Note of meeting between Lord Burns and Maurice Frankel (Director, Campaign for Freedom of Information)

102 Petty France Thursday 29 October 11:00 -12:00

Attendees

- Lord Burns, Chair of the Independent Commission on Freedom of Information
- Maurice Frankel, Director of the Campaign for Freedom of Information (CFOI)
- Katherine Gundersen, Research Officer at the Campaign for Freedom Information
- Stephen Jones, Secretary to the Independent Commission on Freedom of Information
- Alexandra Avlonitis, Secretariat to the Independent Commission on Freedom of Information

1. LB opened the meeting by thanking MF and KG for their attendance and sought their views on how the Act had developed since its commencement in 2005.

2. MF explained that CFOI had been pleasantly surprised at how effective the Act had been, despite some early frustrations about the time taken for complaints to be processed by the Information Commissioner's Office which had since been resolved.

3. LB and MF discussed the Act's parliamentary passage; MF explained that the veto had been introduced as part of a package of measures, which included a binding decision making power for the Information Commissioner ("IC" or "ICO") on the public interest. MF did not think that at any stage during debates in Parliament there was any discussion of the ministerial override applying to a decision of a Court or Tribunal.

4. LB and MF discussed the 'chilling effect'. MF's position was that the chilling effect was overstated and pointed Lord Burns to the Justice Select Committees findings in its Post Legislative Scrutiny (PLS) report from 2010 – i.e. that it was not possible to identify whether one existed. MF explained that the perception of uncertainty surrounding the release of information as a result of the public interest test was unwarranted, and based on what was *said* about the consequences of the Act rather than on what decisions under the Act indicated, because very little 'harmful' information had actually been released. He suggested that Lord Burns consider the outcome of decisions at the First Tier and Upper Tribunals, in addition to ICO's decision notices. MF explained that such an investigation would show that very little information which impacted the provision of frank policy advice was ever released.

5. MF suggested that the Commission may benefit from considering the Disclosure Logs of public authorities to get a sense of what information had been released without dispute under the Act.

6. LB and MF discussed the UK Supreme Court's judgement in the *Evans* case[1], and its impact on the ministerial override. MF reiterated that it was not made clear during the bill's parliamentary passage that the veto would apply to the decisions of a Court or

[1] [2015] UKSC 21

Tribunal, indeed, it was only when the veto was used in the Iraq cabinet minutes case that this possibility became clear. MF was of the view that the veto was unnecessary because of the elaborate appeals process. In some cases it had been used against decisions of the ICO without the government attempting to argue its case before the Tribunal; it should not be available as an alternative to exercising an available right of appeal.

7. LB and MF agreed that the regime had developed significantly over the last ten years. MF explained, for example, that the ICO and the FTT would be unlikely to order release of Cabinet information in light of how the regime had developed, particularly in relation to the protection of information that might harm Cabinet Collective Responsibility. LB and MF discussed the appeals structure available to dissatisfied requesters. MF explained that the UT's decisions had been given considerable weight, and that they had impacted considerably the earlier stages of the appeals process.

8. LB and MF discussed ways in which information might become less sensitive, for example, it might decrease in sensitivity sometime after it had been created. MF explained to LB that there were a number of cases, including for example requests for information about Free Schools, and for the number of times a specific Cabinet Sub-Committee had met, whose release had been ordered by the Tribunal and to his mind would cause no harm. They also discussed ways in which Part II of the Act might be made clearer for both requesters and public authorities.

9. MF and LB spoke briefly about the burdens imposed on public authorities by the Act. MF explained that some public authorities used the public interest extension test as a delay mechanism, rather than as intended. MF explained that delays in processing and answering requests are a frustration to requesters and suggested that a 20 day time limit on Internal Reviews, similar to the Scottish FOI Act, would be hugely beneficial.

10. MF drew LB's attention to the *Dransfield*[2] case, which he explained enabled authorities to consider disproportionately burdensome requests as 'vexatious' for the purpose of the Act. When asked, MF thought that public authorities had begun to employ the revised criteria and been upheld in doing so. This provided authorities with a mechanism under the Act to protect themselves against disproportionately costly requests for information or, for example, 'fishing expeditions', which could not be refused under the Act's cost limits. MF thought that the Act's provision on vexatious requests now effectively applied to what under the EIR were described as 'manifestly unreasonable' requests and might be better described as such.

11. MF explained that Government initiatives such as 'Contract Finder' should better protect authorities against having to redact sensitive commercial information from large contracts; thus reducing further the burden imposed on them by the Act.

Stephen Jones
Secretary to the Independent Commission on Freedom of Information

[2] 2012 UKUT 440 AAC