JACK STRAW: Maybe you would like to wait for the question.

LORD McNALLY: Yes.

JACK STRAW: It was just to say you've been robust in your defence of the Act and in your, if you like, dismissal of the view that there is a clear chilling effect from the Act. On the other hand, I think you do accept the concept of a safe space.

LORD McNALLY: Yes, absolutely.

JACK STRAW: Picking up what Lord Burns was asking Mr Graham, do you accept that that safe space must as much apply between a minister and his or her officials, if you like, vertically, in an organisation, as it should horizontally between a minister and his fellow ministers?

LORD McNALLY: Yes, I do. I mean, just when I was listening to that, I saw the Permanent Under Secretary of the Ministry of Justice, and it was then Ursula Brennan, and senior officials defending the cuts to legal aid that had been made by the Government in front of the Public Accounts Committee and I thought that the hostility and the questioning of civil servants was quite improper and unfair. They were not there -- the people who should have been there to answer the questions in the way that they were put should have been the politicians and therefore I think there should be a protection on that. In between ministers, there has been a change.

I mean, I'm just about old enough to remember the publication of the

Crossman diaries and the absolute outrage at that stage at the way that Dick Crossman revealed his battles with the Dame and all this kind of things. But, as Chris Graham said, now we have memoirs and we have leaks and we have a much earlier disclosure. I mean, I was mildly embarrassed with a memo I'd sent to Jim Callaghan recommending that he shouldn't see John Prescott about the Icelandic fishing dispute, because I said, oh, he's just showboating, was finally published when John Prescott was Deputy Prime Minister, but that's one of the risks.

LORD CARLILE: Lord, McNally, you served with distinction as a minister and in a coalition government at that and, if I may say so, you're a renowned canny political operator. In the tension of, for example, a coalition government, doesn't Freedom of Information create a chilling effect to the extent that ministers may well choose to commit things that normally would be committed to writing only to an oral space, to an exchange of views privately?

LORD McNALLY: I mean, do ministers talk privately about each other, yes, but I don't think this needs a coalition to get that phenomena --

LORD CARLILE: You mean any government.

LORD McNALLY: No, and, quite honestly within the coalition, the battle lines on policy and that were not drawn on party lines in many cases and, I mean, just to go to this chilling effect, I mean, I can honestly say, and I've heard all the Mandarins who have spoken in our Lords debates on this, I did not witness it myself, and in fact, when I gave my views to the Institute of Government about my experience, one of the things that impressed me,

going back into Whitehall after a long gap since I was there in the mid 70s, was what I described as the democracy of Whitehall, that you would as a minister be surrounded by officials and relatively young and junior officials would robustly give advice to ministers of state.

I think I've mentioned before there was a difference between Francis Maude and myself. Francis was a strong supporter of open data but was less enthusiastic about FoI and we had a meeting at the Cabinet Office which was quite robust and where there was a lady civil servant there who kept on chipping in with her hostile views to the FoI and her final coup de grace was of course "and there is the chilling effect" and I said, well I've not noticed much chilling in the last 20 minutes from you. So I've heard the Mandarins and they've spoken about it. I have not myself witnessed it.

THE CHAIRMAN: I understand that and I notice what you say in your evidence about there still being a great culture of secrecy. But if we take the examples that you gave of your officials appearing before the PAC, having to answer questions about cuts in legal aid, in a world, since their advice to you, which may have been that there should not have been cuts on this scale, had been published before their appearance, I mean, it would make that appearance doubly difficult and you wouldn't want to see that.

LORD McNALLY: Yes, I think it makes for difficulties, but what I would say --

THE CHAIRMAN: I mean, that must be --

LORD McNALLY: I mean, the way the Act is working gives protections.

THE CHAIRMAN: Yes, I accept that, although the point I was making to the Information Commissioner, it's very noticeable to me that, in the decisions,

there is much more emphasis given to the issue about confidentiality and collective responsibility between ministers than there is in terms of ministers and their relationship with officials, but that's all --

LORD McNALLY: I agree, but I don't want to run off with the idea that somehow -- I think that the example I gave was an abuse, not the way a system should run. If the system runs properly, it should not expose --

THE CHAIRMAN: Well, I had the pleasure of being before the Public Accounts Committee many times in my life and I often thought to myself that it would be better if the minister was present.

JACK STRAW: Sorry, could I just pursue the point that Lord Burns has raised, because I personally think that the safe space is actually needed even more to protect -- its chilling effect is about maintaining the bond of trust between officials at any level and ministers without which governments would break down. So you accept that, in this case, if Ursula's Brennan's advice about, of that of officials further down, which had been probably to fight the cuts to say what a disaster these would have, had then been made available, it would have made her life impossible, but it would also have made ministers' life impossible to --

LORD McNALLY: But it's rarely given in those ways, as, you know, you well know, and, I mean, it goes back again -- once you get used to Freedom of Information, some of these things cause a maturity in discourse. I argued very strongly when I was trying to take a bill through Parliament to release the risk register and it was fiercely resisted, both by officials and by my elders and betters in the Commons who said, oh, if the Commons get hold

of a risk registers, they're tear us to pieces, but I argued unsuccessfully that a risk, as Chris Graham described it, is what it says on the tin. It describes risks. It's not a forecast of what's going to happen, it's a prudent look at what might happen. But I'm worried that, if you pin your moves on the idea that you're going to save these poor benighted civil servants, because I've not seen much evidence during the working of the Act of the civil servants being exposed in this way.

THE CHAIRMAN: No, I think I would agree with you, the way it's worked, if one goes down the various cases, the amount of material that is being released, that has caused great problems, is not large. I think what, however -- the case is made, and is my only reason for pressing this -- the case is made that the way that the Act is drafted and the way that many of these cases develop, that it generates more uncertainty amongst officials than is necessarily the case and that there should be greater clarity. Now, the outcomes are -- it's not so much the outcomes, it's the sort of extended and rather long processes that sometimes have to be gone through --

LORD McNALLY: I think the length of the process is -- one of the things is that, if you had, from the very top, a determination to free up information, the costs and time would go. Partly -- you mentioned the culture of secrecy. The problem is, both in local government and in national government -- it's great that the chairman's microphone is -- he can't shut me up. But if you've got genuine Freedom of Information, one of the reasons why I'm so supportive of Francis Maude's open data is, the more you've got information out there as part of the system, the rest -- I mean, two examples --

THE CHAIRMAN: Where should the leadership come from, Lord McNally? I mean, that's the question --

LORD McNALLY: Well, I think both from ministers and from senior civil servants. Let me give you two recent examples of Freedom of Information. One affected my old department. It was recently revealed how many prisoners were released by mistake by NOMS each week, I think the figure is four. Sometimes they're released three days early or something. But why the hell was that kept back? Actually it's a good piece of information to keep NOMS on its toes, and yet it took a Freedom of Information case to get it out. Last night in the Evening Standard it's revealed that Westminster City Council have spent £90,000 on a new Rolls Royce for their Lord Mayor. It might be embarrassing for Westminster City Council but why shouldn't the good burghers of Westminster know how much Westminster City Council is spending on their Rolls Royce, and that's one of the things --

THE CHAIRMAN: I don't think you'll find any difference of opinion.

LORD McNALLY: Well, when you talk about cost and benefit, it's very difficult to get the full cost benefit, but I suspect, both at national level and at local government level, there's many a pound being saved by people saying, well, if we do this, it will be FoIed and we'll have hell to pay.

THE CHAIRMAN: Well, thanks very much.

LORD McNALLY: No, great. Just always to remember that data, open data, is what government wants to tell you; Freedom of Information is what we want to know.

THE CHAIRMAN: Well, thank you very much and we'll have that ringing in our ears.

LORD McNALLY: I just put on record, I was just thinking of it's 50 years since I first heard the radical president of Leeds University addressing a NUS conference, that's how long -- and I won't go along with the rest of this distinguished body about how long we've known each other, but --

THE CHAIRMAN: Well, it's been very helpful. Thank you very much.

IAN READHEAD: Good afternoon sir, ma'am. I am Ian Readhead. I'm the National Director of Information and also the chief executive for the ACRO Criminal Records Office and I lead on Freedom of Information and data protection for the Police Service. I'm joined this afternoon by Mr Wise, who leads the National Central Referral Unit, which manages the responses from chief officers across England and Wales.

THE CHAIRMAN: Well, thank you very much, that's very helpful and we're very grateful for your coming and for your evidence. As I said at the outset of today, we're very interested to hear from some of the people who have submitted evidence to us.

Is there anything that you want to say by way of an opening statement?

IAN READHEAD: I was responsible for introducing Freedom of Information to the Police Service in 2005 and in general terms, sir, I would say that it's been effective in creating the right transparency and open governance that you would expect from the police service in a liberal democracy and overall the Act has been good for policing.

THE CHAIRMAN: Okay. Thank you. Michael?

LORD HOWARD: You'll have seen that we have some difficulty with the equipment. Good afternoon to you both. I shall address my questions to Mr Readhead, but of course, if either of you wants to reply, that will be absolutely fine.

In your written evidence, you state that the penal system takes too long, frequently takes too long. If it were possible to find a way of streamlining

the appeal system, would you be in favour of that?

IAN READHEAD: Sir, I would. I think that it's really important in this environment that applicants are certain about what it is they're entitled to see as a result of a Freedom of Information request. Where there is a dispute, there's a whole sequence of processes which have to be followed, both through the Information Commissioner, who can have a decision notice, and then to tribunals itself and then eventually to the court as well. I think the danger is that people -- there are some applicants who simply will not accept what they have been told and it would be good to know that there was a position in that process that could be reached within a given set of time where the final adjudication could be made.

LORD HOWARD: Well, that may be difficult, but I think you've probably heard some of the earlier evidence this afternoon, that there was a discussion in about the system in Scotland, which doesn't have a First-tier Tribunal. I don't know if you want to express any views on that.

IAN READHEAD: Well, the Scottish system, we've often looked at Scotland and there's no doubt that some of the elements of Scotland are quite attractive and certainly I think in that country there is that process which seems to reach an outcome at an earlier stage.

LORD HOWARD: And you also draw attention in your evidence to frivolous applications and appeals and you suggest that a greater readiness to award costs in those cases would be helpful. Have I understood that correctly and, if I have, do you think that would be a sufficient remedy in those cases?

IAN READHEAD: We recognise the importance that there is a process of transparency and for us to actually respond to the legislation and employ the exemptions appropriately. However, a number of the requests that we receive are not, in our view, in the public interest. So, for example, the serial number of every police car engine that may be in the force are candidly absurd or other requests about the level of complaints that we may get on a full moon, and so I would like to think that there may be a method by which we could effectively deal with such applicants.

Now, earlier on you heard about section 14 of the Act. We readily employ vexatiousness where we think that somebody fits within that exemption.

I think it's right for us to do so because it gives us more time to then deal with the justifiable requests that we're receiving.

THE CHAIRMAN: But you don't feel that you can turn down those requests that you've just mentioned on grounds of being over-burdensome and trivial in relation to the time and effort that would be involved.

IAN READHEAD: There has been stated cases more recently, the Dransfield case is one, but at the moment it's sometimes difficult to deal with a person who is just making the ridiculous application and it doesn't necessarily fit the vexatious definition within the exemption. Did you want to add anything?

MARK WISE: No, that's correct, and the problem here is of course reputation of the police service in turning an applicant down who actually may have a real interest in receiving that information. I think part of the Act should allow us or encourage us, when we're training across the UK, in encouraging our FoI staff to actually challenge the applicant and ask why

they want the information, and I think that's the important part, where we now as part of our smarter approach in having a better liaison with applicants to deal with that.

THE CHAIRMAN: But how would you like to see -- I mean, what changes would you make, if possible, to deal with these cases? I mean --

MARK WISE: Support the Information Commissioner, I think that's ultimately where it is, because, once we make that adjudication in the internal review appeal system, it's down then to the ICO and, I have to say, to a certain extent they work in our favour, albeit recently, with ICO case and the surveillance, it was well publicised within the press that we'd applied section 14 vexatious, because the Home Affairs Select Committee in our view were already reviewing the way that we operated RIPA nationally and we felt a real burden with the amount of requests that we subsequently received, when in fact there was a number of bodies that were already looking at this in an independent status and therefore the Act, is it really there for us to try and give out some of this information prior to independent inquiries carrying out their role as well, and to us that's a vexatious approach, but it wasn't seen that way.

LORD HOWARD: There's something else in your evidence, which you may have had this kind of situation in mind when you mentioned it, and I'm not sure that I entirely understand what you mean, because you say:

"The time has now come where a real analysis of the true and pure motivations of some applicants should be addressed."

What exactly do you have in mind and how could that be incorporated in the Act?

It's quite difficult to see how that could be done?

IAN READHEAD: Well, I suspect, developing what has just been said to you, about 35 per cent of the requests we receive are from journalists and we fully recognise the right of journalists to understand what the police service is doing, but journalists also act as campaign groups and they can align a whole sequence of questions, asking the same question time and time again of different forces in different locations, and I feel that we need to be alert to how that can erode, again, our capability to give a proper answer and to give it once without finding that then another journalist asks a not hugely dissimilar question but just slightly changed to make you go through the whole process again, and that's onerous and it takes a lot of our time. It's disproportionate when compared to the other questions that we actually get asked by applicants.

THE CHAIRMAN: Can I ask, do you publish all of the answers that you give to FoI requests?

MARK WISE: In the majority, yes, we do.

IAN READHEAD: Yes, we do. Although I have to say -- I mean, it's a weakness on my part: I always tried to convince my colleagues, when we introduced this legislation, that the more we put on a publication scheme, the less questions we'd receive and that's proved to be absolutely not correct. In year one, we had 15,000 requests. Last year, we had just under 50,000 and we put a huge amount of information into the public environment. So it doesn't in any way reduce the level of applications we receive.

THE CHAIRMAN: But it doesn't help to deal with those, where there are multiple questions which are basically asking the same question. Can't you just refer them to a previous answer?

IAN READHEAD: Well, sir, we can't, because it's a different request. It's been slightly changed to deliberately get over the fact that we've answered the question before. So it's quite difficult for us to do that.

LORD HOWARD: Have you ever tried to rely on section 14 in that kind of situation?

IAN READHEAD: Yes, we did, but we weren't successful in using 14 on this particular case.

LORD HOWARD: And can you think of a way of widening section 14 which might have enabled you to do that?

MARK WISE: I think it's a test and trial situation and understanding exactly how far we can push the limits as we move forward. But the reality is, as Mr Readhead has just said, that 52,000 requests is a huge burden on us at the present and the forces just don't have the resources or the money to actually carry on and part of our regime now, as I said, is about a smarter approach, trying to pick up the phone straight away to applicants, trying to be more helpful in explaining what information we hold and then obviously trying to negotiate as to what we can then deliver, because I would rather see a happy applicant put the phone down as opposed to one who wants to maintain a request that then goes through all of this process in trying to get the proper information they want.

LORD HOWARD: But it would be quite difficult, wouldn't it, just going back to

the evidence you submitted in the bit that I quoted, to identify motive as a criterion, because that might lead you to a situation in which the same piece of information was disclosed to one person who asked for it but not to another, because some judgment was made that the motive was somehow superior in one case to another. That would be really different, don't you think?

IAN READHEAD: I think, sir, you're right, and actually showing motive is difficult, but, if as a result of the questions being asked, and if you did know from the sources of those questions, you could actually show that this was just part of a general campaign where slightly different questions were being asked time and time again of different forces in order to try and adduce a different response, then, you know, I just wonder if that might be a method, on the basis of being able to show to the ICO, look, you can see, from the way in which the questions are being articulated and the links between the people asking those questions, that this is all one and the same thing that we've tried to answer.

THE CHAIRMAN: Well, could you give us examples?

MARK WISE: Well, on occasions we've had campaign groups, where they'll go away, they'll change names --

THE CHAIRMAN: No, sorry, what kind of questions are they asking that are causing you this unhappiness, this unease?

MARK WISE: Off the stop of my head I'm struggling to find one for you.

IAN READHEAD: Shall we use the IOCA one?

MARK WISE: Yes, we can use it.

IAN READHEAD: So the Communications Commissioner issues an annual report in relation to how the police service have made applications under RIPA. It's the Commissioner's reports, it's not our report, but we received a sequence of questions which were about that report before it got published and, although we made it clear that we could neither confirm or deny what was in that report for quite obvious reasons, we had that same question asked repeatedly.

LORD HOWARD: And did you answer it or did you refuse to answer it and was it taken to the Commissioner? What happened?

MARK WISE: Well, in some forces we refused and applied section 14, which was upheld by the Commissioner.

THE CHAIRMAN: You mean, information which is going to be published is one of the categories that's exempt.

LORD CARLILE: Can I ask two questions related to cost? Do you know the overall costs of answering FoI requests to the police service in England and Wales as a whole?

MARK WISE: No, we always used the work that the MoJ previously did, which was 250.

LORD CARLILE: Times 50,000?

MARK WISE: Yes. I mean, some of these are repeat questions, so a journalist may submit to 43 forces the same requests so we can--

LORD CARLILE: Now, however you categorise them, have you made any attempt to categorise those requests into broadly vexatious and broadly not vexatious requests? What proportion of the requests that you have

received would you estimate fall into either the vexatious category or your own category in your written evidence of not having a true and pure motivation, whatever that means?

IAN READHEAD: Oh, I would think vexatious requests are easily less than 3 per cent of all requests.

LORD CARLILE: So it's a very small proportion?

MARK WISE: It's very small.

LORD CARLILE: Leading on from that, as I understand the position, costs are only awarded if they have been wasted, not if they're vexatious. Is it your view that there should be a situation in which the Commissioner, for example, can make an order that the requester pays some costs where the request has been disproportionate, and, if so, what optimism or otherwise would you have about collecting those small sums of money? Is it realistic?

IAN READHEAD: Well, I think it is a matter for the Commissioner clearly. My optimism is that the administrative costs of trying to collect it may outweigh the actual award that's been given.

MARK WISE: And we can see that really with subject access.

JACK STRAW: Could I ask a related issue, which is about the calculation of costs when assessing whether the cost of processing the application, not about fees, but the cost of processing the application, is within the limits? We've had some of evidence to suggest that the items that can be included in that calculation, for example, exclude the time it takes to read documents and also excludes the time it would take to redact documents. Do you

have an observation about that?

MARK WISE: I think we would like that included and I think we'd submitted that to the Select Committee previously. You have to realise that a lot of our stuff historically is still paper records, so you're talking 30 to a hundred files in some cases, it's a substantial amount of work. There's a presumption out there that we can push a button and the information's produced in seconds and of course the reality is that just doesn't happen and the work we try to do with the journalists is explaining how some of this works in the background, so we can have a level of negotiation, because that's the only way forward. Things aren't going to change, FOI requests are going to increase, resources are to decrease, and we've just got to find a better approach, but in general I think the position is we think the Freedom of Information Act is relevant to our business and we can comply with it.

LORD HOWARD: Can I just pursue that for one further question? Some redaction has to be done for legal reasons and would I be right in thinking that, in terms of the kind of documents which those you represent have to submit, that can happen quite often? Can you give us any idea of how much of a burden that can be, the need to redact for legal reasons?

IAN READHEAD: Well, in those cases, clearly we have to be very careful that we do not disclose things that could be prejudicial to the investigation of crime or bringing offenders to justice. In those kind of cases, it does take time and care to ensure that we've sufficiently redacted documents so as not to disclose anything which may inhibit our future policing requirements.

MARK WISE: But the reality is some of our disclosures are that intense in

a paper record, so every single piece of paper has to go through and be redacted, that could be one request, and you can imagine the amount of time that takes to deal with it, and there's no recognition of this. This is part of the problem in the background because at the moment we can't do anything about it.

IAN READHEAD: And I would want to add, because we've mentioned journalists several times, the majority of journalists actually do understand the legislation and they do understand the time it takes and do work with us in refining exactly what it is that they want and what we do encourage all of our staff is ring people up and ask them, find out what they really want to know, and that can save you considerable time in reviewing, you know, lots of documents when in fact it's just a single piece of information.

THE CHAIRMAN: I have two additional questions. One is how much of your material goes to the tribunals?

MARK WISE: Substantially increased in the last couple years certainly, and I think it is because of the process that allows this, so that's a frustration for us, because on average it's about £9,000 or £10,000 for us to seek legal advice and have counsel representation. We're actually working on a basis of having some of our FoI staff trained to actually give the evidence and not employing legal counsel as a cost saving, but that's a drastic step forward. But at the moment there is no barrier to stopping anybody having their day in court on --

THE CHAIRMAN: But is it typical because you take the Information Commissioner's decision to the tribunal or is it because the requester takes

the information decision?

MARK WISE: In most cases it the requester. It's very rare for us to actually challenge an ICO decision.

THE CHAIRMAN: Is there anything else you would like to add?

IAN READHEAD: If I didn't make the point, we still think that behind this application process it should be free. We would not wish to see any charging imposed. For all of what we may say to you today, we think it's really important that members of the community can make Freedom of Information requests to us and not be charged for doing that.

MARK WISE: Probably one last point was talking about the safe space you were referring to earlier with Mr Graham and I think this is one of our issues, is understanding and allowing senior staff to have -- where we talk about information, I think drafts in particular should be safe space material and I think, if anything we're considering with regard to the content of what actually information is, drafts to us would be something that we would ask to be protected because, until that work is undertaken, we see a lot of problems, particularly, say, over financial issues within the police service, where staff members are trying to jump onboard and understand what's going on in the background before any decisions have been made about redundancies for issue and, again, that just doesn't allow normal work to be conducted in the background first.

THE CHAIRMAN: Do you receive many, what might be termed, commercial requests, of people wanting --

MARK WISE: Very classic, and obviously --

THE CHAIRMAN: About your computer equipment or --

MARK WISE: Constantly, mostly IT related. Another individual who asks for crimes in schools and then he writes to the school and offers his secure blind systems, we get those on a regular basis. So there's a number of cases in the background, but it is mostly IT I have to say.

THE CHAIRMAN: Thank you very much.

IAN READHEAD: Thank you, sir.

Blanche Shackleton, 38 Degrees

THE CHAIRMAN: Good afternoon and welcome. Thank you for -- well, your organisation has been an intermediary of providing us with a very large number of requests from the public. I'm tempted to say we're very grateful. I'm also tempted to say that it has extended the length of our inquiry a little, as of course we're having to give them all appropriate intention and it's probably no underestimate to say this is an industrial process, dealing with the number of requests that we have had. But it's a very interesting part of this.

Do you have any introductory remarks to make, or could you give us a broad outline of what you think of the conclusions and, in a sense, the story that is coming out of your work.

BLANCHE SHACKLETON: Absolutely. So first of all my name's Blanche Shackleton. I'm campaigns director at 38 Degrees. I'd like to thank you very much for inviting me here today. Our membership also absolutely delighted to have an airing on this stage.

To give you a little bit of background, 38 Degrees is a movement of over 3 million people in the UK who believe that our society could be fairer than it is and that democracy is better the more that people get involved.

When we first found out in the summer that the government planned to review Freedom of Information, we added it, the staff team added it, to a weekly poll that we sent to a sample of 50,000 of our members and we asked them to rate, you know, the importance of the things that we could be campaigning on. Ever since Freedom of Information has gone into that weekly poll back in July, it's been ranked in the top five of issues that our members want to campaign on. They feel extremely strongly about it, I think the two key reasons being that they feel that transparent government is incredibly important and encourages a greater public trust in government in what's going on sometimes behind closed doors and allows them to see more of that.

Almost 200,000 people have signed our petition asking for Freedom of Information Act to be protected. I know that you had 30,000 responses, or around that. When we -- I wrote an email to our membership last week saying I was coming here and since then we've had 86,000 responses, so --

JACK STRAW: 86,000?

THE CHAIRMAN: And are you reading them all?

BLANCHE SHACKLETON: So I've got quite a task ahead of me today in terms of distilling that, but we've been working very hard to try and pull some themes out for you, but we will be more than happy to provide some more evidence for you at a future date, if you have any further questions based

on further distilling --

THE CHAIRMAN: But possibly not all of them.

BLANCHE SHACKLETON: No, absolutely. Also in the past week we've had 190,000 people sign a petition asking for the Freedom of Information Act to be extended to include private companies and charities providing services for the Government.

THE CHAIRMAN: Thank you.

DAME PATRICIA HODGSON: You have explained very clearly how you canvassed amongst your membership the importance of this issue and what led you then to take it forward. I see from the responses that the design of the facilitating email, as it were, was fundamentally the questions that the Commission has asked, with a couple of introductory questions that you designed yourself. Could you just explain how you think about engaging your membership and making it easy and clear for them to then engage with the topics?

BLANCHE SHACKLETON: Absolutely. So firstly we were in contact with your committee about the questions you were asking, but I think in general our approach to this is always what is the simplest way of trying to find the information that in this case the Commission is seeking and what is the simplest way of people feeding into this process and to any democratic process that allows you, just with your opinions, regardless of whether you've had prior experience -- a lot of our members have had prior experience of Freedom of Information, but also a lot of our members have just read things in the newspapers, for example, and that is why Freedom of

Information is important to them. So we've really tried to boil it down into its simplest form and also tried to explain from what we can perceive, from newspaper reports and that kind of thing, what we believe to be the government's intention, when they're looking at different parts of that law so that our members can see what it is that they're feeding into.

DAME PATRICIA HODGSON: So I can see that your first two questions, as it were, are separate from the questions posed by the committee, why do you think Freedom of Information should be protected and how do you think government transparency could be improved, are, as it were, general encourages into the subject.

BLANCHE SHACKLETON: Yes, absolutely.

DAME PATRICIA HODGSON: A number of your respondents responded by saying, as you have subsequently highlighted, that FoI should be extended to private contractors who provide public services. Were you surprised that that response came in at the top, as it were, as a very specific response to a much more general question?

BLANCHE SHACKLETON: I was quite surprised. I think that we've heard over the years that our members feel that private companies play an increasing role in deliver of government services without the same checks and balances in place is a worrying trend and something that they want to put a stop to. Particularly in relation to private companies providing, let's say, NHS services, our members have always expressed a desire to have a greater understanding of what is going on and the decision making processes there. It did surprise me to see it coming quite so high up and

is the main reason why we then have capitalised by seeing how much member opinion is behind that and have been very pleasantly surprised by the numbers of people who are calling for that and for charities as well to be brought into line.

DAME PATRICIA HODGSON: Could you then give us a little but more flavour as to the range of responses in this area and what they are more specifically asking for?

BLANCHE SHACKLETON: Absolutely. So if you bear with me one moment. So our members have said that any private company or charity receiving public money or providing services for the public should be subject to the same FoI laws as public bodies. They have also said -- they've talked in particular about not seeing there as being any particular burden on doing that, seeing that as simply bringing into line rather than an unreasonable request, and I've got some quotes here. So, for example, John from Rutland and Milton has said:

"Indeed any organisation charged with providing public services or whose services impact upon society and the ordinary citizen should be subject to FoI scrutiny."

It's been very straightforward that people have just come behind that and that is very, very reflective of what a large numbers of our membership's saying.

LORD CARLILE: Can I just take up a large point about charities?

BLANCHE SHACKLETON: Absolutely.

LORD CARLILE: As you know, there are many very small charities, often with a

turnover of less than £100,000 a year, providing small amounts of public service, for example in the mental health field or in the legal field, for that matter, providing pro bono legal services. Is it really your view that those small charities should be obliged to comply with Freedom of Information requests about their everyday activities?

BLANCHE SHACKLETON: As I say, it has been pretty unequivocal coming from our members that charities and private companies providing these services --

LORD CARLILE: Forgive me, what's your judgment? Is it your judgment that small charities should be subject to this kind of scrutiny or would you accept, for example, that, albeit some charities might be subject to such scrutiny, there should be a financial lower limit set below which they should not be scrutinised?

BLANCHE SHACKLETON: My judgment, and I can only speak from our member's behalf and the data that I've seen there, is that I believe that some of our members might be open to considering what you're proposing. I wonder whether having a conversation about it and breaking down some of the more specifics around the turnover of those organisations, I wonder whether what we might find is some more nuance in the results --

LORD CARLILE: Well, can you help us a little more? You see, we have actually analysed the tens of thousands -- in fact over 100,000 of, responses that we've received from members of 38 Degrees. It might be helpful to the Commission if you were to give us your analysis and judgment, having analysed those answers yourself, if you have done that

analysis.

BLANCHE SHACKLETON: My analysis, based on having looked at the responses that we've received, but also a general understanding of having worked with 38 Degrees members for a few years now, is that 38 Degrees members are highly pragmatic individuals but that the transparency of government, the transparency of the way that public money is spent, is extremely important to them. Do I think there is a balance to be struck? I think that some 38 Degrees members would believe that to be the case, yes. I also believe that it is for us sometimes to set principles and then to look at the policy that is being made and that is being come up with. What we've tried to do is feed in as best we can to that policy making process, but I think, without some more specifics, what you're asking for is more specifics, but we haven't asked for those specific questions. I would be very happy to ask those specific questions and come back to you with a more specific answer.

DAME PATRICIA HODGSON: Moving on to one of the other subjects of the questions from the Commission, what protection did your members think there should be for information relating to the internal deliberations of public bodies?

BLANCHE SHACKLETON: So our membership in general said that any protections that erodes the public trust in politics should not be considered. They could see examples --

JACK STRAW: Sorry, should not?

BLANCHE SHACKLETON: They could see examples where there were

protections that could be put in place. For example, we heard time and again, where national security is to be considered, then that's something our membership understands, but there should be a presumption of transparency. So I for example have -- I can read you Chris Seale, from Leicester West, said:

"There are no exceptions to having open government, other than those which directly relate to national security. The public has the right to know what's going on and how decisions are reached. Secrecy simply encourages duplicity. Open government allows open debate and transparent decisions that can be challenged or supported by individual citizens.

DAME PATRICIA HODGSON: So to push that a little bit further --

BLANCHE SHACKLETON: Absolutely.

DAME PATRICIA HODGSON: -- did your members think that there should be any protection, any safe space, for information relating to the process of collective cabinet discussion and policy development?

BLANCHE SHACKLETON: In terms of the cabinet, 75 per cent of our members felt it was very important that cabinet discussions in general should be subject to FoI. 16 per cent, I should say, said it was fairly important and the remaining said it was not very or not important at all. The overriding consensus was that FoI should apply even more so to the cabinet as the kind of most influential group of parliamentarians. The public, our membership, wanted to see what was going on, they wanted to have a greater understanding, wanted to see greater sunlight, on how cabinet

decisions are reached and how they're made.

JACK STRAW: I wonder if I could just pursue this issue of private companies and charities. I think that we've heard a lot of evidence about this. Let's, just for the sake of this discussion, accept that in principle FoI should extend to private companies and charities. Picking up the point that Lord Carlile raised, there's first of all the issue of proportionality, yes, if it's one of the major contractors or a private hospital, but does it go right down to a small charity or indeed a very small two person company. So I think where to draw the line there is tricky. There's also the issue of what kind of service we're doing. If, for example, we take the Health Service, I think forever and a day the Health Service has probably used private contractors for decorating wards, painting them, and no one's really interested in the FoIing the painters and decorators. You've then got the people at an intermediate level, say the IT providers, which may well be private contractors, are you interested in accessing the service that they're providing if it's one being provided to the public and then there's the obvious services, which would say operations, surgical operations, where plainly they're standing in the shoes of the NHS. So I don't know if you've got a view now or whether you'd like to offer us a view later about essentially how you define what we're talking about.

BLANCHE SHACKLETON: Well, I think I'd like to do both. I can offer you the beginnings of my thoughts now and I can certainly go back and we will trawl through the data and see what we have over that.

In terms of proportionality, my view, from having looked at what we've

received from our members, is that they feel very strongly that people who are, in the NHS example that you're using, providing healthcare services, people who are on the frontline of that delivery who have large contracts, or who have very large financial contracts, both of those should be subject to Freedom of Information. On the point around kind of painter and decorator or IT, I will go and I will have a look through, because I wouldn't be surprised if we've had a lot more come in the past week than you might have had when you first received, because I think this has become a much more hot issue in that time.

JACK STRAW: Thank you.

DAME PATRICIA HODGSON: On the basis of the responses that you've been able to analyse, you gave us a weighting for collective responsibility, 75 per cent said very much and 16 per cent said quite a lot and whatever. Can you give us the weightings on the other questions?

BLANCHE SHACKLETON: Absolutely. So 93 per cent of 38 Degrees members ranked keeping Freedom of Information requests free and open for anybody as very important.

THE CHAIRMAN: 93. I mean, I've obviously been reading a mixed sample of them, because I thought that quite a number of them said that providing a charge was small, but I could --

BLANCHE SHACKLETON: We have a slightly -- so, firstly, the statistics that I'm using today are only going on the survey that we sent out last week, rather than the evidence.

THE CHAIRMAN: I see, right.

BLANCHE SHACKLETON: So in the evidence that I'm speaking to, where I'm giving you more, it's a combination of both what we've received in the past week and also what you received, but any quantitative statistics that I'm giving you, is based on --

THE CHAIRMAN: On combination.

BLANCHE SHACKLETON: -- a poll that we've subsequently done.

99 per cent of 38 Degrees members agree that Freedom of Information should be extended to cover private companies who are hired to run public services. It was 94 per cent who said charities, the same should be true of charities.

75 per cent -- that's the cabinet one I've already spoken to. 88 per cent of 38 Degrees members ranked it as very important that risk assessments are available to the public via Freedom of Information requests, so that's certainly something that we've heard a lot about in the past week, I'm sure was reflected in your evidence. 92 per cent felt it was very important that ministerial vetos, that is executive vetos, remain rare and have very clear restrictions and --

THE CHAIRMAN: I mean, in particular, the ones that I've been through suggested quite a lot of people were content with the veto providing there was judicial oversight.

BLANCHE SHACKLETON: That's absolutely right, that's what we've seen coming through loud and clear. Then finally 68 per cent of our members think that you should not have to pay to make a Freedom of Information request and, around the issue of paying, there was some interesting

nuance, because actually that's the statistic that was the most split in our membership and what I don't have for you is a £5 or £10 or anything like that.

THE CHAIRMAN: Some people did mention figures.

BLANCHE SHACKLETON: But what we have had is that any cost, the members who do believe that there could be a cost say any cost --

JACK STRAW: A charge, yes?

BLANCHE SHACKLETON: A charge, that's right, sorry -- Any charge must be proportional and then we saw quite a lot of disagreement over what proportionality meant in those circumstances and so I would say that that is an issue where we've been unable to draw a very clear consensus on where our membership stands.

THE CHAIRMAN: Do you have any idea of the people who've replied have actually used this process or have ever been requesters or not?

BLANCHE SHACKLETON: I have -- so when we asked our membership last year, and we asked a small -- I think it was around 60,000 people, around 3,000 to 4,000 of them said they had used Freedom of Information in the past personally, and so I thought that was actually relatively high and then we've got some examples of what they've used it for. They've used it both for kind of private means and for themselves, so somebody -- I have a member from North Devon who requested some information about themselves from the DwP to help them with a tribunal case, also Caroline from Dover, who used it to ask the Environment Agency about their plans, if there was any fracking in her area, and so all sorts of different things our

members have used it for.

DAME PATRICIA HODGSON: Would it be possible to supply your questionnaire to us?

BLANCHE SHACKLETON: Absolutely.

DAME PATRICIA HODGSON: And the numbers responding?

BLANCHE SHACKLETON: Absolutely.

DAME PATRICIA HODGSON: And do you have any means of knowing the extent of overlap between -- because you say you've accreted two separate responses, the ones we have and then this poll. Do you have any means of knowing what the overlap is between --

BLANCHE SHACKLETON: I can very easily find out for you.

DAME PATRICIA HODGSON: Thank you. I think in the exploration of those numbers, I think we've answered the next few questions.

What we didn't touch on was what your members thought about the appropriate enforcement and appeal system for FoI requests.

BLANCHE SHACKLETON: Okay. So with appeals, as has already been alluded to, when we asked our membership about this, we not only asked them about the appeal system, but also how authorities would justify their decision making, because what we were hearing from our membership was a concern around the justification that often you had kind of blanket responses that came back that didn't really explain what was going on or why the request hadn't been granted and our membership felt very strongly that the authorities that had been asked for requests needed to justify their decisions and that the public then needed to be able to appeal, via an

impartial, transparent and accessible judicial system. That was what came through as a very clear theme.

DAME PATRICIA HODGSON: Yes. One of the frustrations -- you get terrific insights from this material. One of the frustrations of course is that inevitably they're short answers that don't engage in the further debate. So you're not really able to give us any more feel about a discussion about the appeals process or might you be able to?

BLANCHE SHACKLETON: I think there are some of these questions where we have seen that there has been more of a discussion and there have been more divergence of opinions. On the appeals process, I think there was less divergence of opinion. Our membership felt very strongly that this should be something that a judicial system was in charge of, that it should be taken out of the hands of politicians or taken out of the hands of government and it was --

THE CHAIRMAN: Would the Information Commissioner count as part of that?

BLANCHE SHACKLETON: Absolutely. So we saw some mentions of the Information Commissioner, I think some in particular calling for the Information Commissioner to have more powers to call for the release of documents, but not a terrific amount on the Information Commissioner, which I would suggest is also down to perhaps people being slightly less sure of the role of the Information Commissioner.

THE CHAIRMAN: Right.

DAME PATRICIA HODGSON: And could you give us the same kind of feel about the responses around the use of the veto?

BLANCHE SHACKLETON: Absolutely. Sorry, bear with me. So, as I say, members felt it was very important that vetoes remain both rare and have very clear restrictions on them. So I have some quotes which I think draw out some of the flavour that we were receiving from members. So some saying actually the executive should not have a veto and wanting, you know, all information out there, others saying that in issues of national security, of course, a veto was understandable. My view is that that's where most of our membership lies but that they would like to see a categorisation of things for which vetoes were not acceptable and were not allowed and I believe that that would cover a lot of their concerns about not enough information being put out into the public domain. I would say risk registers, as I know you've already talked about today, is again something that we've heard quite a lot about in terms of vetoing. It's felt by our members that risk registers should be published and that ministers should not be able to veto risk registers that were relating to bills that are going through Parliament. So I think this was a particular concern that came after the Health and Social Care Act and the risk register for that, as it was a bill, was not released and was subsequently leaked and was incredibly worrying to our members about the impact that that would have and I think really made people distrust the Government's intentions when they were passing that bill and was, I think, bad for the democratic process in that way.

DAME PATRICIA HODGSON: And the last question from me: apart from the template for the questions that you circulated and the supply of the answers to us, what other nature of debate do you facilitate within your membership,

on, for example, this subject?

BLANCHE SHACKLETON: Absolutely. So all sorts. So, in addition to set pieces like this, when we have wanted to dig in further to issues, we've often held focus groups, with groups of members who have taken different actions relating to a campaign. So that I think what you're talking about, and what you're seeking with some of your questions, is what goes on below some of those answers and what informs some of those answers.

DAME PATRICIA HODGSON: Precisely, yes.

BLANCHE SHACKLETON: And what we've found useful in the past is focus groups to really enable you to have an in depth conversation about these things and it's something I would be very willing to conduct if it would be helpful to the Commission.

DAME PATRICIA HODGSON: Thank you.

THE CHAIRMAN: Thank you very much.

BLANCHE SHACKLETON: Thank you very much.

THE CHAIRMAN: Well, it's been a very interesting exercise to go through and engage with your members and we're grateful for the summary information which you've provided, which we would like to see, and it may be compared with the analysis we've been doing ourselves, but basically really what you've described has very much been my response of the answers I have been reading.

BLANCHE SHACKLETON: Absolutely.

THE CHAIRMAN: So thank you very much.

BLANCHE SHACKLETON: It's a pleasure.

THE CHAIRMAN: And any more summaries of things that you want to provide would be very welcome. Detailed responses at this stage would not be.

BLANCHE SHACKLETON: So I'd be very happy to provide you -- so obviously we have the statistics, which we would be delighted to share, but we will be doing a more detailed breakdown of answers to these questions, which we'll be very happy to provide and then, if there's anything below that that you would seek answers to, then please let us know, because we have a lot we can trawl through.

THE CHAIRMAN: Thank you very much.

BLANCHE SHACKLETON: Thank you.

Lord O'Donnell

THE CHAIRMAN: Well, good afternoon, Gus. You've just caused me a small amount of anxiety there, as we were just about to come to the end of the session and I thought you weren't here, but just in time.

LORD O'DONNELL: Second evidence session today.

THE CHAIRMAN: Yes. Well, I understand only too well. Thank you very much for coming.

As you know, we've been through a process of consultation exercise, we've had a lot of written responses and we now decided that in some evidence we needed to take some oral evidence and we're enormously grateful to you for coming this afternoon. What was your other evidence session on?

LORD O'DONNELL: That was the House of Lords Constitution Committee on devolution and the unified civil service.

THE CHAIRMAN: Well, this should be more relaxing. Lord Howard?

LORD O'DONNELL: Is it possible for me to make an opening statement?

THE CHAIRMAN: Of course it is.

LORD O'DONNELL: Right. Thank you.

First of all, thank you for giving me this opportunity to contribute to the debate.

I'd like to start by making clear that in my view the Freedom of Information Act has been important in opening up processes and decision making in government and thereby enhancing accountability. In particular, FoI has allowed governments to be much more proactive in releasing information about why they have made certain decisions. I welcome this and would

urge governments and go further and publish routinely the analysis they considered before reaching decisions.

Ideally this analysis should be made available when their decision is announced and ahead of parliamentary assessment of any legislation needed for implementation. I think the examples I would point to would be the Monetary Policy Committee and the Office for Budget Responsibility which demonstrate the power of that approach. I also do not believe requesters should be charged for putting in requests. Everyone should be able to make requests of public bodies.

The difficulties arise if FoI discourages the proper analysis of all options. Civil servants should at times think the unthinkable and consider options which might on reflection, be unworkable or undesirable. Similarly, ministers should be able in cabinet to argue against decisions without fear that such views will later be published and used to attack the final decision. Both ministers and civil servants will need publicly to defend whatever decision is made. For ministers, this follows from the doctrine of collective responsibility. For civil servants, it is their job to talk truth unto power in advance of decisions but, once made, it is their role to defend decisions in, for example, select committees. If they did not, they would soon lose the confidence of ministers and cease to be able to do their jobs effectively.

A difficulty with the FoI Act is that it creates a great deal of uncertainty about what could become public, the response to this uncertainty about the ministers not commissioning work, as in important contingency planning, or civil servants being cautious about which options they explore. Section 35

and 36 provide exemptions for policy submissions but all are subject to a public interest test. The difficulty is that it is hard to define what is meant by the public interest and how it will be weighed against counter arguments. If your review, Mr Chairman, could clarify how this test will be applied, that would be extremely helpful.

Tribunals have accepted that releasing ministerial submissions which contain the full and frank advice of civil servants does damage the public interest in good decision making -- I refer to you Judge Angel's(?) decision of 28 January 2015, in the case of DFE v Information Commissioner.

Of course, each case has to be decided on its merits, but that does not mean there cannot be clearer guidance about how the balance of interest will be decided.

As a great believer in evidence based policy, I hope the review will help to ensure advice to ministers is based on the best available evidence displayed clearly and objectively. My fear is that the way FoI is being applied has led to ministers not commissioning some analysis and civil servants moderating the way they provide such analysis. It is of course extremely difficult to test whether my fears are justified because by definition we are talking about acts of omission, not commission.

The other area that needs to be cleared up is the nature of the cabinet's veto. I believe, and I think the cabinet believed, that Parliament had expressly given them the power to veto a decision to release in exceptional circumstances. That power has only ever been used exceptionally, I think seven times since the Act was introduced, and often to protect the sort of

papers that would not be expected to be released until the time of the 30 or 20 year rule, such as cabinet minutes on the Iraq War or cabinet subcommittee papers on devolution. The recent Supreme Court decision suggests we were wrong. So it would be extremely helpful if this review could clarify when veto could be used. Thank you.

THE CHAIRMAN: Thank you very much.

LORD HOWARD: As you see, we have some difficulty --

JACK STRAW: Some of us have some difficulty.

LORD HOWARD: -- in operating this equipment. Thank you very much for coming along this afternoon.

You've just told us that you want to see published an analysis of the reasons why government came to a particular conclusion. Would that analysis then include thinking the unthinkable, which you said civil servants should be encouraged to do, and all the options which were considered on the route to making that decision?

LORD O'DONNELL: No, I think it would include the main options that were considered. So if there was something that came from left field. so I think it's quite right that there should be blue sky thinking, but, actually, when it comes to, when key decisions are made, I think there are generally three or four key options and I think putting out some of the analysis about why a particular decision was made, what counter arguments against those decisions were considered and why, on balance, it was thought that was the right option I think would be good, amongst feasible options.

LORD HOWARD: So there would have to be a distinction made by somebody

or other between feasible and less feasible options?

LORD O'DONNELL: Yes, and I think that's perfectly reasonable. I mean, we generally start -- I've always encouraged people to start off thinking as widely as possible and to narrow their thinking down and in fact quite often, in submissions that go to ministers, you have tended to have narrowed them down to three or four options. I think the problem is, along the way, I want to get to those three or four options by having had someone think much more broadly and think outside the box, as it were, to use that horrible cliché, but some of those ideas may turn out, for example, to be illegal and there's not much point, you don't want to put those to ministers.

LORD HOWARD: What you've described, it often comes under the label of "safe space", and you've talked about safe space in some of your observations on the Act elsewhere. Would you like to expand at all on what you mean by "safe space". And in particular does it come to an end when the decision has been made?

LORD O'DONNELL: Well, I'd say you very much want, as I suggested here -- and I think this is an issue for ministers and for civil servants -- I think ministers in cabinet want to be able, when a proposition is put forward, to be able to put counter arguments to that proposition. They want to be able to do that, in the sense of trying to improve the quality of the decision and its eventual presentation. But if doing that means that those arguments become public very quickly and could be used by the opposition to actually attack that final decision and to attack that minister, who by then will be defending the decision under collective responsibility, as he must,

then that seems to me to be an incentive structure which would suggest that that minister in the first place would not make those arguments in cabinet.

Now, similarly for civil servants, you want them to be able to say to ministers, "Look, you're thinking about this decision, here are the four or five reasons why we think -- the counter arguments, here's the evidence we think weighs against it," and you want to be able to do that in a safe space in the sense that you want to keep the minister's trust, you want to be able to say to them, "Look, it's my job not to be a yes man, I am telling you here is some evidence that goes against your decision and here are the counter arguments that may well be put," and it's far better for the minister to consider those things before they come to a decision than afterwards.

I think your point about when does this come to an end, I think, when you've got the decision out there, then I think, as part of that, ministers and the civil service together need to consider how much they publish and what I'm saying is I think it probably makes sense for rather more to be published routinely on the pros and cons and the considerations as to why you've come up with that final decision than is done at the moment.

LORD HOWARD: But what opportunity would you provide for that ministerial judgment, about what should be published after the decision has been made, to be challenged? Would that be challengeable, in your ideal world?

LORD O'DONNELL: Well, I would say that sort of information is something that should be there and that's a decision made by the minister. I mean, are

you saying should there be an FOI request for other material, should that be possible?

LORD HOWARD: Yes.

LORD O'DONNELL: Well, then I think I would like to say that other material should be covered by sections 35 and 36. That's exactly what sections 35 and 36 are for.

THE CHAIRMAN: You mean exempt.

LORD O'DONNELL: Yes, exactly.

LORD HOWARD: For 20 years?

LORD O'DONNELL: Well, for as long as that exemption is held up. I mean, it may that be there are some areas of policy where it could be released much earlier.

LORD HOWARD: But who decides?

LORD O'DONNELL: Well, I think the ministers and civil service together should make those decisions.

LORD HOWARD: And therefore the Freedom of Information Act would not apply to this category of information?

LORD O'DONNELL: No, there could be applications and then I think then I would say -- in my ideal world, we would say, "Look, I think you're asking for material other than this vast amount that was published at the time the decision was made, you're asking for extra information on top of that, we think that's covered by section 35 or 36," and we go into the standard FoI process. But I think the problem with the current system is that, once you go into that standard FOI process, no one knows what's going to come out

of that and what I would really like is the results of this Commission to actually give us a lot more charity on how those public interest decisions would be made.

LORD HOWARD: Well, I'm going to come on to that, but I'm a little puzzled as to the position that you've expanded, because, as long as the Freedom of Information Act applies and as long as requests could be made for further information about what went into the decision making process beyond what was published by the minister, you're left with the same kind of uncertainty that exists now.

LORD O'DONNELL: If we end up in the world and nothing has changed, so if we end up with the situation we are now with respect to section 35 and 36, you, I fear, will be absolutely right. What I'm arguing for is that I hope we get to a world where you have managed to come up with some wonderful way of ensuring that you've managed to improve the process. But, if you don't, then I would say all the things I've said about people not wanting to commission certain research, certain questions and, you know, it being made very clear that they don't want anyone to start thinking the unthinkable --

LORD HOWARD: What help can you give us to come to your desired outcome?

LORD O'DONNELL: Sorry, what?

LORD HOWARD: What help can you give us? I'm searching for an approach which would enable us, if we wanted to do that, if we thought it was desirable, to reach your promised land, and I'm struggling to find it.

LORD O'DONNELL: Well, I think at the moment the public interest test is there and it's interpreted by every individual tribunal in its own way. You know, I famously was asked the question when the coalition was being put together, the two groups came together and they were going to have their negotiations and they were talking about should they have the civil servants in the room, would anything they wrote down be FoIble, to which I said, you know, there are policy exemptions we could do, but they're all subject to a public interest test and, to be honest, because I am very uncertain about the way that is, I cannot give you an answer, to which it was a very clear response, and this is very documented, "Right, okay, thank you, thank you very much, no civil servants in the room, therefore we have no records". So that's a classic example of the FoI doing the reverse of what it was intended to do.

LORD HOWARD: Absolutely, but I'm asking you how you think that example could be avoided in future, because if, as you say, the disclosure process which you've identified remained subject to the FoI, presumably the test which you would want the Commission and the Tribunal to apply as to whether or not that additional information should be disclosed would be a public interest test, and so where are we in a different position, how are we in a different position, how are we in a situation of less uncertainty than there is at the moment?

LORD O'DONNELL: Sure, and the way I would solve that is I would want there to be a rather clearer view about the potential costs of putting information out. The benefits are quite clear to some people, that, you know, they'll

learn something they didn't otherwise do, often not quite as much as they think, but there we are, but there's no evidence about costs to this and I would say actually, if by releasing something, there's clear cost to the process of government, then actually by releasing this, you, the Tribunal, should really consider very carefully whether you are improving the quality of decision making.

JACK STRAW: But, I mean, isn't that just another way of saying -- I mean, how do you assess this clear cost, other than by making a judgment about the public interest?

LORD O'DONNELL: Well, it is a judgment about public interest, but at the moment the public interest, I mean what does that mean? We need a bit more guidance about what constitutes "the public interest", because I think at the moment very little has been said about the problems of improving government decision making because you have got this situation where people have started to either not ask for information or not want to write it down.

JACK STRAW: And just on this issue of the coalition, this story which we're aware of, telling officials to leave, when you gave that advice, did you yourself have any advice from the lawyers about whether section 35 or 36 would have actually engaged to protect the release of what's obviously very highly sensitive information?

LORD O'DONNELL: I didn't, because I didn't think I needed it, to be honest, because, if I'd had the advice from lawyers about does the veto stand up, does, you know -- I've had plenty of lawyers telling me that things would

never be released like cabinet minutes and then they were, so, you know, I would have been a bit sceptical about any lawyer's advice, if I'm honest.

THE CHAIRMAN: Could I press this question, first of all, just to get some clarity: when you're talking about the information that has been released that could be regarded as damaging, I mean, how much information falls into that category? I mean, how many examples are there of information being released that is really damaging? I mean, I've been through much of the judgments on this and it seems to me that, in the majority of cases, those that the government thought were really harmful, they deployed the veto. Many of the others, where the Information Commissioner has found against the Government, were issues which came quite close to being issues of data or issues of relatively sensitive information. I mean, what I've struggled to find is actually cases, clear cut cases, where a lot of information has been released and discussions of the kind that we have been talking about, which have been damaging.

LORD O'DONNELL: I think the problem for all of us is that -- and it isn't so much things that are being released that are damaging, it's the uncertainty. So nobody really knows in advance.

THE CHAIRMAN: So it's not that the material actually has been released, it is just the fear that it might be released?

LORD O'DONNELL: And the fact that, you know, we are not certain whether the release of something creates a precedent which means that, whilst the release of that doesn't do anything very much, actually it opens up a whole class of things which would be damaging.

THE CHAIRMAN: But the Information Commissioner makes quite clear that he takes a case by case approach to this rather than one of precedent.

LORD O'DONNELL: Yes.

THE CHAIRMAN: Do you think there's some clash here between the sort of culture of the bureaucracy versus the actual practice of the Commissioner and indeed the Tribunal?

LORD O'DONNELL: Indeed, and if we say it's all on a case by case basis, I kind of almost rest my case when I had to say the negotiating committee, "I don't know, because it's all on a case by case basis".

JACK STRAW: Whilst I see the advantage of a generic category, isn't the truth that the range of government decisions is so diverse that you can't avoid them being on a case by case basis? I'm just thinking of three sets of decisions made almost at random: decisions relating to fracking, the Prime Minister's announcement earlier this week that there should be stronger language tests for people for whom English is a second language who are resident here, and, for example, the change in the prison regulations to restrict the ingress of books. Now, these are not cognate, are they? So, unless you have the broad principles set out in something like section 35 and 36 and then a public interest test, how else can you make a balanced judgment in respect of those, except in the particular case?

LORD O'DONNELL: And I would like to say, as you say, the number cases is incredibly wide, but there could be some principles --

JACK STRAW: Well, what are they?

LORD O'DONNELL: Okay, so a principle which said, actually, if we release this,

that opens up a whole class of areas where some advice has been given which is going to be used in a way that would actually damage the quality of future decision making.

JACK STRAW: Okay. Good.

LORD O'DONNELL: That kind of principle I think would be very useful.

LORD HOWARD: But that is something which the Commissioner could take into account in deciding the public interest, and in deciding whether the public interest justified the disclosure of those documents.

LORD O'DONNELL: Indeed, and, if the Commissioner could be -- you know, if we had some more guidance about precisely how they come to those decisions and, you know, at the moment, I don't have a clue. When a case goes before an Information Tribunal, I have no idea if we're going to win or lose. I know I've got QCs who tell me at great expense certain things might win or not, but they're about as good as forecasting as the Treasury --

THE CHAIRMAN: I'd rather you didn't go any further on that.

LORD HOWARD: Isn't that an inevitable consequence of the fact that you are relying in the end on someone's discretion? We've looked with interest at the evidence you gave to the Post Legislative Scrutiny Committee in 2012 and you repeatedly there called for clarity and certainty and you said repeatedly there must be no grey areas. Isn't it apparent from the discussion we've had this afternoon that there will always be grey areas, that there is no alternative to grey areas, and that desirable though it may be in your ideal world, you can never have clarity and certainty about these

matters because there's obviously always going to be an exercise of discretion?

LORD O'DONNELL: Well, there could be clarity but I realise that that is not a world -- you know, you could have a clarity by complete exemptions, right? If we're not in that world, then what I'm asking you to do is minimise the grey.

LORD HOWARD: But I'm still not clear how.

LORD O'DONNELL: And I would say, along the lines we're talking about, are there some principles that we could apply, is there some general guidance that could be specified which says, "Look, the public interest test isn't just something which every tribunal's going to come to fresh and look at the individual cases, they're actually going to have some principles that might guide them in this process, might allow all of us to know, in advance, what's covered and what's not."

LORD HOWARD: Do you have any direct experience of ministers avoiding putting things into writing in order to escape the provisions of the legislation?

LORD O'DONNELL: I mean, in a sense, how could I? Minister A phones Minister B on his mobile phone and I'm not involved in that process at all. That's what I mean. The whole evidence thing you're asking for is virtually impossible to --

LORD HOWARD: Not at all. You might have suggested to a minister that a meeting's necessary to discuss a particular decision and you might have been told, "No, I don't need we need one" and you might be able to form

quite a good judgment that that was the reason why the meeting wasn't taking place. Have you ever come across something like that?

LORD O'DONNELL: Yes, is the short answer, and yes, I've had occasions where -- I mean, I think the area of contingency planning. You know, I think there are various reasons why ministers are very reluctant to commission planning for outcomes that they do not want to happen.

JACK STRAW: But is that directly related to FoI? I mean, if you --

LORD O'DONNELL: That's a combination of FoI and leaks, let's be honest.

JACK STRAW: Yes, because I can recall in the early part of the 1997/2000 government, well before FoI was a serious prospect in people's minds, that there were some ministers who were very reluctant to go in for contingency planning on any basis because they were just reluctant to. It was nothing to do with FoI. So I just wonder to what extent you think FoI has changed the climate.

LORD O'DONNELL: I think it's added to it. It's another reason why you might be nervous about contingency planning. It's not the only reason, but it's a part of it.

LORD HOWARD: And can you think of a principle which could be devised and applied to deal with that particular problem? Because it's not collective cabinet responsibility, it's not necessarily even advice of civil servants to ministers, which were the two categories of absolute exemption for which you've called in your evidence to the Post Legislative Scrutiny Committee. How would you provide a principle which would apply to that particular situation?

LORD O'DONNELL: Well, if you're doing contingency planning for an event and that event is on a specific date and that date has passed and nothing's happened, then it might be that you would be able to take a different attitude post the event.

DAME PATRICIA HODGSON: Could I ask you to reflect upon the differences that you have either encountered or feel might result from the incentives of Freedom of Information, the differences between risk assessments and risk registers that are part of a policy development process, and risk registers that might be part of your ideal presentation of policy post decision in order to be transparent to the public?

LORD O'DONNELL: Well, I think I argued the case on risk registers that they should be exempt and I think we lost and as a result of that I think risk registers will be rather more bland and I think people will not want to put in those risk registers things that would be very scary. You take the -- I think you've got particularly difficult questions in the financial area. I mean, if you say, Look, I really think there's a risk that there might be a run on this particular bank and that was subject to FoI, that would be completely self fulfilling.

THE CHAIRMAN: I don't think the Bank of England is subject to --

LORD O'DONNELL: No, but such a thing could easily be in a Treasury risk register.

LORD CARLILE: You set us an unexpected piece of homework, which slightly distracted me, by suggesting that we should in some way seek to provide guidance about the meaning of the public interest. But the more I think

about it, I think the less attracted I am by trying to provide guidance on the meaning of the public interest because, and I'll give you an example in a second, isn't it the case that our understanding of the public interest evolves and sometimes evolves very quickly as a result of changing events?

My example is the Jimmy Savile case. The Crown Prosecution Service published a report on the Jimmy Savile case -- and I'll declare an interest, I know about it because it was written by my wife -- but it published a report and in that report it was very critical of the actions taken decades before or years before by a previous incarnation, as it were, of the Crown Prosecution Service, completely different personnel. Now, those personnel were exercising a totally different set of judgments, because they were looking at an issue which wasn't as high in the public mind, the damage it caused was not as well-known as it is today. So, by seeking to define what we mean by the public interest, or even issuing a set of examples, don't we really place a chilling effect on the virtues of a public interest examination and test which is an evolutionary concept?

LORD O'DONNELL: Well, I think where you think of it as evolutionary, I think of it is totally unpredictable, and that's my problem.

LORD CARLILE: Isn't that one of its virtues?

LORD O'DONNELL: No, I don't think so. I would say I would like to understand the principles behind it. You know, when you think of it from first principles, the public interest, is the public going to be better off as a result of this information being released? Now, there would be some gains

from having that information, perhaps, and there will be some cost from the quality of Government decision making in future might be damaged by that, and, when you look at each individual case, you might be able to come up with a set of principles as to how you start measuring those costs and benefits.

THE CHAIRMAN: Could I just have one question? I'll take you up on this point that you said that publication of risk registers is going to make them more bland, but isn't it the case that people will later actually examine those risk registers and, if something goes wrong, will say, "Did this ever get into the risk register and why not," and people who prepare risk registers which turn out not to have been fit for purpose, in the sense they didn't get anywhere near some of the risks that actually did emerge, I mean, aren't they then going to be subject to some challenge and, I mean, isn't there an argument that actually says that the process of making these things available whereby we can judge the quality of people's risk registers, that that actually will improve the work that goes into them?

LORD O'DONNELL: I think you would get better risk registers if people felt that they could genuinely write down what the serious risks are, genuinely, and there was, as it were, a safe space to talk about those --

LORD HOWARD: Right, but the subsequent publication is an important part of being able to assess the quality of the work that was done.

LORD O'DONNELL: Indeed, and I would be all for subsequent publication, I would just want there to be quite a long lag between them doing it and that publication. At the moment, again, the lag is completely unpredictable.

That's the problem, it's uncertainty.

LORD HOWARD: But what if you had an event that occurred pretty quickly after the risk register was compiled, with intense public interest in the decision making process which had gone into the lack of protection against that risk, as it turned out? Well, everybody would then want to know what the Government had considered and, if a risk register had been compiled, there would be intense, dare I use the phrase, public interest in disclosing that risk register even after a relatively short period of time.

LORD O'DONNELL: Yes, and that might well be part of the principles that you would apply, which is that this risk register won't become public, but if one of the events in it actually happened, then there would be a strong case for releasing it.

THE CHAIRMAN: Or even an event that should have been in it.

LORD O'DONNELL: That should have been in it, exactly. So that would then be quite good guidance and you'd understand that.

JACK STRAW: Quite a bit of uncertainty though, when you compile a register.

LORD O'DONNELL: A lot less uncertainty than not having that guidance. It's not perfect, I agree.

DAME PATRICIA HODGSON: Sorry, we're dotting about a bit. I was going back to who is qualified to define the principles of the public interest and my colleague's example about Jimmy Savile. The more you think about public interest, the more you think about how it changes over time in reaction to experience. Also, it is very, very differently defined, sometimes only a few years apart, according to press interest. Social media is causing a very

different sense of what the public interest is. So, in these circumstances, in this difficulty of ever pinpointing it, it's a bit like trying to define the ten commandments of the public interest, who is qualified to set down what the principles should be, or might it not be better to understand that the public interest is a movable feast, it's quite a democratically informed thing, and that would lead me to be quite surprised that you had not said more to us about the clarity of sections 35 and 36. You've focused absolutely on the public interest in interpreting it, but you weren't here to hear the Information Commissioner, but he talked about his understanding of 35 and 36 evolving and in his evidence he says, "I think departments got better at it, I got better at it, I reissued guidance," which leads you to wonder whether the underlying legislation was clear enough in the first place.

LORD O'DONNELL: Well, I didn't have too many problems in that line. I think where you're right about the evolving and the case by case part is generally on the benefits of publishing. So a certain issue comes up, so Jimmy Savile or whatever, and then there's a lot of interest in that and it may have implications in all sorts of others areas, so it may be that there's a big wait there. I think where one might be able to improve matters is saying, "Yes, but in all of these cases, here are the steps you should go through to think about what are the costs of publishing." Right? So if we even tied down that a bit better and said, so, you know, what is it -- so you're saying it's a case by case all the time, how can anyone interpret, how can anyone come to a view about this in advance, which is quite useful, or are we to assume that it's just a complete random noise generator? So

I would say -- trying to be able to say these are the sorts of things that the Tribunal should look at in terms of the costs to decision making, quality of decision making.

THE CHAIRMAN: I mean, one of the exercises I've been going through is actually going through the decision notes, as indeed the Tribunal has, to try to see if I could interpret from that what their approach was to the public interest test, because I think you're right that this is the centre piece of this. I think there is very little -- you know, the debate as to whether something falls within 35 or 36 or it doesn't is not a big issue. What this boils down to in the end is the public interest test, and I think one can see the way it's evolved over time, and indeed there have been some decisions by some of the tribunals which have enhanced that understanding. The Act, of course, is, you know, in a sense the way that it went through Parliament was a process whereby it was heavily changed when it was going through --

JACK STRAW: That's true.

THE CHAIRMAN: -- and it was amended as it went through Parliament and it does have, as a result of that, some characteristics of uncertainty. But, you know, what we are searching for, I think, is what a lot of this line of questioning is for, is to respond to your challenge of how to reduce the degree of uncertainty. I mean, you're simply making the argument, which I have some sympathy with, which is that the outcome has not been terrible at all, there hasn't been a huge amount of information that has been disclosed that we would rather was not disclosed, but we would like to have had a greater degree of certainty about which of those things it would be.

But, you know, to arrive at that, we need -- I think what the questioning is directing is we're still puzzled as to how that can be done and whether it has to be in legislation, whether it has to be in guidance, whether it's government guidance or it's parliamentary, you know, how is it that one actually brings that about? Because I think a lot of people could be much more relaxed about this within government if that could be achieved.

LORD O'DONNELL: Yes, indeed, and we had certain priors. I mean, that's the problem, that our priors have all been proved wrong. I mean, I had a prior that cabinet minutes would, you know, be exempt in general.

THE CHAIRMAN: But there's only one case where that's not been the case.

LORD O'DONNELL: Indeed, but once you've got one case. So if a Prime Minister says to me, "Well, cabinet minutes can't be released, can they", I have to say, "I'm not sure, I don't know", and then if he were to say to me -- I would have previously said, "But don't worry, Prime Minister, you can use the veto," actually I would have to say now, "Well, I'm not sure actually, I don't know if you can use the veto." So, you know, if you were to say -- there are kind of things that, well, there is a process for releasing these already in cabinet minutes, and there's a process where we do it for history and all the rest of it. That's there, that's a kind of well understood process and that's the kind of process that the Information Commissioner buys into and actually thinks that it would have to be something extremely exceptional to violate that principle, and if you read through the whole case that was put forward there, it wasn't that they were saying it's extremely exceptional, they were just saying, "This is a very important case," and

plenty of other things that in my view would have been -- if you release those cabinet minutes, there are plenty of other cabinet minutes you could have said should be released.

LORD HOWARD: I think he was saying, wasn't he, that it was exceptional, because it was so important? Now, the trouble with all these phrases, "public interest", "exceptional", whatever kind of phrase you choose, in the end they all depend on the interpretation of that phrase and the exercise of the discretion to whom the power is entrusted.

LORD O'DONNELL: But the idea that -- you know, I'd like to think cabinet actually does do important work nearly all the time, and therefore to say it's important --

LORD HOWARD: Surely you'd agree that some are more important than others?

LORD O'DONNELL: Some are definitely more important than others, but there's an enormous amount that's important --

THE CHAIRMAN: The suspicion that cabinet hasn't done its job terribly well in a particular situation, would you regard that as being something which might go into the balance?

LORD O'DONNELL: That could be a mitigating factor, I agree that if someone were -- presumably something had gone wrong in process terms that they strongly felt was inappropriate, but actually -- and that release would have an impact on knowing whether that was true or not.

THE CHAIRMAN: Yes.

LORD O'DONNELL: I think that's the important part, certainly.

LORD CARLILE: Again, going back to the question I dwelt on before, and forgive me for returning to it, as I've said, I'm instinctively unattracted by the idea of trying to define what the public interest means. However, I'll come back to the criminal law again with an analogy. When one asks a jury to make a set of difficult decisions in, say, a complex fraud case, you don't put the Companies Act in front of them, or even the Fraud Act, which is much shorter, you provide them with a road map, a written road map to reach their decisions, and I rather imagined that road maps to decision making on Freedom of Information existed in the public service, but I suspect now that there are very few of them.

Rather than seeking to define the meaning of the public interest, do you think it might be helpful if public authorities actually devised what I have called road maps to decision making, sets of questions so that, when faced with these difficult decisions, there would be a question matrix which officials could follow which would enable them possibly to reach more reliable and more consistent decisions.

LORD O'DONNELL: Well, I think that's -- in some ways I'd say it's a very different way of approaching the problem. You're saying -- and we share the same objective here, to improve the quality of decision making, and the question is how do you improve the quality of decision making, and there have been various attempts through my lifetime to do that, to make decisions more evidence based, impact assessments, you know, things that you publish at the same time, putting more evidence out there, my point early on about publishing even more was to take that to the next stage. So

I think all of that makes sense, that the civil service, if anything, is the guardian of trying to do objective evidence based analysis with clear submissions to ministers laying out the options, with recommendations. I remember a former permanent secretary of mine giving us a template, you know, timing, recommendation, advice, presentation, all those sorts of things, and there is in the civil service a very kind of detailed structured advice about how you do those sorts of things. I don't know personally how that reflects your examples in local government, but I do think there's an enormous amount to be said for there being checklists along the way to decisions and the like and being as clear as you can about the nature and quality of the evidence which you're presenting.

THE CHAIRMAN: If you remember when you and I were working together, we made quite a big effort to try to separate in terms of the analysis and options behind a policy from the advice that we actually gave to ministers, so that we had some material which we thought was more readily available and some that we hoped would be better protected. Has there been any attempt to try to do this in submissions in Whitehall over time, to try to separate the part that is really sensitive, which is the policy advice, from the actual analysis, because it's that analysis surely that then should be published really quite quickly after a decision has been taken?

LORD O'DONNELL: Yes. Well, if you were follow my line about what could be published, I think this does pick up on what Lord Howard was saying, that it would give you -- you know, that analytical part would then be the bit that you would publish, whereas the individual advice you would keep

confidential. There's no feeling that within FOI it recognises any of those distinctions and, again, it would be a joy if this review were to kind of give some clarity along those lines.

THE CHAIRMAN: Thank you so much for coming and having quite a - I mean, I hope you've found it as interesting a debate as I have, and it's been very worthwhile and we very grateful both for your opening statement and for answering our questions quite so straightforwardly. Thank you very much.

LORD O'DONNELL: Thank you.

(Meeting concluded)