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Independent Commission on Freedom of Information

Monday 25 January 2016

Panel:

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

Witnesses:

Jonathan Isaby – Taxpayers Alliance
Sam Hawke - Liberty
Councillor David Simmonds – Local Government Association
Nicola Dandridge – Universities UK
Peter McNaught – Health and Safety Executive
Chris Hopson – NHS Providers
Caroline Dodge and Geoff Wild – Kent County Council
Bob Satchwell and Peter Clifton – Society of Editors and Press Association
Rt. Hon Dominic Grieve QC MP
The Rt. Hon Lord Beith
Professor Christopher Forsyth and Professor Richard Ekins
Maurice Frankel – Campaign for Freedom of Information

Monday, 25 January 2016

(10.00 am)

MR JONATHAN ISABY

THE CHAIRMAN: Good morning. Good morning, Mr Isaby. Thank you very much for coming and thank you for your evidence. Is there anything you would like to say by way of introduction before we set off on the questioning?

MR ISABY: Thank you very much, Mr Chairman. Thank you for inviting me. Thank you for the opportunity to inform your deliberations.

I think I'd start by saying I'm not entirely sure why you need to be existing in the sense that I certainly don't think that there should be any dilution of the Freedom of Information Act, which you are looking at. I think if you were looking to strengthen it and extend it, which I hope perhaps you might. I don't know whether your remit allows you to do that, I hope you will consider some ways in which it could be extended and strengthened.

But the Act itself I think remains probably one of the most important things that the government, of which Mr Straw is a member ever did and, as I wrote in The Times this morning, it was one of those pieces of legislation, a landmark piece of legislation, that I thought was irreversible, something that no government would ever think of trying to go back on.

My starting point is that anything that a public body does with taxpayers' money, the taxpayers footing the bills ought to know what is being done with their money and the ability to ask those questions of authorities spending their money is absolutely vital. Obviously, there are exemptions relating to national security and

private individuals' health and welfare issues of course, and that's right. But in the main there should be a presumption of, if taxpayers' money is paying for something, we have a right as taxpayers to know what is being done with our money in our name and I celebrate the fact that we've had a Freedom of Information Act in this country for the last 16 years and, as I say, I'd like to see it strengthened and certainly not diluted.

LORD CARLILE: Mr Isaby you'll have to forgive me for not having yet read The Times this morning. I will read your article with interest later.

In your evidence, the Taxpayers' Alliance seems to be saying that the protections provided in sections 35 and 36 are sufficient. Is that a covert way of saying that the protections in sections 35 and 36 are excessive because, if so, would you say so and tell us why you think they are excessive?

MR ISABY: I think we're saying that at the moment they work pretty well and that there is no obvious call for them to be strengthened, but at the same time I'm not sure anyone's necessarily saying they need to be particularly changed either. This is what strikes me about this whole commission, that the Act is working very well at the moment and I think there's a kind of desire to -- you know, this is a solution in search of a problem almost.

LORD CARLILE: Well, you have to bear in mind that it was not the Commission that formed the Commission. Are you saying that there is no legitimacy in having a debate as to whether the Act is working well and whether it should be reduced in its effect or expanded in its effect?

MR ISABY: No, I think a debate is very important and, as I say, I think there are ways we can look at how you can extend and strengthen the Act in terms of the remit and

who it covers, and perhaps we'll talk about that in a minute. I certainly don't blame you, as someone invited to take part in this, for the fact that you've been asked to look at some things which I think the government is privately already having second thoughts about, frankly.

LORD CARLILE: Well, I mean we're not the government. So now we've established that there is some validity in the debate, can we move onto something else?

In your evidence, the Taxpayers' Alliance appears to suggest that different public bodies interpret the public interest differently. Does that matter?

MR ISABY: I think that does matter in that -- I mean, the Taxpayers' Alliance will often ask the same question of every single council across the whole of the UK, for example -- you know, how much did you spend on international travel last year, for example -- and the fact that different councils will come up with -- well, some will say it's in the public interest or not or some will say we can afford to -- you know, that to answer this would cost too much and others will just hand the answer within hours of coming, you know, shows that some councils are working very efficiently in the way that they process data and being open in the culture in the way that they hand that data to people who made a request and that others are not raises an important issue and I think best practice needs to be occurring and the councils that are less open and less efficient in how they respond need to be looking at the other ones.

LORD CARLILE: Forgive me. I don't think anyone would dispute that there should be consistency if the same question is being asked of councils seeking information on the same issue. Do you accept, however, that taking the issue of public interest in a more abstract sense, public interest may look quite different to, for example, a

body considering national security as opposed to a body which is providing information on safe trading standards prosecutions. Would you like therefore to produce a definition of the public interest or are you content that bodies should look at public interest within the context of their own work?

MR ISABY: I accept there is clearly a big difference between national security issues and trade issues or other things that you might have just mentioned. I still think the presumption needs to be that, you know, pretty much everything that a public body does is in the public interest for that to be in the open apart from the very small number of areas where, say, national security is concerned or private individuals, health or welfare records are involved, you know, the presumption always need to be in favour of publication.

LORD CARLILE: I don't think anybody would dispute that, but can I try and focus you on the abstract question of the public interest? Would you seek, would your Taxpayers' Alliance, which does a very valuable public job, seek to define the public interest more exactly or are you content for the public interest to be a much broader concept, rather like, say, the British constitution, which at the moment is not written down?

MR ISABY: Of which many of you are a part. I think -- again, I suppose at the end of the day it would depend on how that was defined. You know, I'm nervous about going down a route where there's a very specific definition which potentially might allow information that is currently published to not be published. So, you know, whether there's a way in which it be defined, you know, broadly enough so as to not have any impact on publication, I'm not sure.

LORD CARLILE: You support proactive publication of information on cabinet

discussions and agreements. Given that the cabinet is not a public forum, at what stage is it your view that information on cabinet discussions and agreements should be published?

MR ISABY: Well, I think we said in our submission that, you know, we're moving from a 30-year rule towards a 20-year rule and I think that's a sensible and reasonable move forward. I think, you know, any possibility of proactive publication, you know, before 20 years would be a good thing.

LORD CARLILE: Can we avoid the word proactive, because, with respect, I don't think it means very much in this context? Can you be more exact and can you tell us, for example, whether you're saying that minutes of cabinet discussions should be published immediately after the discussion has taken place or do you accept that there is a policy making space in which the cabinet should be able to discuss, including the sometimes unthinkable, to be sure that there has been some real blue sky thinking at cabinet level before people can say, oh, the cabinet has been thinking outrageous things?

MR ISABY: I think it's fair for that policy space to exist and I'm certainly not demanding immediate publication of minutes. I think in terms of a cabinet wanting to, you know, help persuade the public of the merit of the course of action it's taking may actually, you know, benefit in trying to persuade the public by being open about the discussion it's had and how they've come to the conclusions they've come to, and I think if ministers wanted to, of their own volition, on particular issues put that out there, that would be a good thing, although, dare I say it, and, again, those of you on the panel who've served in cabinets know full well that it's often the next day's media which gets a very early report of what has happened at

cabinet meetings, so ministers themselves, when it suits them, are keen to get that information out there through one channel or another.

LORD CARLILE: I've never leaked cabinet minutes, probably only because I've never been in a cabinet, Ms Isaby. But what kind of material do you think could and should be published?

MR ISABY: I mean, one of the issues we touched on in our evidence was the current debate about HS2 and how, you know, potentially tens or billions of pounds of taxpayers' money is going to be spent on a scheme which -- well, we believe the business case simply doesn't stack up and there needs to be more openness about the way that conclusions have been made to spend huge amounts of taxpayers' money on the back of, we think, a very flimsy case, and there was discussion about, you know, risk assessments, whether they should be subject to FOI and, you know, absolutely they should be. If politicians are going to go down a course where a risk assessment has said, you know, there are quite big risks here, we think the public probably have a right to know that. The politicians, you know, are absolutely at will and free to defend the decisions they've made, but they need to be held accountable for those decisions and --

LORD CARLILE: And what stage should risk assessments be exposed, because you may agree, whatever your view of HS2 and mine, that risk assessments sometimes need a degree of risk assessment themselves? There may well be a dispute about competing risk assessments which maybe a cabinet might want to resolve before it publishes risk assessments, if it does. So are you saying that risk assessments should be published at every stage?

MR ISABY: I think in general yes. I mean, again, it comes down to a presumption of,

you know, unless there is a very very convincing good case not to, then why on earth not.

LORD CARLILE: But that may be a matter of opinion. I mean, there are varied opinions, aren't there, on HS2. If you were to ask the major cities in the north their view of HS2, they would not necessarily agree with the Taxpayers' Alliance. At what stage therefore do you think it's legitimate for this kind of risk analysis to be published?

MR ISABY: Well, I say sooner rather than later. You know, we're talking in very hypothetical terms about risk assessments and risk assessments which sounds almost like something out of the Yes Minister really.

LORD CARLILE: Yes.

MR ISABY: So I can't give you a precise answer as to what should happen in that hypothetical situation, suffice to say, you know, I think moving towards more publication is the right direction of travel.

LORD CARLILE: Is sounds like you're favouring more publication on the basis of a judgment made in the public interest. Is that a fair conclusion from what you say?

MR ISABY: Yes, I think you've summed it up very pithily.

LORD CARLILE: Thank you. That's very very helpful.

The evidence of your organisation states that public bodies invite burdens on themselves by not answering requests on time and or/in sufficient detail. What would your proposals be for addressing that undoubted problem?

MR ISABY: Well, I think, you know, it needs to be told to public bodies in no uncertain terms what their responsibilities are on the law, that they have to answer

requests within a certain period of time and I don't think enough of them take that seriously enough at the moment. You know, I'm hesitant to go down the road of kind of financial sanctions, because obviously that starts involving, you know, taxpayers' money at stake. But, in order for the message to get home, I think it needs to be, you know, made absolutely clear from the highest level to tell those bodies that you have obligations under the law and you should actually carry them out, of course.

LORD CARLILE: You'll be aware that we've had many representations from public bodies saying that the Freedom of Information Act regime is unduly burdensome on them, that it's too costly and that the fee rates which are take as the standard hourly rate are simply unrealistic at 2015 realities. Do you think that's an important point or do you think it's a point which actually is made but conceals that the real overall costs of answering requests is quite small?

MR ISABY: I think it's a red hearing because, you know, the overall costs of answering requests is far smaller than the budgets that public bodies have for self promotion and their own information management about what they want to put out there, this is about what the public wants to know, who make the requests. A lot of this comes down the following, that actually, if a lot of this information was published routinely, you wouldn't actually even need to have a FoI procedure in place to get the information in the first place. You know, the nature of technology these days and the internet and so on and so forth is such that huge amounts of information could be published very very cheaply and instantly, completely cutting out the need for the process to even happen in the first place. So I think there should be far more automatic publication of information so that you wouldn't even need to go

through the process.

LORD CARLILE: What about the point that is made that sometimes FoI is simply used by -- forgive me using the term with at least one journalist in the room -- idle journalists when they can perfectly well find the information on open sources anyway?

MR ISABY: Well, if it's available on open sources, the reply will come back very quickly "here's the link of where you find the information" and I dare say -- and the same thing happens with Parliamentary questions, that, you know, you will ask a Parliamentary question and, if the information's already there, you know, you'll be pointed to where it is.

LORD CARLILE: So you think it's acceptable for a public authority to be robust in those circumstances and say this is not a proper FoI request, it's all available on open sources anyway?

MR ISABY: If the information is already there, then absolutely. It's reasonable to say "here's the information, here's the link, we've already put it on line". Absolutely. But in terms of the cost element of it, to go back to my point before, I think there's deep inefficiencies in some public bodies but the fact that some will answer requests from us very quickly within hours, giving us what we have asked for, whereas ours will prevaricate and email back and forth for weeks, even months, before giving what ought to be a pretty simple answer to a simple question.

RT HON JACK STRAW: Could I just go back to the answer you gave a couple of questions ago, Mr Isaby, where you said that public authorities ought to be more active in making information available? I think we're all very sympathetic to that. Are there particular categories of information? I mean, for example, you

mentioned one which is overseas flights by public officials, but others in that -- well, what categories of information that you're seeking do you think should just be routinely made available as part of the publication plan of the public authority?

LORD CARLILE: And can I just add to that? I was going to ask you in particular about something that your organisation has produced masses of interesting information about, which is the expenses and benefits in kind of senior executives. I mean, do you think, following up Jack Straw's question, that that sort of information should be published proactively?

MR ISABY: Yes. I mean, a lot of that is now anyway, certainly as far as kind of Government ministers and, you know, senior civil servants in Whitehall are concerned, that is now in the public domain and I think, you know, a lot of that has come about because of the pressure that the Taxpayers' Alliance and others put on from our founding back in 2004 for more transparency about where taxpayers money is going. So that culture of openness is starting to be there as a permanent thing, which is a good thing, but, you know, clearly there is more to be done.

THE CHAIRMAN: Are there some clear categories of things that you would like to see openly published in that way?

MR ISABY: I mean, look, you know, council expenditure. So the Taxpayers' Alliance is mainly concerned about money and spending lines within budgets and that is exactly the kind of stuff that absolutely should be there, you know, as a matter of course for people to see, you know, broken down, you know, down to a pretty low level as to how much has been spent on each individual line of budget and, you know, as far as that goes, the more information the better, as far as I'm concerned.

RT HON JACK STRAW: I think all local authorities have to publish details of spending above £500 now. So has that made a difference?

MR ISABY: It has made a difference, although different bodies will publish the information in more accessible ways than others and I think certainly a move towards, you know, more -- I mean obviously sharing best practice and looking towards what is the most beneficial and productive way of publishing it, certainly so that you can compare and contrast, because a lot of what we do is about trying to identify which bodies are delivering best value, which are not delivering such good value, so that you can compare and contrast and say: well, look, if X council is delivering this service for that amount of money, why can't you down the road do the same thing, and hopefully therefore push overall costs down?

LORD CARLILE: Can I turn now to a different subject? The Taxpayers' Alliance has said that it supports FOI by covering private companies delivering public services under contracts. Does that extend to charities delivering public services under contracts?

MR ISABY: Yes, I think it would, and we look at -- I mean obviously Kids Company has been in the news over the last few months, a body that was handed in excess of £40 million over a decade with absolutely no accountability to the taxpayers footing the bill as to how that money was being spent.

LORD CARLILE: Would you have a lower limit on the burden that that puts upon small companies and charities? I mean, I can give you two examples to focus on: one might be a small company possibly doing some painting and decorating on a pavilion on playing fields belonging to a council, another example might be a small mental health charity which is receiving a small number of tens of

thousands from a local authority or from a health commissioner to provide services. Are you suggesting that small organisations like that should be subject to what they would say would be a disproportionately expensive burden, or would you be prepared to set a lower limit and, if so, what?

MR ISABY: I am not going to pluck a figure out of the air as to what a lower limit should be. I think clearly you need to look at what proportion of that organisation's budget is coming from the taxpayer to decide what would be a reasonable demand to make of them. I think, you know, as far as possible it would come back on to the charity or private sector company's part, the publishing of very solid and detailed accounts of how they have spent that money, that particular chunk of money, taxpayer's money, which has come from Government or a quango or a public body or whatever, in order that the information is out there, so that there would be relatively few questions that could be asked of it.

LORD CARLILE: Why should that be the responsibility of the service provider as opposed to the Commissioner? Why cannot the commissioning authority be responsible for publishing the information about the commissionee's activities?

MR ISABY: Well, the commissionee would presumably have to provide the information to the commissioning body in the first place.

LORD CARLILE: But surely if a council commissions a charity to provide mental health services, the Commissioner will know exactly how much money it is paying for that charity?

MR ISABY: Yes, it will know how much it is paying for that charity, but, in terms of digging a bit deeper down the budget lines as to how much has been spent within that chunk of money that they've been given in order to establish, you know, where

the money has gone, you know, that will clearly be something that the commissionee would have to provide.

LORD CARLILE: Why do we need this when the accounts of companies, and indeed the accounts of charities, which for the most part are companies, need to have to be published by law anyway and, if you read the accounts which you can get on the internet, you will obtain the information which you require?

MR ISABY: I don't think the accounts, for example of Kids Company -- I've kind of singled them out because they've been in the news, but I don't think, had we have been looking at the accounts of Kids Company that, as published, would have answered the searching questions that have now been asked of them as to what happened to that £40 million.

LORD CARLILE: But let's just put Kids Company aside because hard cases can make bad law. Let's suppose there are some honest charities and honest companies around that are not criticised or questioned, is it fair to those companies to place yet another regulatory requirement on them when the information may well be available by open source means anyway?

MR ISABY: Well, I am not sure that the detailed information that we think ought to be in the public domain would be available through open source automatically. Again I am loathe to heap particular burdens onto businesses, not least because successive governments have heaped all kind of burdens on to them over the years and I'm instinctively a kind of deregulation. But if a company or charity is a beneficiary of taxpayers' money, then I think that adds a certain onus on them to account for where it's gone.

LORD CARLILE: Yes, thank you.

You seem to agree that vexatious and over costly requests should be dealt with by existing exemptions. Some of the evidence we have is that public authorities are reluctant to use those exemptions. Is it your view that better operational guidance is needed to public authorities so that they know the circumstances in which they will be forgiven for using those exemptions?

MR ISABY: You know, maybe some extra operational guidance could be helpful but, again, this comes down to the fact we think the section 14 rules work pretty well at the moment but I am not --

THE CHAIRMAN: But, having read the evidence on this from some of the public authorities, because a significant number of them say that they find this a very difficult thing to operate, that, despite recent judgments about it, that it remains a troublesome area as far as they are concerned?

MR ISABY: Look, you know, the situation is never going to be perfect. But I think --

THE CHAIRMAN: You say there are sufficient exemptions in place, and I understand that, but if the people concerned find it difficult to operate, then that suggests that there may still be a problem with the way in which it's been defined.

MR ISABY: I have not read all the evidence from all the public authorities that are submitted to you because that would take a very long time.

THE CHAIRMAN: We know.

MR ISABY: But at the end of the day, there are some authorities which, as far as I am concerned, seem happy with the rules as they are and I think, you know, the guys who are dealing with it happily perhaps need to be liaising with the people who are struggling with it to work out what could be done better and to share best practice. As I say, if that does require some new operational guidance to bring together how

the rules should be working, then so be it.

THE CHAIRMAN: Okay, I think thank you very much.

Is there anything that you would like to say that we have not covered? Because our time is up, I'm afraid.

MR ISABY: I don't think so.

THE CHAIRMAN: We have a lot to get through today.

MR ISABY: I think that pretty much covers everything. I'm aware I'm the warm-up act for some far more distinguished witnesses!

LORD CARLILE: You've warmed us up nicely.

THE CHAIRMAN: Not at all.

MR ISABY: Thank you very much for having me.

THE CHAIRMAN: Thank you very much for your evidence and thank you very much for coming. It's been very helpful.

MR SAM HAWKE

THE CHAIRMAN: Good morning.

MR HAWKE: Good morning.

THE CHAIRMAN: Thank you very much for your evidence and thank you very much for coming this morning.

MR HAWKE: Thanks for inviting me.

THE CHAIRMAN: Is there anything you would like to say by way of an opening statement?

MR HAWKE: Just a few brief words, if I might.

It is Liberty's view that the evidence on the Freedom of Information Act is clear, it is working and it is working well.

It has more or less done and it is doing what it set out to do, and that is achieve a greater openness in Government and measure of public accountability, a crucial tool in providing citizens -- given that they are the largest group of people who actually use the Act on a day to day basis at both central and Local Government level, and it also saves an enormous amount of public money for what is ultimately quite a small budgetary expenditure, whether it is MP's expenses or local council's expenditure on luxury cars and a vast number of other issues of public expense that have been revealed. It is clear that the Act is providing what it basically was tasked with doing.

But I think that something Liberty can speak to more particularly is its impact on access to justice. We at Liberty take on cases and intervene in existing ones on issues of significance and public importance, such as the discriminatory effect of police stop and search powers and it is in cases like that, and along with many

other people, and the ordinary citizen uses the Freedom of Information Act in their own cases, that enable us and others to get key information necessary for bringing a claim and investigating aspects of it that we cannot get through litigation later and to supplement the process of litigation to vindicate people's rights and challenge decisions of authorities where they have done wrong.

So I think in an area of real public importance and in an era of quite significant retrenchment in access to justice through changes to Legal Aid, any further attempts to impose fees, widen exemptions and so forth would represent an even more retrograde step in providing access to justice.

I will just close by saying that the Justice Committee went through the evidence in 2012 pretty thoroughly and came to conclusions that, in our view, had not been displaced. The evidence is still clear. The Supreme Court decision in Evans clarified the position in some respects, but it is completely consistent with the use of the veto hitherto and we expect going forward as well. So in our view, we think the evidence shows that the Act is working well and changes to widen exemptions or anything else should not be made.

DAME PATRICIA HODGSON: Thank you.

You introduce the full range of the Freedom of Information Act. As you said, the information that gives citizens what they need to know in terms of wide range of Government services, police, health and so on, you make a very important point about access to justice.

I don't think that there would be a great deal of disagreement with you on that.

But can I narrow down the area of discussion to the safe space for policy deliberations.

In your evidence you argue that there is no basis for creating protections already available to public bodies and ministers that's in sections 35 and 36 and the power of the veto that you just referred to under section 53.

Can you expand a little on your reasoning in that particular area?

MR HAWKE: Well, in our view it is clear from the evidence available that section 35 and also section 36 act as completely adequate safeguards in protecting what are legitimate Government and public interests, which you have just described. It is clear that the Tribunal, along with the Information Commissioner, are continuing to interpret what it means for disclosure to be and to not be in the public interest. But in case after case, the Tribunal has decided where the public interest lies and we believe that it is the job of the Tribunal to continue doing so and the evidence shows that it has done so correctly.

The supposed chilling effect that is alleged by Government ministers in evidence after evidence of bodies such as UCL's Constitution Unit, many others that gave evidence to the Justice Committee, the evidence is weak on that. There is just as much evidence, if not more, of an improvement effect that you might describe. The openness that the Act requires is just the sort of thing that is going to focus policymaker's minds on improving their internal records and improving the level and quality of deliberation that they go through as they reach decisions of public weight.

DAME PATRICIA HODGSON: So can I just be clear: you are not challenging the legitimacy of the idea of a safe space?

MR HAWKE: I think everyone recognises that there are legitimate public interests to be protected, but that just a level of disagreement is often at the definition of what a

safe space involves.

DAME PATRICIA HODGSON: Indeed.

MR HAWKE: An entirely protected space that admits of no openness or transparency is plainly not something that the public would accept and which the regime that's been instituted, rightly, allows. Now, a retrenchment on that just simply wouldn't be justified in our view.

DAME PATRICIA HODGSON: We heard from the Freedom of Information Commissioner last week that both he and Departments had become more adept over time at understanding what sections 35 and 36 might mean and that he had revised guidance. Would you consider that that might mean it is not as clear as it might be?

MR HAWKE: As with all decisions in law and in policy making where the public interest needs to be safeguarded, it is going to be decided on a case by case basis.

Clear and totally bright line rules are just not going to be possible.

Of course, as other people have said during evidence here, you could have clarity by simply exempting absolutely everything and that is not the level of clarity that anyone I think wants and recognises as legitimate. You are going to have a case by case assessment of what is in the public interest and that is just the sort of thing that the Information Commissioner and the Tribunal are tasked with doing and have shown to be able to do adequately.

DAME PATRICIA HODGSON: In your evidence, you say nothing has changed that justifies a departure from the conclusions of the Justice Select Committee. Do you think the Supreme Court ruling on the veto changes the operation of the Act in any way?

MR HAWKE: We don't think the evidence shows this. We think the use of the veto hitherto has been very spare, it has only been used, I believe, seven or eight times, depending on how you define it technically or otherwise and that is the Government's guidance on the matter, the guidance that the Coalition Government released in 2011 made clear that it has to be used very sparingly and I think that is the way it was also presented as the bill was passed in Parliament. There was very little suggestion, if not -- there may have been no suggestion, in fact, that it was going to be used routinely or at all against Tribunals; rather, it was presented as a counter-balance to the decision to make the Information Commissioner's decisions binding.

In fact the appeal system that was instituted was actually presented as the bill was passed as a parallel protection for Government decision making with the veto.

So in our view, that is all consistent with the Supreme Court's decision in Evans, which found that the circumstances in which a veto can be used are very slim and, given that there is just something constitutionally dubious about the use of a veto against a properly reasoned decision of a Tribunal -- and also it is important not to forget the circumstances of that case, which are very fact specific: a very well-reasoned decision of the Tribunal was vetoed in a manner which didn't engage, which both majorities of the decision found with the reasons provided.

So, in our view, there should not be anything really surprising in the Supreme Court's decision and that is why the Justice Committee's findings on that just simply are not dislodged.

DAME PATRICIA HODGSON: We do have evidence from other quarters suggesting that the judgment has created uncertainty about the use of the veto. The

judgment itself emphasised that some aspects of the legislation were not crystal clear.

MR HAWKE: I mean, there is always going to be areas of any provision that have aspects of in clarity and that is just the nature of legislation is that it cannot provide for all contingencies in all circumstances before the fact, and again, that is also why we have an independent judiciary tasked with interpreting them in light of ongoing facts and updated principles.

Again it is our view that the way in which you resolve those aspects in clarity are through judicial interpretation by our independent judiciary and it is exactly what happened in Evans.

DAME PATRICIA HODGSON: From what you said, you seem to agree with the Justice Select Committee that the ministerial veto is a necessary backstop to protect highly sensitive material?

MR HAWKE: It is our view that, as the evidence stands, we oppose changes for it to be made wider and for there to be wider exemptions as well to supplement any veto. We don't think that the evidence has changed to dislodge the Committee's finding, even though we may find the notion of a veto constitutionally troubling.

DAME PATRICIA HODGSON: Thank you.

Now, you do seem to accept, and you say it is inherent in legislation anyway, that there is considerable uncertainty about the operation of sections 35 and 36 and the interaction with the public interest test, and you have just repeated that, where it is not clear, it is for the courts to decide.

Could I just ask you again whether or not the drafting of these sections might not be a little clearer and, if they are not clear enough, this in itself could have

a chilling effect?

MR HAWKE: I think the evidence as it stands from people from whom you have heard evidence, such as the Information Commissioner and others, has been that the legislation broadly is clear enough. It is working well. There is a problem of a kind of selection bias insofar as the high profile decisions and the ones that reach senior officials are the ones about which a furore is generated. At the ground level of Freedom of Information, the sort of requests that people day-to-day use, ordinary citizens use, against their local councils and, from time to time, Central Government, people know exactly what needs to be done, which exemptions can be used, which cannot.

There is always a danger, I think, in attempting to legislate in light of a very small number of very high profile cases where Cabinet ministers may wish a little bit of information wasn't put into the public domain. I don't think there is any evidence to show that any retrenchment needs to be made on the basis of those cases.

RT HON LORD HOWARD: If, as the Supreme Court found in the Evans case, the legislation is not crystal clear, isn't there a case for Parliament to look again at the legislation to ensure that it properly and clearly reflects the will of Parliament, rather than relying, as you suggest suggested, on judicial decisions?

MR HAWKE: Well, I don't think those two things are incompatible. I mean, part of what it is to interpret legislation, as Evans did, is look at the will of Parliament. There was a great deal of interpretative weight placed on exactly what Parliament intended and, as I said, on the facts of the case, the veto, as Evans interpreted, was consistent with what was said during the passage of the bill and the work that's been interpreted henceforth. So Liberty doesn't think that there is this

disconnect between Parliament's intention behind the scheme of the Act, including the veto, and the way it has been interpreted hitherto.

RT HON LORD HOWARD: Well, the Supreme Court found that there was a disconnect, because they thought that the legislation was not crystal clear. So if the legislation is not crystal clear, I am sure it wasn't Parliament's intention to legislate in a way that wasn't clear, isn't there a case for Parliament looking at it again to ensure that clarity is achieved?

MR HAWKE: Well, I say let's look at what the Justice Committee found in Parliament about the legislation at a time where any reasons for thinking the legislation was not crystal clear in my view would have applied just at that point and they said there is no case for making any change.

THE CHAIRMAN: Quite. But the Justice Committee was before the Supreme Court decision and indeed the Justice Committee said the veto was an important part, if I remember, of the legislation.

MR HAWKE: Precisely, and that is why we say that the Supreme Court's decision is not inconsistent with what was said by the Justice Committee. The veto remains, its use will be sparing. As was recognised all through the last decade of the Act's implementation, the veto can only be used in a small number of cases very, very rarely. That is why we say there is no real change since the Justice Committee's findings to displace them, including in relation to the veto.

LORD CARLILE: Thank you. Earlier in your evidence, referring to the Evans case, you describe I think the Government's behaviour as constitutionally devious?

MR HAWKE: Dubious.

LORD CARLILE: Sorry, I misheard you. What is the dubiety you are referring to,

bearing in mind that there is an issue here, which I am sure Liberty would wish to address, about the separation of powers and what are the legitimate roles of ministers and the courts?

MR HAWKE: Exactly. Just for clarity, my description was in relation to the power of veto against properly and well reasoned decisions of Tribunals. That is quite a different proposition from a claim that the veto could never be used in any circumstances whatsoever on the basis of constitutional dubiety.

LORD CARLILE: But can we take it --

MR HAWKE: What I claimed was that -- and in line with the Supreme Court's decision, that a use of the veto against the Tribunal and part of the independent judiciary with the same status in its judgments as the High Court is constitutionally dubious and that is what the majority found. That is why the use of the veto will have to be so rare in its view.

LORD CARLILE: Can we take it that, subject to judicial review principles, of course, Liberty would not wish to undermine the separation of powers so that neither judges take the place of ministers nor ministers usurp the role of judges?

MR HAWKE: Absolutely and the separation of powers cuts both ways. On the one hand Parliament legislates and the judiciary interprets it. One important safeguard on the separation of powers is not allowing the executive to override decisions of that judiciary.

LORD CARLILE: Ever?

MR HAWKE: Well, it is extremely -- again, it is much easier to focus on particular cases and in this particular case there was no -- the constitutionality of doing so was clearly bad.

LORD CARLILE: But you cannot say never, can you?

MR HAWKE: In our view the separation of powers precludes an ability of the Executive to simply override decisions of the judiciary.

LORD CARLILE: Ever? Okay.

THE CHAIRMAN: Even if Parliament legislates for it?

MR HAWKE: No, Parliament remains sovereign under our system and that is a hugely important constitutional principle. Simply through the interpretation of legislation --

THE CHAIRMAN: But if Parliament had made it crystal clear that it had intended a veto to be used against a judicial decision, you would still object to that?

MR HAWKE: At the policy level we think that would be a dangerous step to take.

THE CHAIRMAN: Right.

MR HAWKE: In our system, plainly that would stand. The judiciary is unable to strike down legislation but it would be important to interpret that legislation as consistently with fundamental rights as possible and that is exactly the principle that the court in Evans used.

RT HON JACK STRAW: Mr Hawke, you are obviously very familiar with the Supreme Court's decision in Evans. Do you accept, leaving aside the merits of the decision, that the effect of the decision was unquestionably, and admitted by the majority Supreme Court justices, to restrict the circumstances in which the veto could be exercised where it was exercised over a decision which had been appealed?

MR HAWKE: In our view, the evidence over the last 10 years is pretty clear: the use of the veto is very rare.

RT HON JACK STRAW: That is a matter of fact. But is it not also the case, and as brought out by Lord Wilson when he said in terms that the decision of the majority was "to re-write the Act", that the consequence of the Supreme Court's decision was to narrow very significantly the grounds on which the veto could be used where this was seeking to override a decision of a court or Tribunal?

MR HAWKE: If it is the case that it was understood that the veto could be used for that purpose, perhaps. But again we don't say that that was what was understood by the use of the veto in general terms. There is very little evidence to show that that was what was contemplated in Parliament as the bill was passed. It was a counterpart to the Information Commissioner's ability to make binding decisions. If it had been said this is a veto against the decisions of the Tribunal, the matter might have been different but it was not. It was what I previously said. Now in those circumstances, I think it is very difficult to say that the Supreme Court's decision significantly or at all really narrowed the circumstances in which people generally and legitimately believed the circumstances of the veto were available. I think the legislative history in the passage of the bill shows that.

DAME PATRICIA HODGSON: Okay. We will move on to another aspect of the Act. Do you consider that it imposes a burden on public authorities?

MR HAWKE: I think discussion of burden is inappropriate. I think this is just simply what a government pays for in remaining open, remaining transparent and remaining accountable. It is basically a cost of running a decent Government and it is a very very small cost in overall terms. A constant refrain, as many people have said, it is five times less expensive than running the Government's public relations service, which I think is a serious -- that suggests something about the

more we could be doing to make Freedom of Information the better in this country. So I think in those terms the use of the word "burden" I don't think is appropriate and I think there is sufficient safeguards in the Act already to stop overly costly and vexatious requests. We already have section 14 that again has been interpreted in a way beneficial to local authorities and the Government to stop disproportionately costly requests. I think that provision is a targeted way of cutting costs, where it is appropriate. Introducing fees, for example, would be an extremely blunt instrument. I think that is what the case of Ireland demonstrates, where 50 per cent of requests under the Act were reduced after its introduction of fees and then later they were removed because, for very good reason, they were deemed inappropriate. Introducing fees just has no way of selecting between what the Government believes are meritorious requests and which are not. A provision like section 14 enables you to select between requests which are too costly, vexatious and normal requests that should be facilitated under the Act.

DAME PATRICIA HODGSON: So you would argue that section 14 is clear enough. Why do you think public authorities are reluctant to use it?

MR HAWKE: I think public authorities would sometimes -- well, I think on the one hand, as the previous person who gave evidence stated, there are public authorities who don't feel there is a problem with section 14 and who feel that they are able to use it properly. So I am not sure the preponderance of evidence goes in favour of a view at all that section 14 is unclear, and especially in light of recent Tribunal decision making that has interpreted the provision favourably to those who want to block off disproportionate requests.

So yes.

DAME PATRICIA HODGSON: Do you think the details of the application of -- the framework for requests and how they are, when and how they have to be delivered is appropriate in the current Act.

MR HAWKE: As we said in our written evidence, Liberty has difficulties with the Act in the over-broadness in our view of exemption categories, the use of class exemptions where specific exemptions should be deployed or the use of, say, a prejudice test rather than something of greater harm. There are other difficulties that could be highlighted, including the delays in facilitating requests by public authorities.

But again we think that the evidence for and findings of the Justice Committee are clear, there is just no case for changing the Act at this stage.

DAME PATRICIA HODGSON: Thank you, Mr Hawke.

THE CHAIRMAN: Mr Hawke, thank you very much. Is there everything you wanted to say or is that -- it sounded like a closing remark to me.

MR HAWKE: Thank you.

THE CHAIRMAN: Thank you very much.

COUNCILLOR DAVID SIMMONDS

THE CHAIRMAN: Thank you very much for coming. Thank you for your evidence.

Is there anything you would like to say by way of opening remarks?

CLLR SIMMONDS: Thank you very much indeed, Chairman.

Three brief comments by way of introduction. The Freedom of Information Act, when it was brought in, in many ways was not a big surprise in the context of councils, because councils have been historically a very open part of the public sector. Council meetings are open to the public, anyone can come in, listen to the discussion, see what is being decided, see the context of the debate. Papers are available in local libraries, available on council websites. So access to information is strengthened in fact further by the ability of the public to both fill meetings, but also to see any item of expenditure over £500 itemised on council websites has been hugely helpful.

The challenge I guess is that the cost of the Freedom of Information Act, whilst globally not a big figure, can mean quite a lot in the context of some councils. So the example of Broadland in Norfolk, which is in the submission, an entire market town's council tax revenue for the year spent handling FOI requests and clearly you could fill quite a lot of potholes with that.

So the challenge I guess is that what is in global terms a good thing can be rather a blunt instrument in the context of one individual relatively small organisation.

Then I think finally from a personal perspective as a councillor, it has sometimes created a bureaucracy around what used to be a fairly straightforward discussion with a member of the public. So when somebody sends me an email with a question and finishes that email saying "I would like you to treat this as an FOI",

I am in a situation of saying "well, I could just tell you the answer to the question. I do know, and I could tell you now. But because you have said it is an FOI, I cannot tell you the answer to the question. I need to send it to the FOI officer who has to log it, because we are required to do that to comply with the Act, and then we have to consider whether, as a corporate body, we maintain a register containing the information which you have asked for." The response to an extent is: if you would like to withdraw your FOI request, I can just tell you now, but, if you wish to do an FOI request, you probably need to wait a month, at which point you will get an email from an officer telling you that we don't maintain a register of that information. I don't think that is hugely helpful for those sort of light touch interactions that can take place between local elected representatives and the residents that we serve.

THE CHAIRMAN: But in that case, you can typically go back to the person and have the conversation that you have just mentioned?

CLLR SIMMONDS: I would. However, once FOI has been mentioned, it feels like a genie is out of a particular box and that creates risks.

RT HON JACK STRAW: How would it be a breach of the Act if you simply provided the information?

CLLR SIMMONDS: So the situation with the Freedom of Information Act, as it operates in the context of a local authority, is it has to be dealt with, it has to be logged, it has to be processed in accordance with the requirements. So the question is: does the organisation, as a corporate body, if you like, hold the information which has been requested under the Freedom of Information Act, and the answer may be yes or no. In many cases we simply don't maintain in an official capacity

registers of all sorts of information. So a good example would be expenses claims for councillors for hospitality. So all of that information is published on council websites so you can read it. But sometimes people will come back and say "well, are you perhaps getting hospitality by taking one of your officials with you and getting them to pay?" If the council as a body does not maintain a register of that information, which it quite likely does not, because the answer in almost every single case will be no, and the answer in the financial cost would be nil, pretty much always, nonetheless, we are not able to say that the answer is nil, we have to say the answer under the terms of the Freedom of Information Act is that we do not maintain a log of that information. That is simply sometimes unhelpful for dealing with the residents who I think quite legitimately may be asking those questions.

RT HON LORD HOWARD: Good morning, Councillor.

When you do reply, as you said you do, in the way that you've suggested that you do, in what proportion of those cases does the applicant or the correspondent, however you wish to describe him or her, say "Fine, well, in that case if you can give me the information more speedily, without going through all the formalities required by the Act, please do so"?

CLLR SIMMONDS: It very much depends on who the questioner is, and this is where I think it can lead you down a real bureaucratic cul-de-sac, in that the purpose of the Act clearly is to cover those corporate sets of information which can be hugely wide-ranging, which some organisations will maintain and some organisations don't.

So if it is one of my constituents who is asking a question on how much we spend

on software licences, for example, as was the case recently, generally I have a relationship with them and they are reasonable satisfied with my ability to answer that question.

If, on the other hand, it is a commercial organisation that wants an official answer, then they may well say "no, sorry, I am not willing to take you at your word, I want the organisation to produce the official answer" and the official answer may be: we don't hold that information. That is one of the challenges with the Act, it creates these various different bureaucratic walls --

RT HON LORD HOWARD: Although your response would be an official answer. You would be speaking on behalf of the Authority, so it would be an official answer.

CLLR SIMMONDS: But not within the terms of the Freedom of Information Act.

RT HON LORD HOWARD: I am not sure about whether the Act does require that, but that is very helpful.

You have also very helpfully in your evidence submitted a number of detailed proposals for amendment of the Act and I am not going to go through them all with you, but hopefully, those details will make my questioning shorter than it otherwise would have been.

Are you able to give us -- can I ask you a general question to begin with -- any sort of general description of the kind of information that your members want to protect using section 36?

CLLR SIMMONDS: Yes. I am very conscious we have experienced ministers, those in the top levels of Government, on the panel today and those will therefore have the experience of the discussions with officials when you are looking to think the unthinkable, and as we are going through a process at the moment of very difficult

financial challenges, clearly in town halls and civic centres up and down the land, councillors like me are asking officials to prepare responses to the current financial situation which will affect people's jobs, will affect important services.

In many cases it is clear that once those proposals fall under the sight of a politician, the answer will be we are simply not going to do that, and we would never have considered it, but it is nonetheless something which remains an option.

So I think the challenge both for officials and for politicians is to maintain, in the way that already exists in Central Government, and was referred to I think by Lord McNally in his previous evidence, the safe space in which to have the conversation about what options are, what options would be acceptable and what would not. I think the big risk at the moment, and you see this in many different walks of life, is that you can create an attitude of mind that you might describe as defensive governance, so the question in the mind of that official, or indeed that politician, is not "how do I get the very best and most open and transparent piece of advice?", it is "how do I ensure if I had to defend this in public that I have a piece of paper that suggests that I am not responsible for the thing that has now gone wrong?" And I don't think that is helpful.

So I think the availability of a safe space in which politicians and officials can debate and discuss and make decisions and can then be held accountable for those decisions, once they have been made in the public domain, is absolutely right, and in my view the Act creates that in Central Government, but it is somewhat limits its applicability in respect of local authorities where similar types of discussions are going on.

THE CHAIRMAN: Could I just ask: what is the experience of those cases when they

are challenged and when you seek to withhold the information on the grounds of a safe space, et cetera?

CLLR SIMMONDS: In the case of a local authority, it really is not the case that there is such a thing as a safe space and the vast majority of what goes to a local authority's cabinet or executive will already be in the public domain, so, with the exception of things that are commercially confidential, that will be the case.

But a good example, and one which I think the ICO referred to, is the question of risk registers, which clearly are something which would fall to be made available when they are requested. Clearly the local authority, in compiling risk registers, there is a need to take account of that wider local community and the responsibilities that we have, as, for example, civil defence authorities.

To give a really good practical example of that is most hospital radiology departments rely upon radio isotopes to undertake some of their work. They're also commonly used in many different university departments and in some industries. One of the risks with those is of course, although they are not useable to create a nuclear weapon, they could be used by those who were so inclined to make a conventional terrorist device considerably more problematic. It is very clear from the experience that I have had in discussions with other organisations, Home Office, police, et cetera, that they would not be terribly keen for public documents listing the locations where all that material could be obtained by undesirable organisations to be made publicly available. So that for me is a example of a significant risk, something which needs to be very much on my radar as a local councillor, knowing that this may be something that my community and people that my organisation employs will have to deal with, but which in that

discussion with those other organisations is unlikely to find its way into a risk register. Whereas the creation of a safe space where that can be logged, so that, should an incident occur, it is clear from the Government's point of view, it is clear from those who are trying to deal with what happened and the response, what happened, how it was planned and how it was dealt with, would be helpful, but publishing that information would in the short term, I think, be regarded particularly by those other organisations with a very legitimate point of view, as not in the public interest.

RT HON LORD HOWARD: But would you not think the Act as it is currently drafted provides you with the protection you need in that particular circumstance?

CLLR SIMMONDS: I think it is clear from the responses from councils up and down the country that they feel, no, it is not. That although --

THE CHAIRMAN: The public has to be.

CLLR SIMMONDS: In the vast majority of cases, certain around half the requests that come in are for commercial or journalistic purposes, the remainder being from members of the public and other organisations. But it does to me lead to a lack of clarity where a safe space, it would be abundantly clear that this was a context in which those discussions could take place and all parties knew that those conversations were taking place on a basis that was confidential.

RT HON LORD HOWARD: But, to answer Lord Burns' question, that has not been tested, so you cannot say that the Act that as currently drafted would not provide the protection that is needed in the particular circumstance you have identified.

CLLR SIMMONDS: I think the lack of certainty has created such a lack of confidence in sharing information in some cases that things that, in my view, should be written

down and recorded but should be maintained as confidential for the time being in the public interest are simply not being so, and therefore an exemption in the way that it applies to Government creates the opportunity to have those conversations and, once decisions have been made, politicians can then be held accountable for them.

RT HON LORD HOWARD: But it has not been tested.

CLLR SIMMONDS: That particular example has not been tested, no.

RT HON LORD HOWARD: No. Okay. In terms of the qualified person requirement, you express some doubts about the need for that. Does it give any benefits? Would there be any disadvantage in removing it? What is your thinking about that? Would you like to elaborate on that?

CLLR SIMMONDS: Yes. The submission which has been sent in talks about this in a bit more detail.

I think the key concern I guess from a council's perspective is to make the process as simple and as straightforward as possible. The Information Commissioner said in his submission and his evidence that the organisation does not have the capacity to provide a lot of the support which perhaps would be useful to organisations that are subject to the Act and so, if some changes to the situation with a qualified person would help that, then it would seem to be an appropriate way forward. But beyond that I do not have a great deal to add to what is in our submission.

RT HON LORD HOWARD: Right. Many of your members, you say, have expressed concern about requests made by commercial bodies for financial advantage.

In your evidence, you suggest that applicants should identify the public interest which is

relevant to their request. Do you think that would be a -- how would that work and do you think it would be a sufficient protection against what you regard as unjustified requests made for commercial, as opposed to public, interests?

CLLR SIMMONDS: This body has been very keen to have some practical suggestions about things that might be done to improve the operation of the Act, and that is one of the things that might help. So we know around a quarter of the FOI requests are from commercial organisations and what they are invariably asking for is tailored versions of information that is already in the public domain. So the council website will contain the itemised list of expenditure but they are asking for that itemised list of expenditure to be reformatted in a way that enables them to demonstrate that their product is cheaper or that they think they can make a particular saving, or that they are more competitive than another company, or indeed to contribute to the creation of content and I have personal experience of this in the IT and software area, you can see that is what it is designed for.

I think the concern that councils have is when you calculate what that costs, and, the example given, the round-robin requests were sent to 200 councils, taking 15 hours each to process. Taxpayers picked up a bill of £75,000 to deal with that request. That is just to deal with the request and that is tabulating information that is already in the public domain into another format for a commercial organisation.

I think the concern that we have is that it is hard to say that one business's commercial agenda constitutes a wider public interest and therefore there needs to be some form of filter.

THE CHAIRMAN: Is it really the same information that has just been reformatted?

CLLR SIMMONDS: Yes, it is exactly the same information. I think we all know context is all when it comes to information. But a very practical example with IT, councils all publish their expenditure over £500, so, looking at that register, you could, off your own initiative, as a researcher for an IT company, identify what that council is spending on software licences. However, many of those businesses say: well, rather than going through the council website, I am going on send an FOI request asking them to tabulate that information so I just get a nice easy figure.

THE CHAIRMAN: Why don't you say that the information is already available?

CLLR SIMMONDS: Because, again, the requirements of the Act is the provision -- and I am just trying to remember the terminology -- of the form acceptable to the applicant which the local authorities is required to comply with. So in that situation if the applicant says "I don't want to read it in the form that is on the website and I want it put together in a table like this", then the applicant is able to ask for that.

THE CHAIRMAN: Again, has that been tested?

CLLR SIMMONDS: That one has certainly been the subject of extensive testing and, as far as I understand it, it is absolutely clear that the local authority is required to.

LORD CARLILE: Are you saying that, when that has been tested, the word "reasonably" has not been implied into the question of format? Reasonably acceptable to the applicant.

CLLR SIMMONDS: "Reasonably" does not form part of the wording and I don't have the full detail in front of me but I know the phrase. There is a whole series of provisions, but one of them is the right of the applicant to request the information in

a format acceptable to them and this is where a great deal of the noise in the system, I think, around commercially driven requests arises.

RT HON LORD HOWARD: Isn't there a bit of a confusion in what you have told us because your last answers have criticised requests for information made where the information is already available. That is one category.

Information that is sought for commercial reasons is a separate category. They may overlap but suppose the information is not available already, albeit in a different form. Do you still regard it as objectionable that it should be sought for commercial reasons? After all, if that information enables the service to be provided more economically or more effectively, isn't that a public interest?

CLLR SIMMONDS: I don't think there is a contradiction. I think there are a number of different categories of information but I think addressing the specific question, what is clearly happening is a commercial organisation is moving on to local taxpayers the cost of research in the pursuit of their commercial objectives. Now, we know in many of those cases --

RT HON LORD HOWARD: Well, that is only the case if the information is already available.

CLLR SIMMONDS: Yes. So the register -- in terms of councils' publication of information, as I touched on at the beginning, councils are extremely transparent organisations, so that information is published, but.what we are seeing is organisations that are saying: rather than use my organisation's resources to put that into the form that suits my particular commercial purposes, I am going to ask the taxpayers to meet the cost of having that work done for me.

RT HON LORD HOWARD: Does that mean -- I want to try to get this absolutely

clear -- that you would not object to applications that are made for commercial reasons if the information is not otherwise available?

CLLR SIMMONDS: Well, if the information is not held by the organisation, then it would fall outside of the scope anyway --

RT HON LORD HOWARD: Well, if it is not held by the organisation, the Act does not apply. But if it is held by the organisation but is not otherwise publicly available, but is requested for commercial reasons, do you regard that as objectionable?

CLLR SIMMONDS: I think this is another one where context is all, because it leads into the discussion about redaction and the cost of that.

RT HON LORD HOWARD: Well not necessarily. That would be a different objection. If you are talking about redaction, of course that is a different objection. I am trying to pin down whether your sole objection is that the information is needed for commercial reasons or you would not object in that category. That is what I am trying to get your view on.

CLLR SIMMONDS: I think the issue of the information being used for commercial purposes is not to me in any sense a bad thing. What is concerning is someone saying: I have that information freely available to me --

RT HON LORD HOWARD: We have established that. Thank you very much.

CLLR SIMMONDS: I want you to pay to put it in a better format that is more commercial for my own purposes.

THE CHAIRMAN: The same surely goes for round-robins. I mean, you cannot object in principle to round-robins because they are a very effective way of comparing performance?

CLLR SIMMONDS: No, and I don't think there is any principle objection to any of the

elements of the Act. As I say, context is all and one of the issues with round-robins is whether you get the context that tells you the true picture of what that information is intended to tell you.

LORD CARLILE: Can I ask the LGA possibly to go back and write to us about the effects of section 11 of the Act in relation to the answer you gave about giving information solely in the way the applicant requests? Because, I must say, it sounds to me, looking at section 11, and the guidance given by the Commissioner, as though you are a pretty soft touch and ought to tighten up your act somewhat and let us know whether really what you said is exaggerating the position.

CLLR SIMMONDS: I will be pleased to check that. It certainly is -- that is the strong view that is reflected in the research that has been done by member authorities.

RT HON LORD HOWARD: Well, that brings me to my next question, which is simply why don't local authorities use the power to refuse vexatious requests more frequently?

CLLR SIMMONDS: We do, but I think the issue that is referred to as much as anything is not so much the vexatious individual requests, it is the vexatious questioner who sends in a request saying how many members of staff do you have whose first name begins with A, how many members of staff do you have whose first name begins with B?, and when challenged says "I am entitled to ask this information under the Act". I don't think in the grand scheme of things the cost of that is huge, but it is a cost that falls on taxpayers and I think it is that issue of how you identify someone as a vexatious questioner as opposed to an individual question is vexatious which is probably of most concern to councils.

THE CHAIRMAN: How much use is made of it, vexatious requests exemption?

CLLR SIMMONDS: It will very much, I guess, depend upon what the question is and extent to which the person is known to the individual Freedom of Information Officer who is responsible for dealing with it, and I guess that would be true of any organisation.

So there are some requests for information which might be seen as either manifestly vexatious or extremely frivolous and lots of examples have been talked about. One of the most recent ones was a request to know how many exorcisms had been paid for by the local authority on public buildings in recent times, which I am sure that is of great interest to people compiling stories for side pages of newspapers, however it is hard to argue that is something which is worth spending a lot of taxpayer's money answering.

I guess where they become more complicated questions is where you have a small number -- and it is a small number -- of people who seek to use their freedoms under the Act to ask any question they can possibly think of on the basis that they feel the local authority has to answer it, and the individual request may of itself not amount to much in terms of answering, but if there are 10, 20, 30 of them coming in from the same individual every week, the cumulative workload of that for a particular public body may be quite substantial.

RT HON LORD HOWARD: Would the vexatious request exemption be used in that situation?

CLLR SIMMONDS: As I understand it, it refers to the individual request and not to the questioner. So the authority would not be entitled to refuse the request on the basis that the person had submitted many hundreds of like requests for no obvious purpose in recent times.

RT HON LORD HOWARD: Has that been tested?

CLLR SIMMONDS: That is a good question and I think we could write to you and let you know what the position is on that.

RT HON LORD HOWARD: Finally I would like to ask about a very interesting suggestion that you make in your evidence which is that the Information Commissioner should engage in a dialogue with local authorities prior to his issuing a decision. How do you think that would work in practice? How do you suggest that would work?

CLLR SIMMONDS: That is the practice that is already operated by OFSTED, the Care Quality Commission, many other regulatory bodies in this context. And the advantage of it essentially is to avoid some of the misunderstandings that have happened in the past. There has been an issue of the capacity. The Information Commissioner, I think they've acknowledge that they have that lack of capacity to engage as widely as they would like to. On those occasions where it is clear perhaps that a judgment will have consequences for the wider sector, for example, which should be prepared for, or where a judgment seems to be somewhat at variance with what was previously expected, the opportunity to engage in a dialogue, and, if necessary, if there are things that are still in dispute, correct those, would seem appropriate. That is why, when OFSTED or CQC gives a judgment, whether adverse or negative, they will say: this is what our judgment is going to be, there is an opportunity if you think there are errors of material fact, for example, where you can tell us that and we will have an opportunity to consider that before we make a public statement about what has happened.

THE CHAIRMAN: Thank you.

RT HON LORD HOWARD: Thank you very much.

THE CHAIRMAN: Thank you very much for your evidence and, I hope you will see we have been particularly interested in those specific cases which you have mentioned which indeed it is very helpful to have your evidence. I think the push-back that we are putting is to what extent are councils and other public authorities actually using the exemptions and abilities which are within the Act in some of these cases and that is what, if possible, we would like more evidence on.

CLLR SIMMONDS: If I were you, I would be asking the same questions, so thank you very much indeed.

THE CHAIRMAN: Thank you very much.

RT HON LORD HOWARD: Thank you.

MS NICOLA DANDRIDGE

THE CHAIRMAN: Good morning and thank you very much for your evidence and thank you very much for coming to see us.

Do you want to say anything by way of introductory comments?

MS DANDRIDGE: I would like to make a couple of points, if I may. Thank you for inviting us to contribute to this evidence session, first of all. But before moving on to those two points, can I make a more generic observation that, overall, universities who we represent are absolutely committed to the overall aims of the FOI legislation and openness and transparency. It is its application and its application to universities that we have reservations about. That commitment to openness I think is very evidenced by the fact that in the UK universities are pretty much in the forefront globally in terms of open access to research and research findings and working out ways in which that research can be shared in appropriate ways publicly, certainly in comparison with many of our international competitors. Likewise there is a massive amount of work going on just now in terms of communicating relevant information to students and potential students. It is a point I will come back to: that whole process now is being very closely overseen by the Competition and Markets Authority. We have moved since the 2010 legislation into an environment where universities are operating in markets and in a very competitive market. So as a consequence of that a lot of information is put into the public domain and that is entirely appropriate and universities totally understand why both that is necessary and desirable.

But the two points that I wanted to make for the purposes of our evidence relate to primarily the burden and bureaucracy that the Act requires, but also the point

I touched on there which is that the sector has changed so much since 2010 and it therefore is now our case that the application of the FOI is no longer appropriate in its current form.

But firstly in terms of burden and bureaucracy, the reality is that universities are extremely heavily regulated already in terms of the information that they have to disclose, not just the information to the students that they are required to make available, and to potential students as well, in response to CMA requirements, but they have to disclose information to the funding council in all the UK jurisdictions, to higher education statistics agencies, to the Quality Assurance agency and the various professional bodies, et cetera et cetera.

There is a lot of regulation and a lot of disclosure that already takes place and research undertaken by JISC, which is the higher education sector body responsible for digital services -- we put a link in our submissions -- shows the cost of FOI compliance is increasing quite substantially and the Government's own estimate, possibly now marginally out of date, is that it costs us about £10 million a year to comply and the FOI requests are increasing all the time from just three per institution per month in 2005 to 18 per month in 2014 and that evidence is provided in the link.

But my second point, which is perhaps a more fundamental one, is the extent to which the environment has changed in England since the higher education legislation was introduced in relation to tuition fees in 2010 that came into force in 2012. That manifests itself in terms of a deregulated market for students, this is the vocabulary that is now applied to universities, but also the introduction of alternate providers, non traditional universities. Research by BIS in 2013

suggested that there were over 670 alternate providers with about 160,000 students and those are likely to be minimum numbers, and anyway it is now out of date. As a consequence of that, in the recent BIS Green Paper, there was a recommendation that this whole area be looked at.

I am just concluding but would you just permit me to read the paragraph from the Green Paper because it is so pertinent? It talks about public body requirements and the anomaly between the requirements on so-called traditional universities, that previously were directly funded by Government, and alternative providers, and it comments that the alternative providers are not subject to FOI. In that context, it says:

"There are a number of requirements placed on HEFKEY funded providers [that is the traditional universities] which do not apply to alternate providers. Many derive from treating HEFKEY funded providers as public bodies. This is despite the fact that the income of nearly all these providers no longer principally comes from direct grant and tuition fee income and is not treated as public funding. Alternate providers are not treated as public bodies. As a result there is an uneven playing field in terms of costs and responsibilities. For example, the cost to providers of being within the scope of the Freedom of Information Act is estimated at around £10 million per year. In principle we want to see all higher education providers subject to the same requirements."

So it is flagging in the Green Paper itself that there is this anomaly now and we would say that this reflects the fact that at the time that the FOI legislation was introduced we were talking about a very different sector in England. Now we are operating in a highly competitive environment, a consumer market which is now

controlled very much by the CMA, we are in very close touch with them, and with associated bodies and despite the fact that there is very little direct State funding we are yet treated as a public authority.

To conclude, we believe that the way forward on the back of the Green Paper is to see a full review of the operation of the Act to higher education institutions to ensure that the application is appropriate but also that there is a level playing field. There are a few technical adjustments in the meantime which we have set out in our paper but I will not go through them now.

RT HON JACK STRAW: Thank you, Ms Dandridge. You mentioned that there had been a seven-fold increase in the number of FOI requests per institution between the start of the operation of the Act in 2005 and today.

Two questions: one, would you accept that that is an inevitable consequence of people just getting used to the Act? Secondly: could you give an idea briefly of the kind of range of requests that come in, different categories?

MS DANDRIDGE: Yes. This is detailed in that JISC report that I flagged and they fall into three broad categories.

RT HON JACK STRAW: Well, you could send it to us.

MS DANDRIDGE: Student issues and numbers is the largest, followed by HR and staff issues, followed by financial information -- sorry, this is what the requests relate to. So it is students, HR, restructuring tends to give rise to quite a few, and then thirdly financial information. We can submit that because it is quite detailed and quite granular in terms of the evidence.

RT HON JACK STRAW: Thank you.

You say in your evidence that -- this is on the second page of your evidence -- the

Act should be changed or that we should consider the change, so that in future the Information Commissioner should be able to express a view on the exercise of the public interest discretion but not to order it with the requesters being able to seek judicial review of an institution's decision.

Do you accept that, if that were to be the case, it would profoundly change the operation and the structure of the Act and fundamentally weaken it?

MS DANDRIDGE: I don't think that was the intention behind this particular comment.

RT HON JACK STRAW: Well, it is a proposal rather than comment, isn't it?

MS DANDRIDGE: Let me just find it.

RT HON JACK STRAW: It's the second page, the bottom.

MS DANDRIDGE: This relates to section 36?

RT HON JACK STRAW: Yes.

MS DANDRIDGE: I accept that paragraph is not particularly well drafted. What we are trying to get at there is simply removal of the head of institution, that whole layer of internal review from the process. So then it is a much more objective test.

RT HON JACK STRAW: So you are not proposing basically to go back to the John Major code sort of legislative --

MS DANDRIDGE: That was not the intention.

RT HON JACK STRAW: That is a useful clarification.

Can we go on to this issue of the alternative providers and your claim that "the playing field is not level"?

What proportion of full time equivalent courses are currently being delivered by providers who are outwith the FOI Act?

MS DANDRIDGE: That data is not known. It is not simply that we don't know it, it is not known because there are all manner of providers now operating at various different levels --

RT HON JACK STRAW: Like you.

THE CHAIRMAN: 1 per cent? 5 per cent?

MS DANDRIDGE: No, it would be more than that. Of the ones that are known, it is a low base and I will get back to you on this, but I think it is roughly around 10 to 15 per cent.

RT HON JACK STRAW: So which kind of institutions are we talking about? Could you name some, please?

MS DANDRIDGE: They would largely be for profit, some of them international. Greenwich School of Finance and London -- not London Business School, the London School of Business and Finance. There are various management schools, quite a lot of them business orientated. Can I let you have that because I am being a bit vague as to what their titles are but there are a lot of for profit providers now, some of them national and some of them international.

RT HON JACK STRAW: But you are confident that, taken together, these providers are providing around 10 per cent of total --

MS DANDRIDGE: No, I am not confident. I will need to get back to you on the figure.

RT HON JACK STRAW: Because it sounds to me a rather significant overestimate. Even if we were to accept that there was a case for a "level playing field" between authorities which are still significantly funded by the public sector by one route or another and these commercial providers, aren't there two routes by which you could do this? One is to exempt the universities and the public providers, for

which I may say we have had no other evidence and I think there is no prospect of this happening, or to look at whether these private institutions are standing in the shoes of public institutions, and that they should be covered by the Act?

MS DANDRIDGE: Indeed, you could approach it either of those two ways.

RT HON JACK STRAW: Have you given any consideration to the latter?

MS DANDRIDGE: I think our primary point is that there should be a level playing field. We would be more -- as I say, I mean there is not a desire to lack transparency, so I think we would do that anyway. What we are proposing is that there should be a review as to the application of the Act that accommodates the different environments and which takes into account the circumstances of both alternative providers and former traditional providers.

RT HON JACK STRAW: Okay. Let us assume that the playing field stays uneven, that the regime for public authorities, including the universities and FE colleges and the rest, remains within the Act and these entirely commercial providers are outwith the Act. How does that harm the position of public sector FAG institutions? What is the damage done?

MS DANDRIDGE: The damage is that it is an extremely competitive environment for students now and that they are subject to bureaucratic requirements that other players in that market are not. So it's simply by virtue of having an unequal playing field in --

RT HON JACK STRAW: No, I am trying to get beyond the cliche here.

MS DANDRIDGE: Well, it is the cost and the fact that they are having to disclose information about their operations that others do not have to.

RT HON JACK STRAW: But I mean the cost is all together you say is 10 million a year,

which is £144.93 an enquiry which is not back-breaking, I suggest. But in terms of the disclosure of information, what kind of information is a public sector university being required to disclose which is damaging its competitive institutions? So let's take London School of Economics, Oxford University, University of Central Lancashire: how is their competitive position been damaged by a disclosure of information, even though it may not be required to be disclosed by a competitor?

MS DANDRIDGE: Well, let me give an example --

RT HON JACK STRAW: That is what I am seeking.

MS DANDRIDGE: -- of evidence that I gave last year to a Tribunal, the Tribunal, which related to disclosure of academic salaries.

The case related to primarily disclosure of non-academic salaries at a senior level and the reason that that was resisted by the university was that it felt that these were very competitive roles where it was difficult to recruit these members of staff operating in a very competitive global context, for example heads of fundraising, is a good example, where it is extremely competitive to get these people, and there was a requirement to disclose that data about their salaries. It was felt that it was damaging to have to reveal the salaries because it would put people off from coming to the UK to apply for these jobs and there was quite a lot of evidence as to the impact that it would have.

This is just taking staffing. I mean, if you have to disclose lots of issues around restructuring, it perhaps constrains the operation of the institution in a way that simply would not necessarily be the case for alternative providers who are not subject, but nonetheless possibly recruiting for the same members of staff.

RT HON JACK STRAW: So we are narrowing this down to fundraisers, which is a very

specific task. Would you accept what is my experience certainly of all the large number of academics, of people working for universities that I know, they are acutely aware, acutely aware, of not only of what they are paid but what their comparators are paid, particularly in American universities if they have an internationally tradeable subject or skill. So they know this information, how would keeping it from the public help the competitive position of, say, a faculty at Oxford, who are notorious for paying less than, say, an Ivy League in the States but where they trade on the fact that they have other advantages? How does this make a difference?

MS DANDRIDGE: A lot of that information -- for commercially sensitive roles where the salaries are protected, the institutions feel that they have an obligation not to disclose that salary, so it is not all in the public domain. We are talking about a small group of people. I mean, the majority of salaries are in the public domain, I agree.

LORD CARLILE: Can I just focus on a specific example which may be helpful. If I am a parent and I have a child who wishes to take a legal practice course, that child can either do it at, say, the BPP law school, which is completely private, or I think the University of the West of England, which is a public university. Isn't it an advantage for the University of the West of England, if it be a real example, that I as a parent know that that university is subject to Freedom of Information, therefore I can find out more about the university to which I may have to pay substantial fees to my child to go? There are two sides to this, aren't there?

MS DANDRIDGE: I think that is a very good question and that is absolutely the sort of circumstance where we would want to make sure that that information was publicly

available. So that is why I started by saying there is no issue about that. We are engaging very closely with student groups, with the CMA, with others to find out what information is of most use and there is absolutely no appetite to keep that information away from students and their parents and potential students.

I think that is the sort of example where, come what may, we would want to make sure that that information is in the public domain --

LORD CARLILE: Forgive me for interrupting, but the corollary to that is it is really up to private providers whether they wish to put that information out to the public or not. If they don't, they may be suffering a disadvantage.

MS DANDRIDGE: Yes, but you are choosing an example where we would not wish to not disclose that information. That is information where it is very obvious it should be in the public domain. We would want it to be in the public domain. The CMA would require it to be in the public domain and I think because we are operating now in a competitive market it makes every commercial sense to make sure it is out there.

So that example is one where we would want to continue making the appropriate information available and indeed there is a lot of discussion and resource going into thinking through how the information could be made most pertinent, most relevant and most accessible. So I don't think there is any dispute about that. It is other areas.

THE CHAIRMAN: That is what I would want to follow up. You said quite a lot of these requests are coming from students. What is it that you are not publishing that the students want to have access to and what is it in terms of their requests that you regard as damaging to the operation of the university?

MS DANDRIDGE: I think that is the area where there is less dispute that the information should be in the public domain. Having said that, I know quite a lot of applications relate to admissions decisions and areas like that where there may be sensitivities and legitimate reasons why it is not appropriate to disclose why someone has not got in against someone else, for example.

But I think that is on the margins. I think generally that information should be out there and that is not an area where we are really concerned.

RT HON JACK STRAW: Could I quickly take you to something else you said in your evidence? This is also on page 2 of the written evidence. You say:

"Uncertainty of the determination of the public interest test has very likely led to changes in practice in terms of the recording of decisions. For example, minutes will tend to record decisions only rather than discussion and information that is in discussion papers is not reproduced in the minutes."

I don't quite follow that because, if you had an agenda item and you have had discussion papers to contribute to consideration of this agenda item, then whether or not you put the discussion paper in the minutes, the discussion paper itself will be disclosable under FOI, unless there is an appropriate exemption pleaded. So are you not actually denying public and students information that ought to be made available to them.

MS DANDRIDGE: It could well be. I think the general point in that paragraph is that the Act potentially has a distorting impact on the way that decisions are recorded and I don't think we are making the more sophisticated response that you are --

RT HON JACK STRAW: Well, I am going from what it says, rather than guessing.

MS DANDRIDGE: Yes. I think the point is --

THE CHAIRMAN: Isn't it somewhat of an own goal in terms of the efficient running of an institution that you should not be recording correctly the decisions that have been taken and the reasons why those decisions have been taken because people in the future will want to go back and examine those decisions.

MS DANDRIDGE: I think that is absolutely right. I don't think there any suggestion that the decisions are not being accurately recorded. I think it is more --

THE CHAIRMAN: But the reasons for them and the background analysis which has gone into it.

MS DANDRIDGE: Of course. I think it is more a generic comment about the dampening effect of some of the legislation. It is not a particularly significant point, it is a fairly self-evident point.

THE CHAIRMAN: Well, thank you very much.

MS DANDRIDGE: Thank you.

MR PETER McNAUGHT

THE CHAIRMAN: Good morning, Mr McNaught, thank you very much for coming. Do you wish to make an opening statement?

MR McNAUGHT: Just very briefly really to set the scene to HSE's attendance to give evidence today, because, perhaps not known by many people who do not read the statistics in relation to FOI requests, HSE receives more requests than any of the other 41 public bodies who are reported on. The simple reason for that is that 80 per cent of those requests relate to information requested mainly, if not exclusively, by parties to civil litigation for information relating to HSE's investigations in relation to work-related injuries and deaths. Those investigations can vary between a very brief investigation that takes very little time and produces very little information or documents to a very major investigation and, because of issues of data protection, because of issues of sensitivity, because of issues potentially of confidentiality, every request has to be carefully assessed to decide whether there are competing interests in terms of disclosure. Of course, disclosure in any event is only actually wanted for the purposes of those civil proceedings rather than to be put into the public domain. It is the burden therefore of that process that, perhaps rather individually perhaps, affects the Health and Safety Executive that is of concern in relation to the operation of the FOI Act.

We estimate that the resources required to do that on the MoJ survey indicates costs of about a million a year. In reality, the cost is probably larger than that because it doesn't take account of other accommodation and IT costs. So quite a significant amount of HSE's resource is put into dealing with requests which essentially we take private interest in bringing civil litigation or defending a claim.

We recognise, of course, that it is important, and a public interest in itself, that parties to litigation and indeed the court have available to it all the relevant information, simply that it is a cost that perhaps should not be borne by a public authority.

THE CHAIRMAN: Could I ask, before Lord Carlile speaks, do you publish automatically all of the questions and all of the answers that you give in relation to the requests? So are they publicly available to everybody or do you simply give the answer to the person who has asked for it?

MR McNAUGHT: In relation to these we just give it to the person concerned. Where the request is of wider interest, then we publish our responses. But this is a singular request in relation to a singular investigation that is only of interest to the individual requester in reality.

LORD CARLILE: Mr McNaught, before I ask you some questions, I should declare a somewhat historical interest of having appeared in countless personal injury cases, mostly industrial accidents, on both sides, though generally not at the same time.

Now, as a body which receives a significant number of FOI requests, I would like you to give the Commission a sense of the sort of requests you receive and in particular, and I think you partly answered this already, I would like you to tell us the extent of the crossover with -- and I am using my words carefully -- disclosure which occurs in civil cases. Also it would be helpful for us to know whether FOI requests interfere with investigations by the HSE or in the recording of investigations by the HSE?

MR McNAUGHT: I might take those in reverse order, if I may?

LORD CARLILE: Please.

MR McNAUGHT: Because they don't affect the recording of the investigations. We obviously record all the product of our investigations. We have to. It is important for any wider purposes but particularly for any criminal proceedings that we have clear records of every aspect of the investigation.

In relation to prejudice to the investigations, our general approach is that, prior to the completion of an investigation and/or any associated criminal proceedings, we will decline disclosure under FOI using the exemption under section 30 and we are successful and the Information Commissioner has supported that approach. That does not mean that we don't get requests during that period and, because our investigations can be somewhat lengthy, there can be a number of requests asking us again whether our investigation is yet complete. Sometimes, if an investigation is very long, there can be the issue of the claimant is approaching the time limit for bringing proceedings --

LORD CARLILE: Three years.

MR McNAUGHT: -- which can bring an extra issue into play.

Once proceedings have been concluded, then you are absolutely right, there is a crossover and a link with the disclosure regime in civil proceedings.

The rules in civil proceedings do not allow for a third party application for disclosure prior to a claim being brought and now, obviously, the civil courts are very keen for cases to be resolved as soon as possible and before any claim is brought. So we get a lot of cases where the request comes in before the claim has been brought. Sometimes we will not know the stage of the case. But in some cases, even where we provide disclosure, and what we do is we look at, for

instance, witness statements. We will write to each witness to ask them whether they will consent to the disclosure of their witness statement for the purpose of these civil proceedings. We might not get a reply. We might get no consent. That information would not be disclosed. Then subsequently there may be a third party application for disclosure to be made through the civil courts which we will have to respond to separately.

LORD CARLILE: Leaving aside section 30 which you appear to be satisfied with as giving you an exemption for the period of an investigation that might lead to criminal proceedings, what really is the problem about FOI once that section 30 exception is inapplicable? Because you are going to have to provide the information to solicitors anyway, at some point, aren't you? So doesn't the FOI process avoid substantial legal costs enabling potential parties to know at an early stage information that may well, say, for example, the Legal Aid agency or funders, substantial sums in deciding whether cases are worth bringing?

MR McNAUGHT: Well, it is the cost to the process. I accept absolutely that the parties have an interest in obtaining that information. Sometimes they may already have the information. So sometimes, for instance, an employer, and the solicitors acting for the insurance company, will request all the information which has been obtained during the course of our investigation. Most of that information will have been obtained from the employer themselves and they already have it but they are looking to effectively ensure that they have everything. But it is the cost of the process in terms of dealing with whether -- there are issues in terms of that issue in itself, for instance. So if an employer may take the view that when they have provided a copy of a risk assessment to HSE they have provided it for

the purposes of any criminal proceedings, not for the purposes of any future civil proceedings.

LORD CARLILE: Has anyone done a cost comparison or a cost benefit analysis as between the provision of information under FOI by the HSE and the cost of going through legal processes to obtain the same information? Because there may be a suspicion that the FOI regime in sheer money terms is much cheaper, albeit you have to pay it.

MR McNAUGHT: Probably the reverse in fact because, if we receive an application for disclosure before a civil court, unless there is any particularly sensitive information which we do not want to disclose, such as perhaps our analysis of the case, we would not object to the order being made. So it is a very simple process, usually dealt with without a hearing. The problem for us is that the fact that there is such a process does not prevent any requester requesting that information separately and relying on the Freedom of Information Act.

LORD CARLILE: I understand what you are saying, but the answer you have given does not take into account the cost of the legal process in asking the HSE to make the disclosure, does it, which may be charged out at £150, £250 an hour legitimately by lawyers?

MR McNAUGHT: Most of the requests we get under FOI are made by lawyers.

LORD CARLILE: Okay. Well, that is not surprising.

RT HON JACK STRAW: Declare an interest!

LORD CARLILE: I've declared my interest already.

What controls do you think are needed, if any, to reduce the burden and, in particular, do you feel that the controls should be targeted at the particular types of

request, for example commercial requests or requests routinely asked by solicitors who may be very experienced in dealing with personal injury cases and nothing but personal injury cases?

MR McNAUGHT: There clearly is a difficulty in terms of deciding to move away from the request of blind principle, but equally our experience of the burden on HSE is that it is difficult to see the sort of wider public interest that is being served by the resource that we put into providing the information in these types of case and I recognise, and having seen some of the evidence, there could be other cases and other public authorities who receive requests which are, perhaps, somewhat similar in terms of having more of a private motivation behind them than a wider public interest.

THE CHAIRMAN: Can I press you? Do you have any proposals to make on this? Is it by identifying the particular kind of requesters.

MR McNAUGHT: It could be done by identifying particular requesters but I understand the difficulties with doing that. So the alternative solution could be in terms of cost. So, as I indicated in my opening remarks, HSE recognises the need for the parties in these proceedings to have this information, it is the cost to HSE and therefore the public purse which is the issue and at the moment the appropriate limit, for instance, being set at £600 and effectively 24 hours of work, most of our cases do not go that far, but they may not be significantly below that. So we very rarely, if ever, can charge and, of course, the charging regime does not take into account the time of the people actually doing the work. It is just the limited costs are that allowed under the regulations.

LORD CARLILE: Can I move on now to the exciting subject which you have given us

evidence about of ICO decision notice FS50121354. You have provided significant evidence on this subject. How many of these issues arise per year and what is the actual cost of dealing with them?

MR McNAUGHT: Issues in terms of?

LORD CARLILE: In terms of decisions made applying -- I will not repeat it -- that decision notice. What is the cost of that decision notice and its consequences per year to you?

MR McNAUGHT: That decision notice essentially means that where the investigation has been concluded, we take the view that a refusal to provide the information requested will not be supported by a decision of the Information Commissioner because he will take the view that the public interest is in transparency and that information being in the public domain. So, of the 5,000 requests that we deal with, about 4,000 relate to civil proceedings. A number of those will be dealt with when the proceedings are still ongoing but there will still be a significant number, probably in the region of half that figure, where we will have carried out a significant investigation, so about 2,000 a year, and we will consider that we have to deal with that under FOI, that we cannot decline the request, and we have to then balance these other issues in terms of personal data, confidentiality and other issues to apply other exemptions which might apply to some or all of the data.

LORD CARLILE: I am trying to tease out what is the net effect on the HSE of ICO's decision notice FS et cetera in cost terms.

MR McNAUGHT: In cost terms. Well, if that decision was the other way and said "All that information is not in the public interest to disclose it" if the investigation has

been concluded, we would not disclose in 80 per cent of the cases that we receive, so 40 per cent of them, 4,000 of them, we would be able to rely on that exemption.

LORD CARLILE: So there is a considerable cost saving as a result?

MR McNAUGHT: Yes.

LORD CARLILE: Thank you.

I wanted to ask you now about the use of the vexatious provisions in the legislation. I think we absolutely recognise that, for an organisation like the HSE, where many requests will relate to specific accidents, it must be quite difficult to say that they are vexatious. But, given that you are in receipt of so many requests, more than any other body that has been referred to, as you said in your introduction, how easy is it for you to use the vexatious provisions and are you reluctant to use them because of inherent difficulty?

MR McNAUGHT: We have used the provisions in other types of requests that we have received.

THE CHAIRMAN: Such as?

MR McNAUGHT: Interestingly we dealt with a case with other Government departments where a number of requests had been made to a number of departments and where the Information Commissioner supported the fact that a number of different requests, a number of different departments, could be aggregated to determine that the request was vexatious and that went on appeal and that was supported as well. But in this context, as you have highlighted, we do not consider that we could say that a request from an individual claimant or defendant requesting information about one of our investigations was vexatious unless the amount of work required was so significant, and in the recent

Upper Tribunal case where the Tribunal considered this, the public authority was talking about three weeks' worth of time to deal with the request. Ours generally are not that excessive, but they are several days of work sometimes to deal with it.

LORD CARLILE: We will come back to the vexatious provision in a moment, if we may, but how do you deal with situations in which, yes, you have got a lot of information, the HSE almost always does, because you carry out thorough investigations, but most of it is available somewhere else?

MR McNAUGHT: Generally, most of it will not be available somewhere else, because it will be information that we have gathered as part of our investigation and therefore hold. Some of it may be available in that the employer will have it, but it certainly will not be publicly available, very little of it.

LORD CARLILE: Returning therefore to the vexatiousness issue, is it the view of the HSE that vexatiousness sets too high a standard and that you would prefer to have a test which is based on something more like reasonableness or proportionality?

MR McNAUGHT: Certainly the guidance, as I think was alluded to earlier, has been amended more recently and that is helpful. I think it could go further in making it easier to reject requests on the basis of vexatiousness. I don't think, however, that it could ever go as far as it was to deal with the specific issue that we are dealing with, which is more to do with what is appropriate in terms of charging and fees for provision of information.

LORD CARLILE: Can I turn to section 36, then, just for a moment?

Presumably you rely on section 36 to protect information relating to internal deliberations which are inherent in what your executive does, because you are

making decisions, for example, as to whether to prosecute somebody for quite serious offences. How effective is the section 36 exemption and would you as the HSE like to make any changes to it?

MR McNAUGHT: We don't actually use section 36 in those circumstances because that deals with development of policy and so we don't think that would be covered in the deliberations that we have about decision making on enforcement action. We would then use section 30 where we would say that the public interest then goes in favour of protecting that information for the reasons that you have alluded to.

But we very rarely -- although we do have a policy function, we recommend regulations to the minister, the Secretary of State, who then makes the regulations, but very rarely do we get requests or do they cause any difficulty where we are having to rely on section 36.

LORD CARLILE: Sometimes you are faced with industrial diseases in particular that may have arisen in very large numbers in a particular industry. Pneumoconiosis is an obvious example but there have been many others. Are you caused any particular difficulties by situations in which there are group actions or the equivalent of group actions?

MR McNAUGHT: I can't think of any and generally we have a very strong scientific base and we have a health and safety laboratory that does a lot of research into exactly these sort of issues and a lot of that information will be put into the public domain in any event as part of scientific research material.

THE CHAIRMAN: Thank you very much. Is there anything you would like to say by way of concluding remarks or are you content with that?

MR McNAUGHT: I think you have covered everything I wanted to raise. Thank you.

THE CHAIRMAN: Thank you very much. I think we are going to adjourn now until 12.30, when we have the next witness.

(12.00 pm)

(A short break)

(12.25 pm)

MR CHRIS HOPSON

THE CHAIRMAN: Mr Hopson.

MR HOPSON: Good afternoon.

THE CHAIRMAN: Good afternoon. Thank you so much for coming to give evidence to us. Is there anything you would like to say by way of opening statement?

MR HOPSON: Yes, if I may. So I am the Chief Executive of NHS Providers as you know. We're the membership organisation and trade association for the 238 hospital, community mental health and ambulance trusts and foundation trusts.

I am not an FOI expert. I am here as an advocate for the views of our members that we have gathered together for this session.

Just to give you a very brief quick overview about how our members see this: so we spend I think a tenth of 10 per cent of public expenditure, so £75 billion goes through our members, and I think they recognise the need for public accountability on the back of that. They work very hard, I think, at publication schemes, open board meetings, huge amounts of NHS data published. I think there is a widespread support amongst our members for the principles of the Act as an important mechanism to exercise public accountability and I think they support the idea of members and others asking legitimate questions.

However, they tell us that particularly recently, they are experiencing a very rapid growth in the number of questions of particular types of questions from organisations that the Act in their view never envisaged and that this is placing a very disproportionate impact on them and I think they believe this Commission provides a very well-timed opportunity to address that.

So just to very quickly talk about some specifics, if I can give you six examples,

I think five and then there is a sixth which is more questionable, of examples where they believe they are being placed under a disproportionate burden. They are finding they are getting very significant numbers of FOI requests from people who are commercial companies who are just solely looking for names so they can then create databases of names and they can then be sold to third parties or they are used for marketing material.

The second is they are getting very significant numbers of requests for what is clearly commercial information from suppliers who are seeking to effectively end run round procurement processes when that information, to be frank, should be provided through appropriate procurement process.

They are getting large numbers of requests from students doing basic research projects.

They feel they get a number of frivolous requests.

They also feel they are getting, as a fifth category, a number of FOI requests from complainants who have addressed their complaints through other parts of the system, had them adjudicated on but they are then kind of coming back again for further requests.

There is a sixth category which I don't want to dwell on at this point, because I think it is more difficult and I don't want to undermine the strength of the previous five categories, but effectively there clearly is an argument about particular types of requests from media organisations where effectively I think nobody is disagreeing with the idea that media ought to be asked focused questions to hold to account. I think you will have heard the use of the word "fishing trip" before, but effectively I think there is a view that they are subject to a much larger number

of fishing trips.

So if you ask our guys, our members, about what proportion of FOI requests come from individual members of the public and come from those categories, they are now telling us that the majority to the significant majority are coming from those categories and their view is that was never intended to be the intention of the Act.

They also would say to you that they note that significant numbers of those people are seeking to then pursue appeals at various levels through that which is also placing a burden upon them.

I don't wish to outstay my welcome in terms of my opening statement, but I do have for you three sets of specific remedies that we propose to you to deal with those categories. I am happy to give them to you now or --

THE CHAIRMAN: Yes.

MR HOPSON: We think there are three kind of sets of remedies. The first is really around vexatious requests and we noted with some interest paragraph 61 of the FOI Commissioner's written evidence to you where he said he would be open to strengthening the guidance on section 14, which is the section covering vexatious guidance, by putting it on a statutory basis in a special code of practice issued under section 45 and he notes this could reduce any uncertainty the public authorities may feel about the current approach and the risk of the Commissioner's guidance being overturned by the courts.

I did note, with not entire agreement, that he seemed rather frustrated with us when he said to you in his oral evidence:

"I wish public authorities would actually use the provisions of the Act to turn away some of the most burdensome stuff. We have clear exemptions in section 14 of

the Act and we have issued very clear guidance".

If you look at the guidance actually I think we would perhaps suggest it is not quite as clear as he is suggesting. It is only effectively aimed at us as public authorities, it is not aimed at people making requests, so I think our view would be we can imagine a process where in the drawing up of this statutory code we might all sit round the table and agree what is vexatious and what is not and I think we would argue very strongly in that process that trawling for names, trying to circumvent procurement processes, frivolous requests and people who use the system as an attempt to pursue a complaint that has already been adjudicated on I think we would argue would be examples of vexatious -- if it was put in the statutory code we would all be clear, both public bodies and people who are making requests, about actually what was vexatious and what was not. So we think that for us would be remedy number 1.

Remedy number 2, and, again, we thought paragraph 67 of the FOI Commissioner's evidence was interesting when he said:

"If a change to the cost regime of the Freedom of Information Act is deemed necessary, the Commissioner would support the conclusions of the Justice Select Committee that reducing the appropriate limit in the fees regulation would be the most proportionate step to reduce the impact of the FOI Act on public authorities."

So again I think, as you know, it is a current limit of £450. That translates as 18 hours' work, £25 an hour. Depending how you define a working day, that is effectively three working days' worth per FOI request of an individual and again, I think as you know, there was a debate about whether you are -- you are not currently allowed to include the very detailed work that our members have to do on

both redaction, but also crucially having the discussions around which exemption clauses to use and, to be frank, it is quite often quite a technical debate about which exemption clauses should be used.

So I think our argument would be that that cost limit should be reduced. I think you would ask me straight away: well, what would you reduce it to? I think our view perhaps would be one working day, which you might define as seven hours as opposed to 18 hours, and I think we would strongly make the argument to you that we believe that all the costs of considering these requests ought to be taken account of and that actually you should consider the time that our members have to spend considering exemptions and redaction. So that would be our second remedy.

Our third remedy would really be around appeals and I suppose when you talk to our members what they say to us is it is not just the need to kind of process the original request, it is actually then the pursuit of appeals. I think our view is at the moment appeals against original decisions seem to us to be a bit of a free good; in other words effectively if you are an applicant actually it doesn't really cost you very much to make an appeal and we think the bar for an appeal ought to be slightly higher. We would suggest perhaps a couple of ways in which that bar might be raised.

The first would be, if you are seeking to overturn the initial decision of a public body, you should at least be able to required to demonstrate (a) why you think the public body is wrong but also secondly you should be required to demonstrate why that information is actually needed in the public interest.

You will note, we have not talked about charging, but we would suggest

perhaps -- and it is slightly surprising to us that it has not come up so far -- that you perhaps might consider charging for an appeal and what we mean by that is we recognise why the bar should be low to make the initial FOI Act request but if the public body has rejected it, it doesn't seem to us unreasonable to say to somebody we are going make the bar a little bit higher, so you have to consider making an appeal. So if you make an appeal, you have to send in at the same time as you make the request, a reasonable fee. I think our view would be that, to keep us honest, perhaps that fee should be refundable if actually the applicant in the appeal wins that appeal and it is proved that we were wrong in rejecting in the first place.

So those for us would be three ways in which we think this disproportionate burden could be reduced.

THE CHAIRMAN: Are you referring here to in a sense appeals to the Commissioner or are you talking about when it goes beyond the Commissioner?

MR HOPSON: No, I think our argument would be going further back in the process which is that initial request to reconsider and then also --

THE CHAIRMAN: The internal review.

MR HOPSON: The internal review, and then when it also goes to the Commissioner you might consider -- and, again, there will be a debate about the point at which of those two you should charge and what the charge should be check but I think there is an argument we would have that at the moment that bar is too low.

As a final point, we genuinely think this has got worse, significantly worse, over the last three to four years and we obviously looked back with some interest at the Justice Select Committee's post legislative scrutiny when it did it, but we think

there has been a significant change and we therefore think in terms of the timing of this Commission it feels to us particularly well timed to address what is a considerable issue for our members.

I hope that is helpful.

RT HON JACK STRAW: Thank you very much, Mr Hopson.

Do you know how many FOI requests your 238 trusts and other bodies receive each year?

MR HOPSON: No, I don't.

RT HON JACK STRAW: Is any effort made to collate this information?

MR HOPSON: No. Individual trusts will do it on an individual basis and I think you have some evidence from one of our members at King's College that effectively shows you how many they have received, I would make the observation that the £300,000 it costs them each year to do this is the equivalent to 14 full time fully qualified nurses. So their view is this is taking a considerable amount of resource off the front line.

RT HON JACK STRAW: Measuring the burdens is obviously important, but a key element of the measuring the burden is the number of requests. Would it not be a good idea if there was a standard system for both collecting and reporting on FOI requests in the NHS sector?

MR HOPSON: Yes. Certainly there would clearly be -- it would be lovely to come here with a complete set of quantitative and qualitative data to support my argument. I would just note though again paragraph 56 of the Information Commissioner's written evidence where he says:

"This is a difficult question to resolve by reference to quantitative data alone."

So in other words, I think his argument is there have been a number of different studies showing quantitatively what the burden is and, even if we were to kind of collect that data, I think his argument would be it would not be conclusive about whether it might support our argument or the argument of those who --

RT HON JACK STRAW: It would not be conclusive for sure but it seems to me getting the quantitative data is essential in any event.

THE CHAIRMAN: Yes.

RT HON JACK STRAW: And the evidence we have received shows that there is wide variation of practice within the public sector as a whole about -- between those who do collect data routinely and then coordinate that data and those who don't.

MR HOPSON: Just to make one point, it may well be that we have not got it. I mean, certainly all the evidence that I have gathered as I have prepared for today's session suggests to me that individual trusts do have a completely specific record of how many they are dealing with, it is just they haven't filed those numbers with us.

RT HON JACK STRAW: Okay, and it may be they are not on a consistent basis either and that would probably be helpful.

You obviously have a written crib there, Mr Hopson. Would it be okay to let us have it?

MR HOPSON: It is a very scribbled notes but I am very happy to give you a note that sets out what I have just said. Yes, of course I would.

RT HON JACK STRAW: Thank you very much.

Just running through the five of the six categories that you mentioned. The first was commercial companies looking for names for marketing material.

MR HOPSON: Yes.

RT HON JACK STRAW: But am I not right in thinking that in most cases, not necessarily all, individual names will have been redacted in any event because they would be protected under Data Protection legislation?

MR HOPSON: So a request will come in, it will be: give us the names of effectively below board level, which is quite often where a lot of our key commercial decisions are made: give us the name of all of your heads of anybody who spends money. Clearly every single trust and foundation trust has to have their board names on the website but it doesn't have their heads of names. So our guys have then got -- they will probably ask:give us your top three management tiers, right the way across all names and all contact details, and that clearly takes a long time to collect.

RT HON JACK STRAW: Why don't you have that information anyway? Because it would be available on an intranet, an internal one. Why isn't it just available?

MR HOPSON: Because our view would be it is appropriate to have board level names in the public domain but it is not appropriate to have significant levels down, particularly because what then happens is they get caught up in mass marketing campaigns of people who then send them acres of material, particularly if you are the head of IT, that, to be frank, is not necessary.

RT HON JACK STRAW: But if I were to go on the website of a local authority with which I am very familiar, I am pretty certain -- this is back then with Darwin -- that virtually every level is known on the website anyway, and people know where they are. I simply don't follow -- this must be information that should be in the public domain, isn't it, about who is working doing what job?

MR HOPSON: So the only information that needs to be put in the public domain is who the board directors are.

RT HON JACK STRAW: No, I understand about -- well, this is your argument, but I am -- forget about the word "appropriate" which means a million things. Just explain to me how it is not in the public interest to deny the public information about people working at a senior level, below board level and at a middle ranking level and at a junior level in an area of the public services?

MR HOPSON: So there is a debate about how much time and effort it takes to, in an organisation of 8,000 people, which is probably your average trust size, of which you have probably got a middle management tier of, let's say, 400/500 people which is probably turning over 20/25 per cent a year, the time that it takes to effectively collect all of that information, with contact details, it is not just names and posts, it is also telephone numbers and emails that we often get asked for and the need to keep that constantly up to date.

RT HON JACK STRAW: Will it not be -- any self-respecting organisation will be running an internal intranet where this will be there anyway.

MR HOPSON: If you then go to the civil service -- I was a civil servant in HMRC as a board level director for seven years, what you will see is that most of the civil servants have chosen, for perfectly very good reasons, to not have their names and details put into the public domain for precisely some of these reasons.

RT HON JACK STRAW: What I am trying to establish here, because it seems to me really important, that this information, which you say is quite costly to produce, will be available -- it has to be -- on an internal intranet, because how on earth, even in HMRC, will somebody know who to talk to if this particular officer has decided to

withdraw their name from the intranet?

MR HOPSON: Because there is a difference between what is declared internally --

RT HON JACK STRAW: No, I understand about that.

THE CHAIRMAN: The cost of collection.

RT HON JACK STRAW: But I am talking about the cost of collection. So I am just trying to pin down is this information easily available to the organisation and the organisation frankly could not run unless the information was available. Are we agreed about that?

MR HOPSON: It depends upon the nature of the information that is being asked for.

RT HON JACK STRAW: No, I am talking about names of people.

MR HOPSON: And what I am saying is it partly depends upon what cut of that information the individual FOI request has asked for, because sometimes what you get is a particular vertical slice through a particular department as opposed to the simple list where you could ask for every single head of.

So all I am trying to say is it really is not quite as simple as just grab it off the intranet and then put it on --

RT HON JACK STRAW: Okay. At least we accept that this information should be available on an intranet otherwise the organisation has some really serious problems.

I would also be grateful if we could have a note about what the argument is for withholding this information about what jobs people are doing. I am afraid I simply do not understand the argument.

MR HOPSON: Okay.

RT HON JACK STRAW: Surely if the information was available, it would save your

members an awful lot of work?

MR HOPSON: So, for example, if you are a doctor who is running the gastroenterology department of a hospital. If that name was to be in the public domain on the website you are likely to invite a very large amount of direct communication, direct to that individual that, to be frank, will take that individual away from their core job.

LORD CARLILE: But it is on the public website. If you want to know the head of the gastroenterology department it is on the website, but if you want to know the name of the head of procurement because you happen to think your company can sell better, cheaper surgical instruments, you cannot find the name of the head of procurement on the website. How can you possibly justify that distinction?

MR HOPSON: All I am saying is that, if you look at the requests that our members are receiving to go right the way across an entire middle management tier, what you will find is the amount of time that it takes them to produce that information -- again, let me put it in a note and I will explain as you've asked the argument as to why.

RT HON JACK STRAW: Just to follow up Lord Carlile's point, in a big village like Blackburn everybody knew anyway who was in charge of gastroenterology and probably who was in charge of procurement and certainly in the local authority all the way down, including in the commercially sensitive departments like planning, who was the case officer --

MR HOPSON: So the issue isn't the people from the village of Blackburn making the FOI request, it is the commercial company in London who basically wants to create a mailing list that they can then sell to a third party of all of the lists of head of gastroenterology procurement in, you know, right the way across all 151 procurement sites.

RT HON JACK STRAW: Assuming you have a properly regulated procurement system, I still don't understand --

MR HOPSON: Well, that's --

RT HON JACK STRAW: Let me finish. I still don't understand why that information should be denied to so people in Blackburn could have it but not people in London. I don't follow that.

Let me go on to ask you about the complainants. In my experience of having seen a lot of NHS complaints, almost all relevant, say, internal emails will have to have been disclosed both for the internal process and the if it goes before an Employment Tribunal. So what additional information is sought and how much of this is a burden?

MR HOPSON: The point I think we are trying to make here is it seems to us perfectly reasonable for people to make FOI requests to gather information in order to make their complaint so that they can effectively work out exactly the areas in which that complaint should be focused.

The argument I think we are making here is that, once that has gone through due process and has been adjudicated on, usually either inside the hospital or, if necessary, through referral to the ombudsman, the argument I think we are making here is that what we are then experiencing is a number of people, even though a determination has been made of that complaint by the appropriate authority, they are coming back again and making a whole series of requests. Again, I think we need to be careful here because I think we all understand there are people for whom some traumatic incidents may have occurred and who therefore they will be seeking to understand.

I can give you some kind of examples. There is one trust here that is required arrangements for medical record transfers pre 2000, every single operational policy change from 1980 to date, GMC numbers of staff from the 1980s, security arrangements then and now including lock fittings, and this is a person whom has gone through a complaint, has had that complaint adjudicated on, but they now want to go back and collect vast amounts of extra information because, to be frank, they were not particularly happy with the result of the way the complaint was adjudicated on.

That is the point I am trying to make. It is a relatively narrow one. It is not about all complainants, it is about once the complaint process has been completed and adjudicated on.

RT HON JACK STRAW: My last question before passing on to other colleagues is about appeals. You talked about having a higher bar -- and this is my language, not yours -- about introducing a system which, say, for example does apply in Employment Tribunals where there is an initial fee, but you are suggesting that should be returned.

Could we park that for a moment. Have you got any views about whether the process of appeals to the First Tier Tribunal and then to the Upper Tier Tribunal could itself be simplified or streamlined?

MR HOPSON: I think a number of people have given you evidence that effectively we seem to have this process of too many layers. So in other words you make the request, it is denied, there is an internal review, internal to the Information Commissioner, first tier, second tier. Four tiers seems to us to be excessive. There are relatively few cases clearly in our part of the world that have gone right

the way up the top but there have been plenty of cases that have obviously gone through each of those lower tiers and our members tell us it is not just the processing of the initial request that is forming the burden, it is actually the amount of preparation time that is needed to (a) go through the internal review and then (b), if it goes to the FOI Commissioner, the amount of kind of management time that takes. I think again, people would make the distinction between perfectly legitimate ordinary requests from ordinary members of the public and then people who are, to be frank, the kind of people that I have highlighted as being, you know, perhaps inappropriate cases. The observation our members make is very large numbers of those people do want to go through that route in terms of doing the internal review and then going to the Information Commissioner because they basically feel that there is, you know, no loss, it is a free good for them to do so. So I think the point our members are making is, look, of course, perfectly entitled if genuinely, a genuine request, somebody thinks we have kind of turned it down, but why are people that are trying to end run round procurement processes, why are frivolous requests able to go through, you know, as a free good to both those first kind of next two tiers up?

RT HON JACK STRAW: Thank you.

THE CHAIRMAN: How well prepared and trained do you think your people are in dealing with the various exemptions that are available under the Act? Is there a tendency to say these are just too complicated, we might as well try to give the information? Because in many cases, and we have been through quite a number this morning with various witnesses, and you mentioned the one about vexatious requests, where there are differences of views about how difficult it is to use that,

but on the commercial side it seems to be that there is a tendency to imply that all commercial requests are invalid, whereas, as we know, commercial requests can play quite an important part in improving competition within any public authority, and fishing trips, which are called fishing trips, all kind of auditors use fishing trips in different ways to try to establish whether there may be things that have gone wrong. It does not seem to me that that makes it invalid.

MR HOPSON: A number of different questions there. Let me take the last one first. I have sitting in front of me three examples from a telecoms provider, an ICT provider and, would you believe, a greengrocer who basically were all effectively seeking to do end run round procurement processes --

THE CHAIRMAN: Sorry, what do you mean by "end run round procurement processes"?

MR HOPSON: So trusts basically procure goods through a public procurement process. They are required to do so under the EU and UK procurement regulations. They will go through a process of drawing up a tender document and issuing that tender document and then people can bid against it. So what our members have is, and here is an example of, you know, 35 different bits of information that a telecoms provider is seeking, about 70 different items of information that an ICT person is --

THE CHAIRMAN: That seems to me to be an issue about quantity in the way that it is done, rather than the principle problems.

MR HOPSON: No, our argument would be that people who wish to sell items to our members should go through the proper procurement processes that are set out to do that and, just as you have schemes of publication for corporate information, effectively that information is kind of provided through the procurement process.

So the greengrocer wants to know how many boxes and bags of fresh fruit and vegetable and a breakdown of what the items were, how many pieces of fruit this would generally represent per box, eg, 100 bananas per box? How many tins of fruit and bags of frozen vegetables in the total cost. How many cakes, packs of biscuits, cake bars, sweet puddings and dessert pies and the total cost? All our members are saying is, okay, if that person wishes to supply those goods to us, go through the procurement process and get the tender document that will set out exactly what is required but stop coming to us with FOI requests that have huge, large numbers of items in them as a means of seeking that information.

That is why I think we are suggesting to you that, if we could have a statutory code which we would perhaps have an opportunity to contribute into, and no doubt my opposite number in the Society of IT Suppliers would also sit around the table, we could have an agreement about what was vexatious and what was not, rather than leaving it as we do at the moment for our guys to make a judgment based on the guidance and then have that challenged and then quite often appeal.

LORD CARLILE: Just as a procedural question: given that tens of thousands of people responded to our call for evidence and NHS providers did not, could you please let us have your six initial points with cogent and brief reasons by the end of this week?

MR HOPSON: Yes, we could.

LORD CARLILE: Thank you.

MR HOPSON: Can I just say I am sorry we didn't give you initial evidence. To be frank, we were not aware of the fact that the Inquiry was going on and we were not written to ask to provide evidence. Had we been so, we would have provided

evidence.

THE CHAIRMAN: Well, I am sorry about that.

MR HOPSON: That is fine. I just want to make the point, that having been sort of --

THE CHAIRMAN: Although I have to say I have found, since the Inquiry was established, that it was very difficult to get away from any newspaper that was not carrying a story about what a wicked creation it was.

But, finally, when your members answer questions, do they publish the questions and answers as a matter of course in all cases or are they selective about how much they publish?

MR HOPSON: Let me just look behind me and check. **(Pause)**

Okay, so the answer we think is that most of the time they would publish that information but then --

THE CHAIRMAN: So the answer is the greengrocer gets, everybody agrees with --

MR HOPSON: To be fact I don't know whether actually this was rejected. I don't know what the answer was. All I have is the example to the question. But the only reasons the grounds we would withhold would be due to, to be frank, the personal nature of the questions. So if an individual were to ask for details concerning their particular case, for example, then that is clearly not something that we would choose to ordinarily put in the public domain.

THE CHAIRMAN: Well, I thought this was public information rather than private information.

MR HOPSON: Again, clearly if it is a matter of sensitive information that an individual patient is asked for, I think you would expect our members to be really quite careful about what they do and do not put in the public domain.

THE CHAIRMAN: Okay. Thank you very much. You have been very helpful and your opening remarks and things which set out very clearly the things you are concerned about and some of your remedies, it is very useful for us to have. Thank you very much.

MR HOPSON: Thank you.

MS CAROLINE DODGE AND MR GEOFF WILD

THE CHAIRMAN: Good afternoon.

MR WILD: Good afternoon.

THE CHAIRMAN: Thank you very much for coming and thank you for your evidence.

As I have been asking other witnesses, would you like to make any opening statements or for us just to go straight into questions?

MR WILD: Very briefly, from a local authority perspective, we welcome the work of the Commission and we are grateful for the opportunity of contributing to the work and our response, as you read it, is an attempt by us to capture some of the practical experiences we have had ever since the introduction of the Freedom of Information legislation to reflect some of our learning and hopefully offer some constructive ideas about how we can maintain the transparency, accountability and efficiency that the legislation brings whilst also tempering it with some practical measures to improve its performance, reduce the burdens on the authorities and enhance the experience of those requesting information to access it as effectively as possible.

THE CHAIRMAN: Thank you very much. Michael.

RT HON LORD HOWARD: Thank you both very much. Thank you for your evidence which was very helpful and, as you know, we have already heard today from the Local Government Association.

You say that you have only used section 36 to protect information on 42 occasions. Can you give us some idea of how many of the 15,495 cases which you say you have been involved with could potentially have fallen within section 36?

MS DODGE: Well, we find it is quite a difficult exemption to actually apply and very

often, sometimes, there are other exemptions that are perhaps easier to apply to the information. The few occasions that we have used it, obviously, it requires the decision of the appropriate officer, which is Mr Wild, and obviously he takes great consideration when deliberating whether the information should be released or not. Therefore, he has very often decided that it is not appropriate to exempt that information and we have relied on maybe other exemptions or have looked more seriously at what information can be released and just applied a different exemption to more limited information. But it is a very difficult exemption to apply and perhaps if other members of the authority could apply that exemption which would then allow Geoff, in his capacity as the Director of Law and Governance, to review that position, maybe it would have been used more often.

RT HON LORD HOWARD: I realise you say it is very difficult. What I am after, if you can help us on that, is how many of the large number of the requests you say you have received, how many could have fallen, in your judgment, roughly speaking, within section 36, as opposed to the 42 occasions when you did use section 36. I am trying to get a sense of the proportion.

MR WILD: 42 is a correct reflection of the proportion of the total number of requests where section 36 could have applied. I think in all of the others, section 36 has never been raised as a potential exemption. It is very, very seldom used or even requested.

RT HON LORD HOWARD: But if I take that answer at face value, you're saying you used section 36 on every occasion you could have used it?

MR WILD: On most occasions that is correct because, by the time the section 36 exemption has been proffered and considered, other exemptions would have been

put forward first, or alternatively ways in which the information could be disclosed have been considered first, so it is very much an exemption of last resort.

RT HON LORD HOWARD: And you say that it should be easier to use section 36 although you are content that it is a qualified exemption?

Are you seeking legislative change or do you think guidance, different and clearer guidance, would suffice to meet your concerns?

MR WILD: From my perspective, and I will leave Mrs Dodge to express her view, is that guidance on a number of exemptions and where they can and cannot be used would be helpful and is that probably the extent of what is required at this stage.

MS DODGE: And I personally think that it would be preferable if the appropriate designated officer that could invoke that decision perhaps could be widened to more than, in our authority, just Geoff. I think because also, as Geoff is the Director of Law and Governance, when we have had challenges, when we have used section 36, the only people that have got sufficient knowledge of the Act really to do an independent review are, like myself, subordinate to Geoff which automatically puts you in a slightly difficult position.

So maybe if you could broaden who are the designated officers, that would allow Geoff, in his position and experience, to have the overall say-so, should it come up for review. It is only a suggestion, that is all I am saying.

RT HON LORD HOWARD: So you want to keep the qualified person provision but change the --

MS DODGE: But maybe extend the number of people that are qualified to invoke it or anybody could invoke it and then the qualified person would be there to review it.

RT HON LORD HOWARD: Yes.

So you are not suggesting, as I thought you might have been, reading your evidence, that section 35 should be widened to enable other public bodies such as yours to use it?

MS DODGE: No, we didn't consider section 35 at all because we just deemed it wasn't appropriate to local government, so ...

RT HON LORD HOWARD: Right. Now you also argue for an absolute exemption on issues to do with the security of the council's networks, systems, et cetera, that's how you put it.

Have you had many or any requests on issues of that kind and, if so, how have they been treated? Have they been granted?

MS DODGE: Well, we certainly have -- one of the biggest concerns from an IT point of view, we've had dozens of requests in the last year for information about what security we have on, you know, like our infrastructure, our networks, like what providers do we use, what virus protection do we have, and that kind of thing and individual requests on their own maybe seem quite innocuous and you give the information out. Then over a period of six months you can actually see a trend and if all the information that was asked was then -- say one person had overarching sight of that and put it all together.

THE CHAIRMAN: They would if you published it.

MS DODGE: Obviously if they found out what measures we were putting in place to stop being spammed and hacked and have Trojans and all of that sort of thing, telling people what we do to stop that is just going to give them a foot in to our networks and compromise our information, isn't it? So I think --

RT HON LORD HOWARD: Have you had that series of requests which amounted to --

MS DODGE: Yes, we have, and our head of ICT actually raised concerns, which I did put in the report, about the sort of aggregation of piecemeal bits of information to different individuals which collectively could be quite compromising.

RT HON LORD HOWARD: What happened? Did you refuse the request or did you give all the information?

MS DODGE: No, we're starting to refuse them from now, or we are starting to --

THE CHAIRMAN: Refusing using which exemption?

MS DODGE: We would be using section 31. That is the only vaguely appropriate exemption and, as I said, this is one of the reasons why we perhaps want a separate exemption to be brought in or maybe perhaps an extension to the existing exemption. I am not saying it needs to be absolute, it could be qualified, but I think there needs to be some sort of provision where local authorities can protect their assets, both their networks and their properties and things like that.

RT HON LORD HOWARD: That would obviously require legislation. You couldn't do that by guidance.

MS DODGE: No, you couldn't really. You would have to broaden the scope of section 31.

RT HON LORD HOWARD: Have any of the attempts you have made to protect this information so far gone to the Commissioner, or not yet?

MS DODGE: Not recently, no. We have not had anything recently go to the Information Commissioner at all but we have had various sort of hacks on our network and I think in the last couple of weeks we've had over 3,000 attempts of people trying to hack in to KCC security network. This is an ongoing problem --

RT HON LORD HOWARD: You cannot directly link that to the requests for information.

MS DODGE: No, we absolutely cannot and we appreciate that, but all we are saying is that you have to give some consideration. You can't make absolutely all information available to everybody all the time. There are going to be repercussions if you do.

RT HON LORD HOWARD: Right. Well, thank you for that. You also suggest that the vexatious provisions should be widened and so I want to ask you first of all whether you think that should be done statutorily or by guidance? You do identify a number of ways in which it could be done but not the question of statutory or by guidance. I would like to know how often you have used the vexatious provisions to refuse requests?

MS DODGE: We don't use it very often at all because, to be perfectly honest, when we receive requests, so we have had things like "how many people are employed at the council called Dave?", and other such interesting things, it is actually easier just to deal with the request than it is to refuse it, because, when you refuse it, people assume that you are calling them vexatious, not the request -- that's a perception, I know -- but they get very aggrieved about it, quite obviously. They then complain and the time it takes to deal with the complaint actually is more time-consuming and costly in resources than to actually just attempt to answer the request in the first place. So one of the reasons why we don't use it that often is just because sometimes it is simpler, cheaper and less cost effective --

RT HON LORD HOWARD: Have you actually had a request for the number of people in the authority called Dave?

MS DODGE: We certainly have, but they didn't ask how many people were in the authority or how many were men and women, so when we gave them the answer,

which I think was 129 off the top of my head, it didn't mean much.

RT HON LORD HOWARD: Can you think of some other examples of a similar kind?

MS DODGE: How many red pens has Kent County Council used? We have over 10,000 employees, it is quite a lot, but we don't have to break down obviously our stationery to that level of detail so it is an impossible question to answer.

THE CHAIRMAN: The first one about the number of people called Dave, presumably that was not burdensome, whereas the one about the red pens was burdensome.

MS DODGE: The one with Dave was very easy to answer because it was just a case of going into the HR system and pulling a list of everyone called Dave or David.

RT HON LORD HOWARD: You gave them Davids as well as Daves?

MS DODGE: You see, you get a lot from Kent County Council, value for money.

MR WILD: But this is one of the points we were trying to draw out in our response at 618, was that these trivial time-wasting complaints, as compared with some of the real meritorious and valid requests that we receive, whether there is a way to distinguish and I appreciate it is very hard to legislate for that sort of distinction, but it would be extremely useful if we could discard some of these more trivial and insignificant requests from those which really deserve time and attention.

THE CHAIRMAN: But don't most of the suggestions you make actually run up against other aspects of the legislation or would be easily circumvented by people?

MS DODGE: I think that is the point I made about fees. Yes, it would be nice to charge people that are going to make commercial gain from the information that we have collated for them, but I appreciate it is unenforceable because people would just then make requests using their personal email. So I don't know what the solution is, but I am just giving you feedback of how we find it as a local

authority.

RT HON LORD HOWARD: That brings me to the last question I wanted to ask you, which was about these requests for information on a commercial motive, rather than on what you would possibly regard as a public interest motive.

My question is this: if requests of that kind enable someone to put in a bid for one of your services on a more competitive or a more effective basis that is in a sense in the public interest, isn't it?

MS DODGE: Absolutely, and our contractual information, the major contracts that we have in place, are routinely published. There's an element that people don't want to bother to look for that information, rightly or wrongly, and maybe we should do something more about that.

THE CHAIRMAN: Can't you just tell them that it is already available?

MS DODGE: Yes, but either way, even if it is already available, someone has put the request in and myself and a member of my team still have to go through the motions of answering it, acknowledging it, pointing them in the direction where they can find that information. That all takes time and collectively that amount of time could arguably be used on frontline services like getting rid of one of my team and employing a social worker. That is really what it is all about. Local authorities, and KCC is no exception, we are under a lot of budgetary constraints. I think we have to save 80 million next year and generate another 19 million in revenue and obviously any money that can be saved by any means whatsoever to go to frontline services is surely a good thing and that is in the public interest too, along with information.

RT HON LORD HOWARD: Thank you very much.

THE CHAIRMAN: Could I ask, do you routinely publish the answers to all of the requests that you answer on your internet site?

MS DODGE: We do have a disclosure log on our website that gives details of the number of requests, not who it was from, but a general description of the request, whether we withheld it or not and how many times we took to deal. Unfortunately we log our requests on a Microsoft Access database which is quite low tech and we have not got the provisions to load -- redact the sort of 15,000 answers that we have given and upload them to the website because we would need another couple more employees to do that and we have not got the budget to employ them. So until we get a more, sort of better technology, if you like, but saying that, we do say on our website with our disclosure log, that if anybody wants a copy of the request and our response to it, we will gladly give it out. But we do it on an as we need to basis rather than use resources we have not got making information publicly available just in case someone wants to look at it.

THE CHAIRMAN: Any other questions?

Thank you very much. Thank you for your evidence. That is very helpful.

MR BOB SATCHWELL AND MR PETER CLIFTON

MR SATCHWELL: So this is Bob.

MR CLIFTON: This is Peter.

THE CHAIRMAN: Good afternoon. Thank you for coming. Just to make clear that you are not both from the same organisation, but that you are from separate organisations and because we thought that many of the points that we might want to raise with you would be common, that it would be helpful in a sense to seat you side by side so that we can hear your answers sequentially.

Do either of you want to make, or both of you, an opening statement?

MR SATCHWELL: If I can just be very brief and I am very happy to be sitting alongside my colleague, who has worked very closely with all other media organisations, some of whom you have heard from in great detail.

The Society of Editors has about 400 members across the whole of the media, so we have a fair amount of evidence, much of it anecdotal, of course, from across the media.

Our basic concern has been that any review of this kind should be more about trying to make sure that the way forward for FOI, which we believe quite clearly the evidence shows, has worked very well on behalf of the public and I believe, actually, on behalf of public authorities, certainly when I sat on an Information Users Group within the Ministry of Justice, we had very similar questions to those being raised now and points which have been raised now about the burden and so on, and that was dealt with.

What we found at that time was that, when in discussion, many people from the health service, from local government, from the police, actually realised that it

could be of an advantage to them to release more information and the problem was that the culture in the past had been that very little information was released but if you released a lot more information, you got a lot fewer questions actually and I think that is the position we are at now.

I think that there are certain areas where FOI needs to be extended, certainly into the area where there are organisations which are acting on behalf of government and other public authorities, and I came in earlier on when you were having evidence from a university -- a university spends an awful lot of public money and it is dear to everyone's hearts and the idea that they should be taken out of it just seems to me to be quite wrong.

We already accept that there are plenty of areas, and I understand why there are areas, where FOI should not apply, for instance to do with individual privacy and commercial confidentiality and so on.

Going on to the burden, I do understand some of the points which are made there but we get, from our members, the view that, quite often, some authorities, whether it is local authorities or the police, have in fact increased their own burden by in fact saying -- instead of just answering a journalist's query through the press office, they have said actually said "put in a Freedom of Information request" when it could actually be easily dealt with just answering the question.

There was one police authority, police force actually, which said: we are in competition with the media, you know, we want to get our information onto our website before the papers and the telly and so on. I said: well, of course you do, but I am not sure the public will see it as being totally independent information.

I think also, if you look at the cost of public relations across the public sector, it

was huge compared to the cost that anyone can identify for answering Freedom of Information requests. At one point I seem to remember that the Press Gazette, the trade paper, did actually do a survey about the number of people in Government and public sector press offices and I think that almost every journalist had a personal press officer. So, you know, there is a huge cost there already.

But I think really what it comes down to, our view --

THE CHAIRMAN: Aren't most of those answering questions from journalists anyway? Most of the press officers I worked with spent most of their time ---

MR SATCHWELL: Or perhaps creating pieces of information --

THE CHAIRMAN: Every now and again they might do that, but the bulk of their time was actually spent answering queries.

MR SATCHWELL: The point is there a huge investment in public relations. The cost of FOI compared to that is very small.

THE CHAIRMAN: Well, I would prefer to think of it as a cost in answering journalists questions.

MR SATCHWELL: If I could just conclude by saying that really our basic point is to try to change the outlook, I think that was part of its intent originally and where -- in some organisations, the switch is in the wrong place, still, instead of -- it is "tell them as little as possible until you are actually forced to tell them something", when in fact it would be better to set the default switch to tell people everything unless there is a good reason for not doing it, and I understand, and I think we all accept, that there are very good reasons to understand it.

The final point I would make, you will hear later on from Maurice Frankel from the Campaign for Freedom of Information, is that it seems strange that after 10 years

of it being in position and 15 years after it being passed through Parliament, we still have to have a Campaign for Freedom of Information. That is an indictment of itself.

THE CHAIRMAN: We will let him answer that question himself!

MR CLIFTON: Good afternoon. Yes, so I am Peter Clifton, the Editor in Chief of the Press Association, or PA, as it is widely known. We are the national news agency of the UK and Ireland. We provide hundreds of news reports, pictures, videos and graphics to customers in this country and abroad, 24 hours a day, 365 days a year.

The customer base is very broad, covering all the main UK broadcasters, national and regional newspapers and an enormous range of websites. PA is a passionate supporter of the Freedom of Information Act and has regularly used it in a responsible way to provide insightful journalism to our many customers, journalism that has on occasion been raised in Parliament, prompted reviews of CPS guidelines and highlighted gaps in the understanding of important data.

I am delighted to have the opportunity to be here with Bob today but I am also keen to stress that we are keen to represent a united view across the UK media.

PA shares the widely aired concerns about the make-up of the Commission and regrets the lack of anyone representing the media industry and investigative journalism, bringing a more positive view of some of the many benefits the FOI Act has delivered to increase transparency around government and public bodies.

We also believe the questions the Commission is considering predominantly around the burden and the controls of the FOI Act suggest a remit based on reining in the Act rather than looking at how it could be further strengthened to

support the Government's commitment to greater transparency.

On costs, we hear concerns about the money spent on meeting FOI requests and yet close examination of the numbers will suggest they are microscopic amounts of money compared to overall budgets; fractions of 1 per cent for Government and councils. This does not seem like a high price to pay. This is, after all, public money that is being spent to give the public greater transparency around the institutions they are paying for. Of course, the amounts spent on FOI requests are significantly less than Government and councils spend on their own PR and official communication channels.

On the other hand, there has been a suggestion that the public, charities and media should be charged for making FOI requests: hardly a great calling card for openness and at a stroke, numerous important investigations would be strangled at birth. Many of the PA's most telling FOI reports involve multiple requests: for example, asking the UK's 45 police forces how many registered sex offenders they have lost trace of. The answer was a startling 396, some for more than a decade, but an answer that may never have been revealed had it cost more than £1,000 to make such a multiple request.

Our overarching view, and one shared by the Information Commissioner, is that the FOI process works. Sections 35 and 36 of the Act already provide adequate safeguards. Vexatious enquiries can be blocked and the safe space so beloved of Cabinet ministers and their advisers is most often upheld by the Information Commissioner.

There seems a clear lack of evidence that there may have been any chilling effect on civil servants in their dealings with ministers, but many, including the

Information Commissioner, the Justice Select Committee and the former head of the civil service have rejected this notion. It is our view that the FOI Act has provided invaluable support for an open democracy over the past decade and, far from clipping its wings, the remit of the Act should be extended to include private contractors like G4S, Serco and Capita who receive billions of pound of public money every year and should surely be subject to greater scrutiny.

The final point is about the public. Millions of the them read the FOI based reports written by PA and many other media organisations. They provide billions of pounds every year to fund our Government and councils. If you took the time to gather their views on this vital democratic issue, it is hard to imagine any member of the public supporting further controls on access to information that should very often already be in the public domain. If we are genuinely striving to have the most transparent Government in the world, our institutions should be making more data available where openness is the default, not secrecy, and underpinned by a strong responsibly run FOI Act of which we can all be proud. Thank you.

LORD CARLILE: Thank you, Chairman. Can I start, Mr Satchwell, with page 2 of the Society of Editors' evidence because there is something I don't understand there? You say in the middle of the page:

"The pursuit of a safe space for decision making is misguided and unnecessary. It is misguided because, if applied through the use of a blanket exemption, it would pull down the shutters on the transparency that the Government and Parliament has pledged to encourage. It is unnecessary because sufficient exemptions and protections already exist to safeguard sensitive

discussions in the formulation of policy."

There seems to me to be an internal contradiction in those two paragraphs. So can I start by asking you to be clear as to whether you believe that there should be some space, safe space, for decision making?

MR SATCHWELL: I think the answer to that is yes and it is partly to do with timing. If you look at any major decision, policy decision, which has been made by Government, as time goes by it becomes less important --

LORD CARLILE: Of course.

MR SATCHWELL: -- to protect it.

LORD CARLILE: Hence the switch from the 30 year rule to the 20 year rule, for example. But if that is right, why do you describe it as misguided and unnecessary?

MR SATCHWELL: I think the idea, I think what we were looking at, probably saying there, is that the idea of increasing the ability of Government to withhold that kind of information -- I also have a view that, when -- I mean, we heard from the previous head of the civil service who said there is no sort of chilling effect on civil servants which was one of the arguments that was put up.

LORD CARLILE: I don't think that was quite what he said. First of all can I thank you for an important clarification in answer to the first part of my question.

I was going to refer to Lord O'Donnell. So can we just remind you that we heard from the Information Commissioner last week who said something similar to what you have just said, but we also heard from Lord O'Donnell that there is uncertainty that the Act brings. Do you accept that the Act does leave some uncertainty as to what will be released or withheld and, if so, would you favour the introduction of

greater clarity at least by guidelines or practice notes?

MR SATCHWELL: Yes. I mean I think to a certain extent it is a matter of common sense a lot of the time and I think, again, it comes back to this point that people at the highest levels of Government, just as the point I was making about local government or the health service or whatever, is that in fact it is of value for people at the highest level of Government to release as much detail as possible about how decisions are made and why they have been made because that, actually, increases public confidence and so on. I think too often there is a concern about -- whether it is political embarrassment or whatever and, you know, okay we live in the real world, but I think the more that can be released at a early as possible time, the better.

I think that the other point is that -- I mean, again, I think some of the view I seem to be getting from the idea I was taking from the civil service argument is that, well, it is difficult for us to be put on the line if our advice to ministers is released. Well, I would have thought, if well paid and highly qualified civil servants are giving the best advice, it is quite a good discipline to know that eventually your advice might well be released.

THE CHAIRMAN: Sorry, isn't that just all about the word "eventually"? It is the when is "eventually".

MR SATCHWELL: I think in a sense, it comes down to some of the tests you might apply to commercial sensitivity. If negotiations are going on, I think it would be foolish to suggest that, while Government is coming to a decision about something and while the Cabinet is still debating something and no decision has been made, that has the equivalent of sort of commercial sensitivity about it, doesn't it?

RT HON JACK STRAW: Can I press you on this point, because it is a subtle issue, the relationship between ministers and their officials but both sides have to put up with the fact that the other side has not chosen them, so it is not -- you know, it is not like in a command and control organisation where probably Mr Clifton has some control over who works inside his organisation. So you have ministers who are appointed by the Prime Minister. You come into a Department, it is a fundamental part of our Constitution that you put up -- I accept the fact that there is going to be a body of permanent civil servants who you will not necessarily have had any control over and whose political opinions about which you ought no know nothing, but whose duty is to be loyal to the Government of the day. But this is based on this issue of trust and confidence which then runs in, subtly, to this issue of confidentiality for a period, whilst these people are speaking truth to power. So, Mr Satchwell, would you not accept that this very important constitutional arrangement we have, permanent civil service, politically appointed ministers, does necessitate some protection for that bond of trust between official and minister?

MR SATCHWELL: Of course I can accept that that is important and that is in the public interest itself. But the point I am making I think is that there is a greater public interest in informing the public about how a decision has been made at the earliest opportunity and I think that that actually would enhance that relationship of trust and the way that Government works, if you do it on that basis.

RT HON JACK STRAW: But it begs the question of what is the earliest opportunity --

MR SATCHWELL: Yes, of course it does. What I said in the conclusion to my opening remarks is that it is a matter of trying to get the default switch into

a different place and it is saying, instead of releasing it only when you have to or when it is dragged out of a public authority or government, well, you know, the assumption should be release it unless there is a very good reason for not doing so, and to think what those reasons are and I am sure that those of you who have sat in those positions know precisely what they are and it should not obviously be just a matter of convenience or embarrassment.

LORD CARLILE: A practical question that arises, I think, from what Mr Straw has just said: between your organisations you represent the whole of the British press, effectively, more or less, and we know that the PA's stories come from every corner of the country and find their way into the newspapers that your editors edit. To what extent has there actually been discussion about the evolution of FOI between your representative organisations and ministers or the Cabinet Secretary over the years since it came into effect? Because I must say it seems to me that we would have less megaphoning about the work of this Commission and FOI in general if we could be confident that there were creative discussions taking place on a regular basis between you and Government.

MR SATCHWELL: Well, over the years, over the whole period, and in fact before the Act was introduced, and working very closely with the Campaign for Freedom of Information and, as I say, after it was passed, I actually sat on a Government committee which did a very similar review.

LORD CARLILE: Has that continued?

MR SATCHWELL: But it has not continued, no.

LORD CARLILE: Is it your view that there should be a review committee or something of that kind which would ensure there was an ongoing conversation between

Government and interested parties, including Mr Frankel's organisation -- if I can be forgiven for putting it so personally -- so that less megaphoning takes place and more real discussion.

MR SATCHWELL: I think, as I suggested earlier, that everyone benefited, everyone benefited from that Information Users Group at that time, including the Office of the Information Commissioner, where what was exposed was the fact that it was very badly underfunded at that point.

LORD CARLILE: I want to turn now to section 35 and 36 if I may.

Mr Clifton, in the PA's evidence you refer to a number of FOI success stories and indeed you made it quite modest about the number of successful stories there have been. I think we would accept that.

But is it fair to say that very few of those success stories relate to the issue of the operation of section 35 and 36 and can you tell us in how many cases the request for essentially factual or statistical information was provided without quibble and that really section 35 and 36 don't act in any way to the detriment of the media?

MR CLIFTON: The one experience we've had of section 36 which jumps to mind was when we recently asked a question of Parliament around any reports that had been written around the provision of alcohol in the Commons and any reports about the health implications of that and the Speaker blocked that, quoting section 36, and we have no ability to appeal because he has an absolute right to do that.

So I would say that is the most -- I have only been back at PA for nine months to a year, that is the only example that I am immediately aware of. I think the vast majority of our examples are where we will go to the police, to a health service, or

the ones that you see in prison services, hospital trusts, and there it is more about the reliability of the responses. We very rarely get everybody respond, we will sometimes only get half of them respond, but on occasions, if we get enough of a response, that will be how we set about crafting our story.

THE CHAIRMAN: What do you do when people don't respond?

MR CLIFTON: Well, we will get back to them and tell them that we are minded to go to the first stage of an appeal. Very often people will then respond and reluctantly give us the information. If we are then at a point where we feel we have sufficient evidence, we will go at that point rather than spend more time going through an individual process with maybe half a dozen of the authorities that we have approached.

THE CHAIRMAN: How many do you end up with?

MR CLIFTON: I mean, the example of the number of prisoners who have been released in error,that was 39 forces out of 45.

THE CHAIRMAN: Quite high.

MR CLIFTON: That is not a bad strike rate, to be honest, that one.

LORD CARLILE: Are there any changes that you would suggest to sections 35 or 36 or repeals of parts of sections 35 or 36 --

MR CLIFTON: We would like to know about the drinking of Her Majesty's Government.

LORD CARLILE: We will have a word with you afterwards about that!

MR CLIFTON: I will see you in the bar maybe!

LORD CARLILE: I can't imagine how Mr Speaker would know about the drinking, for example, by Members of the House of Lords in this building, but there we are. Let's move on to something more serious.

THE CHAIRMAN: What was his reply, Mr Speaker?

MR CLIFTON: When we put in a -- essentially, we put in a request to ask if there had been any reports gathered around the consumption and the provision of alcohol in the Palace of Westminster and Mr Bercow rejected it on the basis of section 36 that it would inhibit full and frank discussion, so we have no response. We were told that there had been nine people that had referred themselves for some kind of medical advice, but that was --

THE CHAIRMAN: To Mr Bercow?

MR CLIFTON: Not to him, no. That was as much information as we were given.

LORD CARLILE: Right. Oh well, leaving that one aside, because the mind boggles after 30-odd years in this place as to what information you would or would not get, can I turn to an entirely different issue which is the imposition of fees.

I don't know if you were here earlier but you have heard various public authorities, and we have had evidence from various public authorities, protesting, as it were, that the imposition of the FOI is unreasonable for them and that the media and commercial organisations could perfectly well pay small fees to obtain information. Why isn't that view reasonable?

MR SATCHWELL: Well, I think the idea of putting the media into that same category of people just trying to trawl for information just to make contact to, as it was put, try and offer services or try and get contracts is slightly different, really. The media is in a different position. We are simply a conduit to the public and I think also one of the examples that Peter has mentioned about where you are going to 45 different police forces or so many different health authorities, it becomes very, very expensive. Even for a major media organisation, perhaps a national paper, it

becomes very, very expensive and there would be cost constraints on that. It is not cheap.

What the media I think tends to do though is, again, often with the help of the Campaign for Freedom of Information, is to try and find a way of asking questions in a way which make it easier in a way for any organisation to answer, so that they are not sort of drifting off and having to go off into what are loosely described as fishing expeditions, but to try and be more specific and to be as helpful as possible to say what you want the information for.

LORD CARLILE: What steps do you take to advise your memberships and your journalists that they should not go off on fishing expeditions? Because we have heard evidence and seen evidence that members of the media, particularly the regional media, have an inclination to ask blanket questions of every single local authority in their region.

MR CLIFTON: I just point out that, although PA provides all the people I've described earlier, I would not want any of them to think I have come here saying "I am representing you in some formal way". I mean, they are our customers and we have great relationships with them.

I would say from my perspective, if you look at the examples that I have quoted here, PA strives to follow up on things in the news. It might be a court case that raises an issue, it might be a news story that raises an issue, and you will see the examples that we've quoted, and there are many others, are building on something that we think is legitimately in the public eye and we think there is a need to find out more information to back up something that has come up as part of the news agenda. My journalists would be expected to pursue Freedom of

Information requests on that basis and the idea of fishing trips on a wet Tuesday afternoon because they cannot think of anything else to do is absolutely not what I would expect. I expect there to be very good thoughts and I think that is what people would expect from PA, and the reputation that we have is we are not going to send out blanket ones about people's first names. We want to follow up and get under the skin of stories that are already in the public eye and I think the examples that are quoted here, and many others I could weigh you down with, would point to that. But I would say there is a awful lot of other fantastic work right at the top of the tree from national newspapers -- the Mail did one on public sector pay before Christmas which actually involved well over 1,000 requests, right down to the Kent Messenger Group in 2009 finding out how many days sick people at Kent County Council had had: 90,000 days at a cost of £4 million to the local council taxpayer.

All of them feel very legitimate to me. I think it is easy to point to the odd example of a crazy one. Crazy stuff happens but the vast majority of the examples that I am aware of and read about from the media are responsible.

LORD CARLILE: Sorry, just to press the point further, and I mean what I am about to say: given that you represent a noble profession underpinned by some ethical principles, does either the Press Association or the Society of Editors issue any guidance of any kind to its membership and customers as to how FOI should be approached?

MR SATCHWELL: We routinely -- I routinely refer them to the Campaign for Freedom of Information, actually, to explain how the Act works and that's been a case from the smallest of local papers to something as big as the BBC and I have said: go

and get advice because, you know, there are people with expertise on the way that the law works and simply you should have that information from the horse's mouth, as it were.

LORD CARLILE: Mr Clifton, given the criticism there has been of some journalistic practices, for example the interception of messages unlawfully, does the PA issue any sort of guidance on the proper use of FOI to its members and, if not, why not?

MR CLIFTON: No, we don't, because that is not our role. We are a news agency like Reuters or Associated Press. We have a fantastic range of customers who we are delighted to have, who pay us for a service that we provide on a daily basis. That is the nature of our relationship with our customers. We know that they know the high standards that PA will uphold and the quality of the content we deliver to them will be reflected in their publications on a daily basis, but we certainly would not give advice because that is not the nature of the -- the Association is probably a bit of a misnomer. We are a news agency that provides quality content to many, many customers.

LORD CARLILE: On another matter, is it the view of your bodies that contractors and charities carrying out work for the public sector should be subject to the same obligations as public authorities and, if so, do you set any sort of lower limit so that small companies and small charities are not unduly burdened?

MR SATCHWELL: I think the simple answer to that is yes.

LORD CARLILE: Is it yes and yes?

MR SATCHWELL: Well, I can understand the point. I mean I would leave that to people who have greater knowledge to set where that land might be and that is as far as I would go, but in principle, you know, we are talking about the major

organisations which are now doing public authority work and I could understand if it is a tiny little local charity or something, there might be difficulties.

LORD CARLILE: Yes.

MR SATCHWELL: But that is something which I am sure could be worked out at a sensible level.

LORD CARLILE: Thank you, that is very helpful.

Mr Clifton, you say in your evidence that FOI is now being used as a tool to protect those in authority from mere embarrassment. By that do you mean that ministers or the Government is simply seeking to withhold that it considered a policy which might be unpopular and even that sort of level of consideration should be disclosed or do you accept that there are circumstances in which the withholding of information that might prove embarrassing is appropriate?

MR CLIFTON: So my view on that is that I think we are reflecting the fact that there is a tendency for a default more often where withholding information is the preferred route and that is what concerns us. I think we all acknowledge that there is a requirement for a safe space and the period of time that might elapse before that might no longer be relevant, but I think we are concerned that in various examples that we write about and that we see quoted elsewhere that there is a default which is to try to block that quest for open access to information rather than make that information available.

LORD CARLILE: In defence of my neighbour Mr Straw, who introduced the Freedom of Information Act, would it not be fair to say that, when it was introduced, far from seeking a default, the then Government was seeking to provide a greater openness? If that is the case, and it almost certainly is, what's gone wrong?

MR CLIFTON: I think what's gone wrong is that we see too often that -- well, I think at the very heart of what has gone wrong is that we still have a society where there isn't a default of making more information readily available, whether it is on websites of trusts and of health authorities and so on, and I think that is at the heart of the issue, that there is an awful lot of information that we should not even be arguing about whether it is in the public domain or not, but it simply isn't and there will be reasons, some of which we heard in one of the sessions a bit earlier, about why it is too complicated and expensive to do that. I think if it was the default to do that more readily and to acknowledge that, you know, UK taxpayers are fully signed up members of shareholders of UK plc, more of that information should be made available, and if it was, we would not have to go to the often torturous process of trying to get to that information which really is not contentious and should just be readily available.

LORD CARLILE: Does to follow from that that the publication of (a) risk assessments and (b) all responses for requests for FOI would be helpful to the media and you would consider sound principle?

MR CLIFTON: Yes.

LORD CARLILE: That's an easy question, isn't it?

MR CLIFTON: Yes, absolutely.

MR SATCHWELL: There are times of course when the release of information as a result of an FOI request, the open release, immediate release, is sometimes used as a way of taking away a media organisation's exclusive. But, I mean, call me cynical but that seems to happen sometimes.

RT HON JACK STRAW: Could I just follow up the important point Lord Carlile raised

with you about the fact, Mr Satchwell, you said that you found the user group that was set up initially when the FOI Act had been passed and was coming into force, and regretted the fact that it no longer was there. Drawing that into Mr Clifton's remarks a moment ago about the need for greater openness, if there were a new user group combining people like yourselves with practitioners, as it were, on the other side, would one of the issues you would be able to pin down in that, the notion that, say, health authorities should routinely provide information about staff at every level or, for example, Mr Clifton, that police authorities, police forces, should routinely provide information about sex offenders from whom contact had been lost sight of, so you ended up with lists of information that should be made available, full stop, and then you would bypass the need for these what you describe as torturous and time-consuming applications?

MR SATCHWELL: If I could just say this from the outset: what I have always felt about the Act is that it wasn't powerful enough about its purpose and what Parliament intended; you know, a real hard purpose clause. In fact, if you read through it, most of the paperwork is actually how to avoid answering an FOI request and how to get an exemption and I understand that that is the problem of Parliamentary draughtsmanship and so on, but that can be a problem in itself.

I think that the value of an ongoing dialogue is that you can have conversations about all of these sorts of issues and you come to an understanding of why a health authority may be reluctant to release certain information and they may get to understand why journalists might ask difficult questions. You know, as I say, certainly my experience of the user group was that the health authorities, representatives of the health authorities, local government and the police were

actually persuaded that they could benefit from the Act in terms of public confidence.

RT HON JACK STRAW: Yes.

THE CHAIRMAN: Of course you do have -- I mean, you have just mentioned earlier a potential conflict between the fact that journalists are looking for exclusives which actually goes against the notion of trying to get everything out ahead of time. But on your point about saying the default position, when you have been doing these various exercises, which, as you said earlier, by and large did not involve sections 35 and 36, have you run up against problems of getting the information that you wanted? I mean, you only said the default position is not to release the information. Is that really what is happening?

MR CLIFTON: We would very rarely -- and certainly in the time I have been back at PA I can't recall an instance where we have done an inquiry of all the police forces where we have had them all respond, for example. So there will be some who do not meet the time limit --

THE CHAIRMAN: Okay, but you haven't had a blanket refusal?

MR CLIFTON: Not from all of them, no. We will normally get a decent body of responses, but there are some who are more inclined not to reply than others.

I have one other point about the level of information that is made available.

I think if more data is made available, there is still a fantastic opportunity for journalists to find stories within that data, so the whole approach to data journalism which we now embrace is about really examining figures that are released around hospital tables or exam tables and extracting interesting stories from the data. So it really is lazy journalism if people think that, well, just because the data is all out

there, there are no exclusives any more. That's absolutely not the case and there can be much better quality journalism by proper mining of data that is made available --

THE CHAIRMAN: On a consistent basis.

MR SATCHWELL: I think it is also true that there has been some change in attitude and I can think of one in terms of the police when, what, 25/30 years ago I tried to get to the idea of what is now called crime mapping, to try and tell the public about the levels of crime in their area. That was seen -- there were technical difficulties at that time both within IT departments of the police and indeed in the way that newspapers were produced, but there was a general sort of hold-back on it. There is still to some extent a hold-back on it.

THE CHAIRMAN: I thought there were apps that would show you the crime in your area now?

MR SATCHWELL: Yes, I mean, there are. But it is that kind of thing where attitudes have been changed by the Act, so that is another reason why it has been effective.

LORD CARLILE: Final issue from me: in paragraph 33 of your evidence, Mr Clifton, you refer to our next witness, Mr Grieve, having exercised what you call "the divine right of kings" to veto the Prince of Wales Black Spider letters. Doesn't that comment display a complete misunderstanding of the separation of powers and isn't it a fact that, actually, the decision of the Supreme Court in that case, insofar as one can distill a decision from it, simply found that Mr Grieve was carrying out a legitimate task but got it wrong in law and should we not leave the situation that way rather than extravagantly trying to change the way in which the veto operates?

MR CLIFTON: So I think we were merely pointing out a concern around the executive having the right of veto over a decision of the judiciary.

LORD CARLILE: So exercise the veto earlier then, as was suggested by the Commissioner?

MR CLIFTON: If the veto had been exercised at the right point and it had been gone through the process in that order, then that is kind of what the Act is there to do. So I think we are only pointing out, obviously in very flowery language, there's a danger that, if this became the norm, you would be challenging and vetoing decisions made by the judiciary.

LORD CARLILE: Well, Charles I and Mr Grieve both lost their heads, didn't they?

DAME PATRICIA HODGSON: It is clear that FOI has enabled the press to reveal a great deal of information that it was in the public interest to know and which wouldn't have otherwise have been revealed, and we've heard a great deal during these sessions and in other evidence about the data that has enabled important stories to be revealed in the health service, police, a range of public authorities. I'd like to go back to the specific issue, Mr Satchwell, that we were discussing at the beginning of your session about the safe space. Just so that I have understood what it was you were saying, I think you said that the safe space is necessary, that you felt it was fine as it is and that it shouldn't be extended. Have I captured what you said?

MR SATCHWELL: It certainly shouldn't be extended, is what I would say to that. What I was saying is I would recognise that there are occasions, there are times, when information should be on the similar sort of basis when you think it through, that there should be a positive decision about it in the sense of saying this is why,

this is the important reason why it should not be released and I think that too often decisions about releasing any kind of information are negative. Well, the simple answer is "no, let's not release it", whereas in fact I think what I am trying to encourage is a positive decision to say the reason why we are not releasing this, there is a very good reason for not releasing it, but the default should be to release it.

DAME PATRICIA HODGSON: Thank you. The Information Commissioner told us last week that his understanding of sections 35 and 36 had evolved over time. He felt various authorities' understanding had evolved over time, although we have heard evidence that that understanding differs in different places and that he issued updated guidance and so forth. Do you think greater clarity could be achieved without changing the intention and, if so, how?

MR SATCHWELL: Well, I think you can always get greater clarity by reviewing and revising and trying to -- I think what it needs to go back to is to keep going back to what the original intention of Parliament was and, as I say, I have always felt that the original intention of Parliament, and this happens too often in legislation, I think, is forgotten, partly because politicians move on by the nature of things and there are -- and I think it is well worth revisiting and sitting round a table and saying: well, you know, where are these boundaries?

DAME PATRICIA HODGSON: Thank you. That's very helpful.

May I move on to the speed of the whole process and the layers that we have heard about characterised by an earlier witness as four layers of review. Do you think any of the layers could come out? Would you welcome a more streamlined appeal system?

MR SATCHWELL: I have not been directly involved in making FOI requests for some time, in fact, even since the Act came in, directly involved, but clearly it seems to me that, if you have that many layers, there must be room to streamline and I think, where there is a problem, one of the problems where we do have an example of a problem that arose with a police force actually was that they rejected a request and the Information Commissioner supported the paper that was making the request and so the police authority changed its reasoning for not releasing the information from -- I think it went from vexatious to there's an investigation still going on. I think it was that way round, it could have been the other way round, but, you know, this is crazy. You know, either there is a very good reason for not releasing that information or there's not and that is where there could be greater clarity.

DAME PATRICIA HODGSON: Thank you.

I think we have heard a very great deal from yourselves and from other witnesses about the importance of authorities publishing information proactively and, Mr Clifton, you made a very good case for that.

Two questions. The first I think I know the answer to but the second I would be very interested in your thoughts and perhaps both your thoughts. Are public bodies complying with their existing obligations for proactive publication and, if not, do you think that someone needs to be given the job of enforcing that? I'll ask Mr Clifton first.

MR CLIFTON: I think the answer to the first one is definitely no. It's a very patchwork quilt view of the country currently in terms of the consistency that we get in the data that is released as a matter of routine.

I think it would be an excellent thing if there was a more commonly held understanding, an obligation on bodies to behave as they are, publicly owned institutions that make their information more readily available. Now whether that's by having somebody whose job it is to crack the whip or, as we have already discussed earlier, some clearer guidelines about the level of data to which all bodies would be expected to conform. But I think at a stroke a lot of the issues we talk about, the sometime that is spent answering these responses would be addressed if there was just a much more open approach to data that is often not particularly controversial, it just adds to people's understanding about the organisations that help to run their lives and I think we should have a more consistent approach.

Whether that is a person or clearer guidelines from, you know, overarching council bodies and so on about what is expected of their members, I am not entirely sure, but, as a media organisation, we would clearly welcome that because I think what we can do then with that data is of benefit to everybody.

MR SATCHWELL: I think it comes down to two things. First of all, two words: public and service. That is what public bodies do, they serve the public, so it just seems absolutely strange to me that there should be any reluctance to release information which is the public's information. The second thing is it comes down to leadership and I think it is something which should come down from the top of any organisation and, unless people at the top of those organisations are driving it and are making it a priority with the understanding, the simple understanding, that the more you can tell the public and explain to the public, the more likely that you are to increase confidence. I have a simple sort of mantra which I trot out which

is that secrecy breeds suspicion and contempt and openness breeds confidence and respect, and you know it is as simple as that. If people at the top of organisations just grasp that and get it down right through all the ranks of their organisations, I think it would make a huge difference.

THE CHAIRMAN: I was very struck by paragraph 54 of your evidence about the problems with the manner in which the Act is working, about Government departments, you know, who fail to meet their statutory obligations and the way they deal with things but also this issue about excessively expensive requests, and I think one of the things we have noticed about the evidence that we have had, both from requesters and from the public authorities, is that this has become really quite a tribal battle. It reminds me when I was doing the Hunting Inquiry for Jack 15 years ago, that there is very little movement from either side, where it does seem to me that there is an awful lot here where progress could be made by being able to deal with some of these vexatious issues but at the same time dealing with some of these very delayed answers and ways in which things are operating in a very inefficient way, whereby, you know, the information is dragged out over a long period of time and this is what I think we have been trying to refer to through the course of the day about some of uncertainties about the Act and some of the battlegrounds that have built up about the Act which seem to us not beyond the bounds of being able to be resolved.

MR SATCHWELL: Well, the battleground is often about it seeming as though somebody is trying to hide something, cover up or whatever, isn't it? It actually makes the situation worse and there is a simple answer I think in most cases as to, when mistakes may have been made, the sooner you answer, the sooner the

problem will go away actually and the sooner that public confidence will be restored.

THE CHAIRMAN: Well, thank you very much, both of you, for both of your evidence and the way you have answered our questions. Thank you.

MR SATCHWELL: Thank you.

THE CHAIRMAN: We will now have a break and we will be back at 2.25.

(2.10 pm)

(A short adjournment)

(2.25 pm)

RT HON DOMINIC GRIEVE QC MP

THE CHAIRMAN: Good afternoon and thank you so much for coming to see us this afternoon. Obviously the whole question of the veto has been quite a big issue in much of the consultation. But, just to get things rolling, do you want to make an opening statement yourself or are you happy for us to ask you questions?

MR GRIEVE: Thank you very much. I think I am very happy for you to ask the questions. I don't think I have any particularly sort of profound pronouncement to make on this subject, but I am very happy to help you with your work.

THE CHAIRMAN: Okay. Thank you very much.

LORD CARLILE: Mr Grieve, on 16 October 2012, overriding a decision of the Upper Tribunal on 18 September 2012, you exercised the veto to prevent the Black Spider letters of the Prince of Wales being released. Would you like now, looking back on that, to give us your assessment of how damaging or not was the publication of those documents and perhaps, if you do regret the decision you made, perhaps you'd tell us?

MR GRIEVE: I don't regret the decision I made at all and if I had to make the decision again today I would make it in exactly the same terms as I made it at the time. Just to go sort of back a little bit, obviously my role in this process came about because, although the Government had objected to the publication and had taken the matter to the Tribunal, if there was any question of the exercise of the ministerial veto, it fell to me as Attorney General to do it because it concerned the papers of a previous administration. So it was for that reason that it landed on my lap and I have to say that, when I read the decision of the Upper Tier Tribunal, I am sure well reasoned and well intentioned as it may be, I disagreed profoundly

with it. I thought the reasoning was frankly very seriously flawed in its assessment of the public interest.

That was my view. Of course there was a consultation process which then took place within Government, as is required, and, as I'm sure you are aware, went through the Cabinet Office as to what other people's views might be. But ultimately it was my decision whether or not to exercise the ministerial veto or not and I chose to do so.

I mean, the reasons in a sense I gave in the reasons that which were set out at the time. Perhaps just to try to encapsulate that, it seemed to me that, by virtue of what I think is known as the education convention, by which the heir to the throne is educated in the role of becoming king, he has access to Government papers which are provided to him for that purpose and, in addition to that, he also performs a huge range of public functions, where he goes around the country and people impart information to him.

So it places him, just as indeed it does the monarch, in a unique position to have both an understanding of what some of the background to issues may be, because the Government papers are available to him, and also, I think it is fairly obvious, a pretty clear ability to get an understanding of what people think about various policies.

Now, in those circumstances, it seemed to me, is it in the public interest that he should be able to communicate what he has learnt from his own activities to Government ministers? The answer to my mind is overwhelmingly that he should be able to do so and he can't do that unless it is within a degree of confidentiality because the very nature of his role means that he shouldn't be taking a partisan

approach in public, but his perfectly entitled to impart his own ideas as well as passing on the concerns of others in correspondence that he might wish to have with ministers and that would be prevented if the letters were published.

Now, in actual fact, as you'll be aware, we've changed the rules. So for the future the Prince of Wales' correspondence as heir to the throne is protected under an absolute exemption. So we were in one way dealing with what were historic documents and to an extent what happened there was a bit of a one-off.

But for all that, it didn't seem to me that the principles involved in all this were any different and that was why I exercised the veto, and I would do exactly the same thing today.

LORD CARLILE: Well, thank you for that very clear explanation.

It follows from what you've said that it's your view that the Government should have the power, should continue to have the power, to veto decisions of Tribunals and the courts. Given the decision of the Supreme Court, insofar as one can deduce a single decision from it, is it your view that there should be further legislation to clarify the circumstances in which the veto can be exercised?

MR GRIEVE: Here I think we move into a slightly different area. I had to apply the law, as I understood it to be and certainly my understanding was that Parliament had expressly provided for a ministerial --

LORD CARLILE: Are you okay?

MR GRIEVE: Yes, I am fine. It is just announcing the start of the day's business, I don't think anything more significant than that.

It was certainly my understanding that Parliament had expressing provided in section 53 for precisely for such a ministerial override. Obviously I have taken

great interest in the Supreme Court judgment and indeed that of the Court of Appeal which preceded it, even though by the time we got to the Supreme Court I was no longer in office.

The Supreme Court, as you will be aware, were kind enough to say that they didn't think any of my reasoning was unreasonable but they thought that I had exercised my reasoning wrongly because I failed to understand the extremely limited scope which that reasoning was in fact going to be allowed. If you read Lord Neuberger's judgment, which was the lead judgment, he makes clear that he thinks the interpretation of section 53 is extremely narrow.

The point which he made, and which clearly shines through the judgment, and I think that of the majority, was their deep concern at what they foresaw as I think a constitutional -- I'm not sure of the best way to describe it, but a constitutional insult I suppose might be the way to describe it, that we should have a situation where a minister of the Crown could by veto override a superior court of record.

It seems to me there is a bit of an irony about this, because Jack Straw will know more about this than I do, but it is quite clear that of course, when the Freedom of Information Act went through Parliament, the original idea was that the Tribunal was going to be merely advisory. Parliament in its wisdom decided that in many cases it would become mandatory but wanted to provide a ministerial override and I don't think anybody really focused at the time we did this on whether we were perpetuating a constitutional enormity which was to give a minister of the Crown the power to override a superior court of record.

So I am actually not unsympathetic to the view expressed by the Supreme Court -- even though I found their interpretation of the clear terms of the statute

somewhat surprising, that of the majority -- I am not unsympathetic to the Supreme Court's view that it is not the happiest place to be. It seems to me therefore that, if we are to restore the ministerial veto, because it's effectively been destroyed by that judgment, then it would probably be sensible to do it in a way which perhaps puts the question as to the way the Government wishes to approach this back to an earlier stage so that we don't have a situation where we have ministers exercising ministerial vetoes which override the decisions of superior courts of record and I think that could probably be done. Of course it is up to Parliament. If Parliament were wanting just to come back and say if you didn't think it was clear enough originally, we are going to make it clearer to you this time around, it is undoubtedly within Parliament's power to do that.

LORD CARLILE: On this point, and it is a very helpful answer, the Information Commissioner last week suggested to us that the veto should be limited to overturning his decisions so there would be no question of the Attorney General or any other minister overturning a decision of a court of record. Leaving aside issues of the separation of powers which may be relevant to your point, would you support the view that the veto should be limited to the Information Commissioner's decisions and could you see any difficulties from exercising the veto at that stage?

MR GRIEVE: The difficulty is this, isn't it, and I think this was quite apparent during my time in Government, that, once you have a system which provides for a review by an Upper Tier, by a Tribunal, ministers, far from being gung-ho about exercising the ministerial veto tend on the whole not to want to do it unless it is absolutely necessary.

So, as I could see for myself, not just with this example, but there were others

when I was in Government there was a strong and to my mind entirely understandable view: well, we should exhaust the Tribunal process first because we have a good argument and therefore we should wait to see whether the Tribunal -- surely the Tribunal is going to agree with us, which of course takes a bit of the heat off Government ministers of them being seen to veto a request for information which may be exciting quite a lot of public interest.

So, as a consequence of that, I think I could see during my time in office that a trend was developing where the ministerial veto was only being used as a last resort. I myself don't feel at all uncomfortable with the idea of ministers being faced with having to make this choice perhaps a little bit earlier and then facing up to the consequence. So to that extent I think the Information Commissioner has a point. If ministers think the issue really is of fundamental importance, then making the decision earlier and then being subject to judicial review if people don't like what we have done strikes me as being a perfectly sensible way forward.

Of course it is true to say that if you do that then the ministers are deprived of the advantage of hearing the reasoning of the Tribunal, which of course might have some bearing on their eventual decision. As I say, as it happens in the case of the Prince of Wales' correspondence, I read very carefully the extremely closely reasoned conclusions of the Upper Tier Tribunal but I must say that, when I had done so, I found myself in actually fairly fundamental disagreement with the way they had approached this matter.

LORD CARLILE: Given that you have been kind enough to turn up and give evidence to us and you served for over four years as Attorney General, can I ask you about the protection for law officers' advice? There is currently an exemption for the

provision of advice by any of the law officers or any request for the provision of such advice. Is that an exemption that should and can be maintained, given the intense pressure there has been for the release of law officer's advice and instructions?

MR GRIEVE: I have always been of the view that if the law officers are to provide full and frank advice to Government, then it is necessary that, unless the Government, as the client, wishes to waive their privilege, in a sense their legal professional privilege, it is desirable that that advice should be provided privately.

There are obvious reasons for this. I realise that the fear is that somehow thereafter, when the Government presents its public case, it will massage the Attorney's advice to present it in some more nuanced, or perhaps less nuanced, more clear-cut way than the nuance which the Attorney may have provided.

LORD CARLILE: The Iraq example springs to mind.

MR GRIEVE: Iraq is the example. We are still wait for the Chilcot Inquiry to shed light on it, so I've always been a bit hesitant about pronouncing on this particular issue. Clearly the Attorney is both a politician and a lawyer. It is rather customary nowadays that the Prime Minister, when he is about to make a serious announcement at which he's at least going to accept that he has taken the Attorney's advice, usually requires the Attorney to sit rather close to him on the green Treasury benches in the House of Commons.

The bottom line is, if the Attorney feels really uncomfortable about this, that the Prime Minister is about to say something that is rather at variance with what he's advised, he shouldn't be there or he should resign. As long as he is satisfied that the Government is operating in a way that is compatible with his advice, then he

will go sit and look cheerful, or as cheerful as possible, sitting next to the Prime Minister. But I do think that the danger that we're going to run is that, if it were to become routine for the Attorney's advice to be published, then inevitably, the Attorney's advice would start to be tailored for public consumption, whereas it is really important that the Attorney's advice should not be tailored for public consumption but should set out both the pros and cons of a policy.

One of the points I keep on making to people is that lots of areas where the Attorney has to advise, it is possible for reasonable people to disagree in how the law should be interpreted, particularly when you're dealing with matters of international law where ultimately there's very frequently no Tribunal that could adjudicate on it. So it is a difficult area.

LORD CARLILE: Following your helpful tip to the media to look carefully at where the Attorney General or the Solicitor General are sitting at any given time, can we turn briefly to the public interest test? Would you be in favour of an attempt being made to define more closely what the public interest is or do you prefer something more akin to a common law approach perhaps of leaving the public interest as a more elastic matter and one which is contextually driven? Discuss.

MR GRIEVE: "Discuss": it is a very difficult question to answer. Perhaps I could just say this: I didn't find the public interest test as set out in the Freedom of Information Act particularly wanting. I didn't find it difficult to deal with myself or I think on the occasions when I was considering it. Of course you could draw it more tightly if you wanted to. Of course, I mean there are two ways in which this can be approached. One is you could provide for more absolute exemptions and then tighten up the test otherwise, that's one way of approaching it, or you leave

the broad measure of the qualified exemptions as they are and the test as it is. At the risk of being unhelpful to the Committee, I don't find that an easy question to answer and the danger is that, just talking off the top of my head, I will come up with an answer I might regret afterwards. It is not unworkable. Before one starts to slate the Freedom of Information Act too much, you know, some people say it's cost too much money to run and ... but it has had, when you look at the problems associated with it, it's had some very good positives to it as well. I know that Tony Blair said he regretted very much having done it but I don't think that I personally as a politician, looking back on it 15 years later, think it was the wrong direction of travel at all.

LORD CARLILE: Thank you, Mr Straw will be pleased to hear that opinion.

THE CHAIRMAN: Could I just ask one further question? We have had quite a lot of comment that the appeals process is lengthy and the question of whether or not it should be streamlined has come up several times, whether or not one or more layers in this process should be removed, and do you have a view about that? I mean, if not, don't worry.

MR GRIEVE: It is lengthy and, if it could be streamlined, that would be absolutely marvellous. On the whole as a lawyer, despite the fact lawyers are supposed to earn money from lengthy legal processes, streamlining them is very desirable. The more interesting question is what you can do to achieve that. In many cases it is a matter of timing, it seems to, me and fitting in just the volume which Tribunals or Commissioners have to deal with. You will be better placed than I will in taking your evidence as to what the best course of action will be. But clearly, taking the evidence and the Attorney General as an example, admittedly

going all the way to the Supreme Court, this was a long drawn out process and of course that's not desirable. Anything that can be done to try to shorten that would have been very good.

RT HON LORD HOWARD: I think, if I correctly understood your evidence, Mr Grieve, you did suggest earlier on a possible streamlining in relation to the ministerial veto. If you excluded the First Tier Tribunal and allowed a point of law appeal to the Upper Tribunal or to the High Court on judicial review, which comes to much the same sort of thing, that was what you've had in mind?

MR GRIEVE: Yes, I mean -- well, I think what I had in mind was that the system provides for two parallel tracks. One is a system which goes up to the Upper Tier Tribunal and eventually potentially to the Court of Appeal on a point of law, which is a legal route. The second one is a route where the Government takes a view at an earlier stage that in fact this really is ministerial veto territory, therefore grasps that particular nettle, exercises the veto before the Tribunal stage is engaged and then accepts that there will be judicial review thereafter. Now, of course judicial review can take some time but it would avoid where we ended up, which is, as I say, this later unfortunate situation where firstly ministers were seen as overriding me, overriding a decision of the superior court of record, which is not going to make the judiciary very comfortable for understandable reasons of the separation of powers, and secondly, of course, pulls it out in an even longer period. So it would have the merit of shortening the system but it would mean that ministers were deprived of the advantage of seeing the Upper Tribunal's reasoning before deciding on the veto, that would be a loss, no doubt about it. It is useful to have that information. Secondly, they would be deprived of that and they would

also have a come to a decision faster, which ministers are often rather reluctant to do. If they can put it off for a little bit, sometimes that suits them rather well.

RT HON JACK STRAW: Mr Grieve, could I just ask you this: Lord Neuberger in his lead judgment cited the fact that Dinah Rose QC, who was counsel for Mr Evans and The Guardian, had, as it were, conceded that, if the veto had been exercised at the point of the Information Commissioner's decision, then none of the major constitutional -- I paraphrase -- issues which were raised later would have arisen.

Lord Neuberger, having said that, then went on to say, paragraph 80:

"There must, however, be a powerful case for saying that it would at least often be a misuse of the section 53 veto power to issue a certificate on certain grounds when it would be possible to appeal to the Tribunal under section 57 on the same grounds."

In other words, a test of reasonableness, not of whether you had reasonable arguments, but whether, as it were, it was reasonable to exercise a veto would be where an appeal would lie.

Do you think it is possible to deal with that issue by careful drafting?

MR GRIEVE: Well, I would hope it was, but it does mean -- those effective words, and obviously I have read the judgment, is that section 53 is dead. The clear implication of that was that, even if you wanted to use section 53 at the moment to exercise the veto at an earlier stage, you might well fall foul of the Supreme Court at the end of the day on reasonableness of the route you've taken.

But I think it is open to Parliament, if it is clear, to deal with that and I don't -- I would be interested to know -- you might obviously want to hear from some jurists or other lawyers about this, as to whether this is such an unusual route, but I don't

find myself seeing that there is a constitutional horror in at an early stage the Government deciding whether this is an issue which is so important that the minister should make the decision and then take the consequences or say that essentially the minister says that, although they may be arguing against it, they are quite prepared to see it go through a judicial process of review to determine whether it should be put in the public domain or not. I don't see that as being in some way conceptually wrong, but somebody may persuade you or me that I am wrong about that, but I find it difficult to see why that concept should be wrong.

THE CHAIRMAN: Thank you. That's been very helpful and we have overrun by a few minutes, but it was very interesting material.

RT HON LORD BEITH

THE CHAIRMAN: Good afternoon, very nice to see you.

RT HON LORD BEITH: Good afternoon.

THE CHAIRMAN: Do you have anything by way of opening remarks to make?

RT HON LORD BEITH: If I may, just partly to make clear that obviously I cannot speak on behalf of the Justice Committee, which is a new form in a new Parliament. But I stand by the conclusions in its 2012 report, which had all party support. Indeed three of its then members are now ministers and one is the Leader of the Opposition.

Freedom of Information is, we thought, a significant enhancement of our democracy and its benefits outweighed its problems and disadvantages. The Committee did not find, and nor did the Constitutional Unit on whose research we relied to some extent, that there was much reliable evidence of the inhibiting of policy discussions at senior level, but we acknowledged that there might be a perception that there was no longer a sufficiently safe space and we recognised that there would be occasions when it would be right for the ministerial veto to be used to protect that space.

The key point I want to make to you this afternoon, apart from one other different point, is that Freedom of Information is only one of several ways in which the safe space is threatened. Leaks, disclosures to court, public inquiries, publication under the 30 year rule, memoirs now published frequently after people have barely left office and must have been writing extensively while they were in office, all of these are routes to information emerging from that supposedly safe space and, even if the Freedom of Information Act were to be altered, you could not say, as

a permanent secretary in department to somebody "don't worry, you can put what you like in that document, it will never be seen because we've modified the Freedom of Information Act, because in the process of doing that I think you would have done great harm to something which is of real public benefit and it is better to have a general right than merely a selective opportunity to disclose only one part of the story. FOI means that the citizen, organisations and the media can get access to the whole story, not just the information selected by individual ministers, squabbling special advisers, people with a grudge or the Number 10 Press Office. The one other point I would make would be about privatisation and outsourcing, simply to underline that we observed in our report that, where public publications were outsourced, particularly in local government, there were already arrangements in hand in many instances for the necessary information for FOI to be available to the authority which was then held responsible for producing it. That is in our view the right way to go about it and, if there is any question about it not being done by somebodies outsourcing functions, then that should be attended to.

THE CHAIRMAN: Thank you very much. Patricia?

DAME PATRICIA HODGSON: You spoke of the balance in public interest in safe space and the public interest in revealing Government deliberations. Your report concluded that the existing protections, properly used, were sufficient to protect the safe space, which I think you have just repeated to us. If so, why does the Act continue to cause so much anxiety to officials and governments?

RT HON LORD BEITH: What I did not seek to imply is that there had been no argument and no questions about the safe space. Indeed quite a lot has

happened since the Committee produced its report but the question you've actually asked me is why is it still discussed. Well, it is inconvenient to ministers and to officials and some of the particular instances when information is refused, the various powers are exercised, clearly give rise to argument and discussion in itself and the organisations which are seeking the information then make waves about it. This is an area about which governments and ministers and some civil servants are very sensitive and there will be argument but that argument is a sign of the value of information disclosed.

Most of us, particularly even in Parliament, have experience of the inconvenience of disclosure, I put it no more strongly than that, because you then have to mount an explanation for things which on the face of it are criticised, but that's accountability.

DAME PATRICIA HODGSON: But you prefaced that remark by saying there were proper questions about its operation. How would you characterise those?

RT HON LORD BEITH: What I was describing rather loosely was what you have just been discussing with the former Attorney General, which is the precise definition and reliability of the safe space protection provided by the veto is not entirely clear. Now, I want to preface anything further I say about it by pointing out that the disclosures that have taken place have not brought the sky in, the sun has not ceased to shine. Public administration has not collapsed and therefore, although there are some interesting legal arguments around this, and you exposed them very effectively in the exchanges that have just taken place, to respond to those difficulties by in any way diminishing the ability of citizens and organisations and the media to achieve greater accountability would be a great mistake.

DAME PATRICIA HODGSON: But you would agree that the Supreme Court decision has created additional uncertainty over the use of the veto?

RT HON LORD BEITH: It has probably increased the uncertainty to which the Committee referred when it felt that quite a lot of uncertainty could be removed if people in public office were reminded of what the existing rules were. Clearly the existing rules are less clear than they appeared to be before the Supreme Court ruling, but I am cautioning that this interesting fascinating argument has to be set against both the huge benefits of Freedom of Information and the experience of the very disclosures which have occasioned these legal arguments which have now taken place without appalling consequences.

DAME PATRICIA HODGSON: Of course, but we are in new territory following the Supreme Court decision and I wonder if you have any thoughts about whether there might be positive ways of retaining all the benefits you describe while reducing the additional level of uncertainty that has been imported as a result of that decision.

RT HON LORD BEITH: I think there is a discussion to be had about the structure of the appeals system and the various levels it has and you have engaged with Dominic Grieve on some of that and my colleague Lord Marks has put forward some proposals on that. I think that could be helpful from various points of view. But I return constantly to the point that, even if you had restored some of the safety which you perhaps thought originally could exist in terms of advising people that FOI would not be attracted by that particular discussion or document, those same discussions and documents are exposed to so many other risks of disclosure that you would be misleading public servants if you said "don't worry about the

possibility that somebody may one day see what you have written". It's not very good advice to be giving them anyway and indeed in many cases I think civil servants have an interest in the documents showing that they pointed out some of the problems which might arise rather than remaining silent.

If you want to take one of most dramatic recent examples, Oliver Letwin may feel that his views have changed very substantially since he wrote a paper so many years ago which caused him such distress at new year, but that emerged not from the essence of the Freedom of Information but from the 30 year rule which I'm sure you would have even if you dropped the legislation.

DAME PATRICIA HODGSON: We heard last week from Lord O'Donnell of his particular concerns about the public interest test and that was explored a little bit in the last session, which I think you were present for.

Lord O'Donnell issued a plea for greater clarity, more certainty. Do you think there is anything in this? I mean, how could one clarify it or is the public interest something that evolves over time as in fact we heard from other people giving evidence last week?

RT HON LORD BEITH: Well, that was as far as we felt able to go in accommodating Lord O'Donnell's points to us, that greater clarity was desirable, but of course the public interest test can't be used against every disclosure the Government does not like on the grounds that repeated disclosures would lead to people believing there is no safe space, even though in each of the given cases the relevant bodies ruled that there was a real public interest in the information becoming known but it has become quite a difficult area, as your earlier discussion showed.

DAME PATRICIA HODGSON: Could I just ask you to say a little bit more about the

appeals structure and the point at which any necessary ministerial veto, which I think your Committee accepted as a necessary backstop, the point at which it should be exercised and whether Government should legislate to clarify?

RT HON LORD BEITH: Well, I was very interested in what Dominic Grieve said about that, about the advantages in the Government having to consider the reasoning of the Upper Tribunal before deciding whether to exercise its veto and I can see in principle at least merit in that. So I do not have a firm view about it, other than that the existing system is multi-layered and complicated and takes a long time to achieve objectives which all parties would want to get to more quickly.

It is an area worth discussion, but I suppose I have an underlying reluctance to see new legislation in an area where we have legislated to such beneficial effect and we could easily get it wrong again, insofar as there is a technical defect in that area which the Supreme Court found in the idea of a minister overruling a court of record. That particular bit of the legislation arose in the detailed discussions which took place as Parliament sought to get it right but it is very difficult to find a perfect answer and I would not want us to do so at the risk of damaging the fundamental principles.

THE CHAIRMAN: We seem to have got into a slightly strange space, it seems to me, where the Campaign for Freedom of Information has pointed out that over the last five years, in the bulk of the cases that have gone to the Information Commissioner, he has upheld the public authorities' view in terms of section 35. There have then also been quite a lot of cases where the First Tier Tribunal has overturned the Information Commissioner on this, which suggests to me -- well, it demonstrates to me the extent to which this issue of balancing the public interest

test is a fine art rather than something that is automatic. So the outcome has not been particularly harmful in relation to information that has been released and yet, as Lord O'Donnell said, people still feel in a state of great uncertainty is if they feel that they are playing the Lottery each time they find themselves in this position because the outcome is uncertain, and what we have been trying to probe is to what extent it might be possible to clarify some of this so that, not that the outcome was different in terms of the information that was released, but so that in a sense both parties, both the requesters and the public authority, could have a greater degree of certainty of how this is going to turn out. Maybe it is inherent in public interest tests that there will always be a substantial uncertainty.

RT HON LORD BEITH: The outcome of art can never be certain, the answer is in your own question, and the more I have looked at it, the more I have questioned how much certainty you can really offer. What you are saying, if the process operates as it was intended to do, is that information will be disclosed unless to do so would impinge on the necessity for a collective Cabinet responsibility and high level policy discussion at which risks are fully and frankly examined. There may be circumstances in which even that information will be disclosed because there is an overriding public interest in doing so, but there is a general recognition that we should, so far as possible, try to preserve that space. You can't make it more certain than that and, if you did, you would be saying, at least in some cases, that some matters where we really should have known what happened in that discussion will not be known, or at least not until the 30 year rule.

THE CHAIRMAN: Or 20 years now.

RT HON LORD BEITH: Or 20 years rule.

RT HON LORD HOWARD: You make some extremely valid points about the difficulty of achieving certainty. But perhaps it is possible to achieve greater clarity.

RT HON LORD BEITH: Yes, I think it is reasonable to try to do so, but my suspicion is that if, with the finest minds we can assemble, we put together some legislative change sought to do that, either it would not work or it would have the unintended effect of inhibiting a general right, and why in order to stop one route to disclosure when there are so many others that are more selective in character?

So I am really urging extreme caution in an area where we have, as we have demonstrated today, been unable to predict with certainty what the outcome of the words in legislation would be. At the moment we have a reasonably happy outcome, except for those governments that are embarrassed by the things that are disclosed.

LORD CARLILE: The administrative court now produces a digest of decisions which provide guidance to judges who may encounter similar issues from time to time and, for those who sit as judges in the admin court, it is very useful. Would you favour the production of practical guidance and a digest of decisions to the same end in this difficult area?

RT HON LORD BEITH: Yes, I would. I think as a general practice in law and tribunals, tribunals should know how previous cases have been decided.

THE CHAIRMAN: Thank you very much.

RT HON LORD BEITH: Thank you.

THE CHAIRMAN: Patricia, you have another point?

DAME PATRICIA HODGSON: Yes. There are just a couple more I would like to ask and it was shifting subject. We were all so focused on the safe space and veto

and clarity, of course. This is reverting to the cost of process.

RT HON LORD BEITH: To the...?

DAME PATRICIA HODGSON: Cost of the process of FOI requests to authorities and to meeting them. We have received evidence about the cost of activities over which the public authorities have no choice or control, like necessary redactions to protect personal information and so on and the fact that these cannot be counted within the cost of the process at present. Your report in 2012 concluded it wasn't appropriate for activities like redaction to be included in assessing whether or not a request exceeded the cost limit.

I wonder whether you might not reflect on the basis of what we have heard that there are particular cases where the public authority has no choice and which are additional to the normal costs of meeting the request?

RT HON LORD BEITH: Well, we received evidence in both directions as I recall and we reached the conclusion that it was neither necessary nor desirable to complicate the system by introducing a charge caused by redaction or altering the limit to take account of redaction and a number of the public authorities I spoke to did not seem actively to seek that particular outcome.

It looked to us that it would both be complicated and could of course bring into a charging regime requests which otherwise wouldn't be so treated.

DAME PATRICIA HODGSON: Thank you. The Information Commissioner referred us to a number of the recommendations made by your Committee that haven't been implemented. Are there any which you would particularly wish to draw to our attention?

RT HON LORD BEITH: Actually, I would like to have a clearer picture of how much

progress there has been on the outsourcing privatisation issue that I mentioned earlier because the information we had, which is probably becoming out of date now as many more functions have taken that route, some of our proposals relating to university research were implemented but, as with many committee reports, if I went through I could probably pick up some others that I think the Government ought to get on with, but this was not one of those reports which was urging the Government into legislation generally; rather to the contrary.

DAME PATRICIA HODGSON: No. You've made that clear.

Thank you very much.

THE CHAIRMAN: Thank you very much, Lord Beith.

PROFESSOR CHRISTOPHER FORSYTH AND PROFESSOR RICHARD EKINS

THE CHAIRMAN: Good afternoon, and thank you so much for coming. We've all had a copy of your report and there's been a good deal of interest in it, and as you will have heard this afternoon, this subject has come up a number of times and we're very grateful that you are willing to come here to talk to us about it. Do you want to make any opening remarks?

PROFESSOR EKINS: Yes, I would make a few words. Thank you obviously for having us here to speak to you.

We would make a few remarks just to amplify part of the argument of the paper. We take a view, as you see in the report, that the action you see in Evans is problematic in rule of law terms, but of course, as you have seen this afternoon and elsewhere, there is an argument that the ministerial veto is itself problematic in

rule of law terms and that seems to be a shared premise in the Evans judgment of the Supreme Court, but it seems to us a misconceived line of argument.

The relevant question at least for decision by departments, the Information Commissioner, the Upper Tribunal and the Attorney General, was the same question about the balance of public interest and it is not a question especially suited, it seems to us, for judicial determination. On the contrary it's a classic question for the Executive. So one might argue that it is constitutionally problematic for Parliament to authorise a judicial body to determine that question. It is arguable but it seems to us that it is not problematic to reserve to ministers the final decision about where the balance of public interest lies and of course one might choose or not choose to have an Executive override, but that choice doesn't seem to us to be unconstitutional.

PROFESSOR FORSYTH: And I thank the Commission also for inviting us today before I begin my introductory remarks.

Our concern is primarily constitutional. We consider that the Supreme Court in Evans misinterpreted section 53 to give it a meaning that Parliament clearly did not intend. It seems to us almost undeniable that the ministerial veto was clearly intended to be a central feature of the Act, to use the words that Lord Wilson did in his dissent.

But the majority judgments in Evans, particularly that of Lord Neuberger, adopt a meaning of section 53 that denudes the section of significant effect. This is contrary to the scheme of the 2000 Act in which Parliament chose that, where the information involved was subject to qualified exemption, there should be an Executive veto with the appropriate minister having the final word of where the

balance of public interest lay.

The effect of Evans is to change that whole scheme of the Act without any Parliamentary warrant therefore and we think that that is constitutionally improper. It must be accepted by all who administer the law, including the Supreme Court, that the laws laid down by Parliament should be applied.

The heart of the Supreme Court's justification for its decision lies in the fact, if the veto operated as Parliament intended, the executive would be overruling a judicial decision contrary, said Lord Neuberger, to constitutional principle. Whilst such a situation is unusual it is not unprecedented and, if what Parliament enacted was such a veto, the Supreme Court, and everyone else for that matter, must accept that.

It may be that one thinks that the Executive override is unnecessary or redundant, that there could be better ways of doing that, but, while Parliament has so enacted the 2000 Act, we have to accept that and I think that's our prime constitutional starting point.

I think we are going to want to say something else about alternatives to a direct legislative overruling of the Evans case. Some of the discussion made in earlier sessions covered that and we will probably have an opportunity to talk about that.

RT HON JACK STRAW: Just going straight to that point, you said, Professor Forsyth, just a moment ago that there could be better ways of doing it and said that you thought there might be alternatives. Would you like to expand on that, please?

PROFESSOR FORSYTH: I've listened very intently and with great interest to the suggestion of the Information Commissioner that the ministerial veto should only affect decisions of the Information Commissioner. That doesn't seem to me to be

a satisfactory alternative and the reason why that is so is in part what do you do when the Information Commissioner upholds the public authority. There is no veto to be exercised then and it may only become clear that a veto is needed when the Upper Tribunal takes a different view of where the public interest lies. So that strikes me as a practical difficulty with that particular solution and you have of course the problem which I think the Chairman adverted to, that Lord Neuberger in his judgment specifically says that, if you were to exercise the veto while there was still a live appeal outstanding,that would be a misuse of power.

RT HON JACK STRAW: Well, I think Lord Neuberger said that if it were possible to appeal, not an appeal outstanding.

PROFESSOR FORSYTH: Yes. If it were possible to --

PROFESSOR EKINS: So you have to exercise your right of appeal rather than veto.

RT HON JACK STRAW: And that would go to the issue of reasonableness.

PROFESSOR FORSYTH: Yes.

RT HON JACK STRAW: So, accepting this conundrum, what is your solution to this?

PROFESSOR FORSYTH: Our prime solution that our paper argues for is of course that remedial legislation should be passed that reinstates the veto in the terms that Parliament actually intended. But if the Commission is looking for another way out, what occurs to us -- I think Richard agrees with me on this -- is that one should make a slight amendment to, I think it would be, section 58 of the Act, dealing with on what grounds you can appeal and to remove the provision that allows an appeal to lie to the Upper Tribunal or beyond the Commissioner on the grounds of taking a different view of the balance of interest. Because crucially this is about where the balance of the public interest lies and that is, in our view,

essentially an Executive function, not a judicial function and why we are in this difficulty is because we allowed the judges, whether in the Upper Tribunal or beyond that, to take a view on where the balance of public interest lies. That is an Executive function and it should be exercised by the Executive.

So if you were to exclude the possibility of appealing on the grounds of the balance of public interest had been got wrong by the Information Commissioner, then there could be appeals beyond the Upper Tribunal and Supreme Court or wherever on grounds other than that, but the public interest would be protected from a judicial override, so to speak.

It would of course be possible always to judicially review the Information Commissioner and so forth, but that strikes me as a better solution, simply restricting --

RT HON JACK STRAW: So, as it were, section 58(1) has two limbs.

PROFESSOR FORSYTH: Yes.

RT HON JACK STRAW: The first is the notice against which the appeal is brought is not in accordance with the law, or, to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently.

So, Professor Forsyth, you are saying that, as it were, the second limb should be deleted?

PROFESSOR FORSYTH: Should be deleted or appropriately amended.

RT HON JACK STRAW: Let me ask you this question: would the appeal to the Tribunal on a point of law then be wider or the same as if there were a challenge to an Information Commissioner or ministerial decision by way of judicial review?

Would they amount to the same thing or would they be different?

PROFESSOR FORSYTH: I think in principle they would be much the same thing in the sense that, whether on the appeal or whether on the judicial review, it should be recognised that the question of the balance of public interest is something that lies within the ambit of the Executive, not within the ambit of the judiciary. So it would not be a ground of judicial review to say you have the balance of public interest wrong. You could still challenge it, of course, if there was something outrageous in the finding of the balance of public interest, but in the normal run of events, where it could go one way or it could go the other way, you would not be able to get judicial review on the basis that the balance of public interest had been got wrong.

Similarly with the amendment to section 58, as we have discussed, you would not be able to go to the Upper Tribunal on a balance of public interest point either. This doesn't mean to say that nobody cares about the balance of public interest, of course, because the minister who exercises the veto would be accountable to Parliament in the ways that we have described in our paper and which I am sure are familiar to the Commission and they were the proper exercise of their --

PROFESSOR EKINS: Can I just say, I think this is a perfectly reasonable alternative, but I do not have a view on the merits of these alternative as ideal Freedom of Information legislation. I think either alternative is constitutionally proper and for Parliament to choose and the question partly is how much value is there in the Upper Tribunal reconsidering questions of the balance of public interest? But if they are going to do that, then I think it makes some sense and it shouldn't be pulled off the table for there to be a reservation of that question to ministers, the

public interest question. In which case one would want to reinstate, to restore, the veto rather than letting it be defunct.

RT HON JACK STRAW: Dealing with an earlier point you raised, Professor Forsyth, which arose in the Evans case where in the Evans case the Information Commissioner confirmed the decision of the public authority to withhold disclosure and there was therefore no notice which could be vetoed. Would one way of dealing with that issue be to have -- and this has been suggested to us, that there would be a power to the relevant minister to exercise and override -- well, either to override the Commissioner's decision where he was requiring disclosure or to confirm it where, as in Evans, he was coming to the same view as the public authority?

PROFESSOR FORSYTH: So the suggestion is that the minister, before there has ever been an appeal against a decision upholding the public authority, would confirm it?

RT HON JACK STRAW: Yes. So it would have the same -- as we know, in the case of Evans, unlike all the other veto cases of which I am aware, the Commissioner came to the same view as the public authorities that there was nothing within the current terms of section 53 for the relevant minister to override by way of a section 53 veto, so that is why --

PROFESSOR EKINS: Can I say, so it's veto or a confirmation, in a way?

RT HON JACK STRAW: Yes, that's right.

PROFESSOR EKINS: These cases take a long time, as we know, or they can do, and the balance of public interest should be made at the time of disclosure, I think. So there is a bit of a risk, I think, of requiring there to be a veto or confirmation at the Information Commissioner point; namely it might not look as though at this

point in time it would be damaging to public interest for there would be disclosure and so one does not exercise the confirmation power and yet two years later, well,one takes a different view or one might want to take a different view and be entitled to, or should be entitled to, and yet have that option then being ruled out.

RT HON JACK STRAW: Can I put this point: you have read the Evans judgments carefully and so have all members of the Commission, including me. One thing that comes through very clearly in these is a sort of sense by the judges who considered the matter at the Court of Appeal and the majority in the Supreme Court of really sort of irritation that a huge amount of time had been spent particularly in the Upper Tribunal, considering the evidence and hearing expert witnesses and so on , and yet all of that was rendered nugatory by a stroke of the Attorney General's pen and the implication from that -- and indeed from Lord Neuberger quoting Dinah Rose, counsel for Evans -- is that some of this irritation would have been avoided, and the sort of challenge to the supremacy of the courts, if the veto decision had been exercisable at an earlier stage. Do you think there is something in that?

PROFESSOR EKINS: I am sure the court was irritated and it might be right that it would save considerable time and expense at least in some cases for this all to be brought forward, but there is a cost in so doing. Now, one could deal with that problem, I think, by, as Professor Forsyth suggested, cutting off the right of appeal on the grounds of public interest, but it has a cost as well.

So I think the court's view on this, the Supreme Court and the Court of Appeal for that matter, is viewing it just too crudely, it's saying judicial body, decision, ministerial override, a certain rule of law, and, when you look at the particular

question that's being decided, the origin of the scheme, in fact the way this comes before a superior judicial body at all, because the initial Tribunal in which this is first conferred is not a court of record. It is almost accidental that it comes before a court of record by way of the restructuring of the Tribunals.

So I think they are looking at it and they are looking at it too crudely and, if one looks at it in a slightly more fine-grained way, this constitutional problem just dissolves, really.

RT HON JACK STRAW: How does it dissolve?

PROFESSOR EKINS: Well, it dissolves because this is not a like a High Court issuing a writ of habeas corpus and a minister cancelling it, this is a question about the balance of public interests and it has been conferred with the same question that each of these bodies has to answer, Department, Information Commissioner and so forth, and it is I think perfectly reasonable, and I am not saying that it is a good idea or not, to confer a scheme that requires each of these different bodies to make the same decision and yet leave there to be a final catch-all on the part of ministers to make the same judgment again, which is not a classically judicial judgment to be making at all.

You can give it to a court, of course you can, you can give to a Tribunal and deem the Tribunal a court, but it doesn't change the nature of the question.

RT HON JACK STRAW: Okay. Last question from me, I think that you have already indicated the answer, but, as you will have heard, we've had some evidence that there should be a streamlining of the appeal process. If Professor Forsyth's proposal to remove the second limb of 58.1 was adopted, that in any event would obviously reduce the grounds for appeal, but do you have any general views about

streamlining the appeal process? Let us say that 58 stayed as it was, is there scope for reducing the grounds of appeal?

PROFESSOR FORSYTH: I think this is a general issue.

RT HON JACK STRAW: It is a general issue and if you have not --

PROFESSOR FORSYTH: The law's delays are well known to all of us and how we can avoid them in this situation. I am not sure I have anything unique to say on that.

RT HON JACK STRAW: You might have something well informed. Whether it is unique or not is another matter.

PROFESSOR EKINS: This is not an answer to your question, I am afraid, so I am not going to help you streamline it, but there might be a need to be quite careful in reframing section 58 if one were to go down to route, because what does count as the ground of appeal, if that is unclear, then the same question will arise again and a court -- you quoted the remarks from Lord Neuberger before: if it looks as though there's an Executive action that's cutting off what would otherwise be a robust right of appeal, that executive action and the legislative conferral will be viewed -- well, interpreted perhaps in surprising ways, so I think one would need to be very careful in how one would frame that.

THE CHAIRMAN: I see this ambiguity because there was one case I was looking at where the Upper Tribunal was questioning the interpretation, I think it was, of the First Tribunal in relation to some of the evidence it had used in the public interest test which had classified as overruling it on a point of law, rather than overruling it on a point of a different view about the public interest. I am not quite sure, you know, that there is a very clear demarcation between the two things.

PROFESSOR EKINS: I think it might well be the question of law in section 58 might

well be taken to go to the question of the balance of public interests in section 1 and so forth. So removing the second level and removing the question of discretion might not answer the point, it might go rather to the discretion as to the particular remedial orders and so forth.

THE CHAIRMAN: Thank you very much. Thank you for your time and thank you for your paper which is a very interesting contribution to this debate.

PROFESSOR FORSYTH: Thank you very much.

MR MAURICE FRANKEL

THE CHAIRMAN: Mr Frankel, thank you so much for coming and you have been extraordinarily patient sitting through the two sessions that we have had. The times I've tried to interpret your expression as the days have gone on but I think it would be better that we should actually hear from you in person and we have allocated a reasonable amount of time where I hope we can deal with the issues that we have.

Particularly thank you for your evidence, which is very helpful and you go into a great deal of detail in terms of analysing how the particular issues that we have been asked to look at have developed over time.

Do you want say anything by way of introductory remarks?

MR FRANKEL: There are a number of issues from the previous evidence sessions today and previously that I would like to respond to, but I would be very happy to try and bring them in in response to your questions rather than take up another slot just speaking before you put the issues you want to hear from me.

RT HON JACK STRAW: May I echo the thanks of the Chairman, Mr Frankel, for all the evidence you and your colleagues have put forward and the huge assiduity you have put into this issue, not only for these proceedings but over many years.

Just picking up your first point, you were here, as you have been for all the oral evidence, for the evidence from Councillor David Simmonds representing the Local Government Association, and here I paraphrase, but he said words to the effect that, if he were asked or local authorities were asked for information, then they could either give it straight away or they would have to say this is an FOI request and if you want to make an FOI request you have to go into a sort of

bureaucratic machine.

I was surprised about this, but do you think that the Freedom of Information Act either was intended or does operate in this way? Surely if someone is given the information, then they are given the information?

MR FRANKEL: I was very surprised by what Mr Simmonds said. Section 11 allows the response to be made in accordance with a requester's preference so long as it is reasonably practicable. You obviously picked up the reasonably which he said was not there. So in other words no requester can ask the authority to do something very burdensome if there is a simpler way of doing it.

There is a second thing which section 11 again does, it sets out three now four, ways of responding to the request which involves providing the information in a permanent form or in another form acceptable to the applicant. That means a non-permanent form and the most common non-permanent form is to tell the person. That is what that must mean.

So when he said you can't give the answer by telling the person, that is wrong as a matter of the Act. But it is worse than that because, if you look at the LGA's evidence, they are calling for that phrase to be deleted from section 11. They are actually calling for the phrase that allows them to answer simply to be deleted on the mistaken grounds that it gives the requester the power to force disclosure in a form the requester chooses to which they have no grounds to object on practicality and cost.

So I thought that was completely off target.

RT HON LORD HOWARD: I want to make sure I understand this, and I am not sure I do, because, if the Act says the information has to be provided in accordance

with a preference of the requester, unless it is not reasonably practicable to do so. Well, even though the information may more readily be available in a different form, even though it may be available, even though it may have been given, the requester could still argue that it is reasonably practicable to give it in a form which he wants.

MR FRANKEL: Well, there are two separate questions tied up here. If the information is already publicly available then there is an exemption, that's section 21, or section 22, it's already available and section 11 doesn't come into it. You cannot force the authority to rewrite the information and tabulate it differently because you prefer it. If it is already publicly available, you just cite the exemption.

THE CHAIRMAN: But if it is an FOI request?

MR FRANKEL: If it is an FOI request, so long as all the requested public information is publicly accessible already, the authority can cite the exemption and is not required to retabulate it.

RT HON LORD HOWARD: Yes, but if the exemption does not apply, so it is not publicly available, but the situation that Councillor Simmonds identified where he says to the requester, look, I can give you this information, I can write you a letter, it would take much longer if you go through the FOI route, but the requester says, no, I want to go through the FOI route, and the authority cannot argue that it is not reasonably practicable to give the information in that way, he has to do it.

MR FRANKEL: Yes, but that doesn't rule out -- the authority cannot insist on giving it to you verbally if you, the requester --

RT HON LORD HOWARD: Well, not verbally, in a letter.

MR FRANKEL: A letter is a perfectly conventional way of responding to an FOI

request.

LORD CARLILE: Aren't we confusing two issues here? The Local Government Association said you cannot give it orally. You are pointing out, probably rightly, that you can give it orally. But if the person is not prepared to accept it orally, then you go into section 21.

MR FRANKEL: Then you go into section 21, if it is already available, but if it is not available then you have to provide it in writing.

RT HON JACK STRAW: But if you have already written a letter giving the information, even if it has not got "FOI request reply" stamped on it, that has already been given and that is the end of it.

MR FRANKEL: Yes, you've provided the information. There is recent decision from a Court of Appeal, from an Upper Tribunal Court of Appeal, saying you can say, if it is in a PDF and you want it in an Excel format and that is reasonably practical, you can require it in that format.

RT HON JACK STRAW: No, we are familiar with that.

MR FRANKEL: Yes.

RT HON JACK STRAW: Could I just pick up another point that was raised during the course of the evidence session itself and that was from Mr Clifton of the Press Association, and Mr Satchwell of the Society of Editors. Mr Satchwell said that coordination, cooperation, between, as it were, the two sides had been an understanding greatly helped when there was a users group, and he thought that would be very helpful for the future. What is your view about this?

MR FRANKEL: I completely agree with that. I was a member of that same user group. A minister sat at it, the Commissioner sat at it, Local Government Association,

NHS, some independent people and two press organisations and it was a very useful forum at which problems that the other side hadn't seen were brought by one party or another and I think it was helpful in improving people's understanding of what was working and not working.

RT HON JACK STRAW: If we were to recommend this, would it not be a good idea, looking forward, for there to be someone there from the Office of National Statistics as well because quite a lot of -- it seems to me, we have not taken evidence on this, but that some of the really important information that people are having to request through FOI applications could better be made available in a data series that are published routinely by people subject to the ONS government.

MR FRANKEL: Whether that is for the ONS or whether that is something to be done through the open data movement is a separate question but I agree with the thrust of what you are saying, that one should look at whether it can be done by publishing datasets so that the information is available routinely.

RT HON JACK STRAW: I mean, the area with which I am very familiar is criminal justice and the more you can provide reliable data through the official statistics, the less people have to get frustrated about the fact that the particular information is not available.

Could I, Mr Frankel, move on now to deal with this issue of the relationship between section 35 and 36: Safe space and chilling effect.

MR FRANKEL: Yes.

RT HON JACK STRAW: And particularly this argument which is at the heart of much of the evidence we have received, which is either concern or support, according to

your point of view, for the notion that safe space, basically, in principle ends when a decision is made and then all that is left is chilling effect.

Do you think it is that mechanical and do you accept that the issue of a safe space may well continue given the reality of decision making in government which is on the same issue, you will have a series of submissions coming forward.

MR FRANKEL: I don't think it is a mechanical process. Apart from anything else, even if one accepts the safe space ends when the decision is taken, the test is not is there a chilling effect, the test is is disclosure in the public interest, where is the balance? It is commonly translated as chilling effect but there may be other consequences.

The second thing is the Upper Tribunal has recently ruled that, particularly with a bill going through Parliament you, can go in and out of safe space as an issue which appeared to be closed is reopened.

But I think that the way in which safe space is used in the FOI context means while you are taking the decision and then you go on to some other concept once the decision has been taken, but the Tribunal at a very early stage has said they don't believe and they reject the endless web, the endless seam, of consideration where Government says, well, we are always considering all OR policies and therefore there is never an end to the safe space because, you know, ten years after the legislation has passed we are still have at the back of our mind --

RT HON JACK STRAW: That is not my point, by the way. But there is a parallel issue here which is whether, as it were, the horizontal safeguarding that is provided both within section 35 and 36 for ministers to other ministers' private offices and so on is stronger than the vertical protection provided for ministers and their officials.

Have you got a view about that?

MR FRANKEL: I know I picked this up from your questioning the other day. I don't particularly feel that to be the case. I think there are two things to take into account. The first is that one of the exemptions refers explicitly to ministerial communications, so, when the Government is arguing the case for ministerial communications, that is how they are describing the argument. The exemption that applies to discussions between officials and ministers is policy formulation more generally.

Now, again, it may very often reflect the way the argument is put by the Government's lawyers to the extent to which they are talking about an effect on the ability of officials to express their views properly or whether they are talking about a general effect on policy formulation. But certainly in the survey that we did there are a series of cases where the decision against disclosure was clearly taken in order to protect the position of officials in discussing with each other or discussing or providing advice to ministers.

The clearest of those is the example of the draft Parliamentary questions, where officials were commenting on what they assumed the MP who was putting the question down, what their motive or interest was and they didn't want to dissuade the official, make the official feel vulnerable about expressing a possibly indiscrete view if it was immediately going to be disclosed to the MP who was asking the question. I don't think is -- I don't myself detect that difference because I think it is -- you don't see it very often but the -- I am sure that what the Tribunal say is that, if ministers are just discussing a convenient day to make an announcement, they would not give much weight to that either. It is a ministerial communication

which doesn't touch what they are now calling as the underlying rationale.

RT HON JACK STRAW: I am not talking about stuff like that. Anyway, I am not talking about that.

To go back to a point that I was making to Mr Satchwell and Mr Clifton, preserving confidence and trust between officials and ministers seem to me to be absolutely fundamental to good governance, particularly in the context in which the one, as it were, does not choose the other. That, it seems to me, to be a really powerful reason for there to be safeguards against premature publication of advice, even after a decision has been taken.

MR FRANKEL: I don't see it quite like that. I think confidence and trust are not to do with an FOI disclosure. Confidence and trust are to do with leaks. If an official leaks what the minister has said to the official or what the discussion is, that goes to the heart of confidence and trust between the minister and his or her advisers. If it is disclosed under FOI, the official has no responsibility for the decision to disclose --

RT HON JACK STRAW: No.

MR FRANKEL: -- at all and I know that is -- I am saying that confidence and trust may not be the right way to describe what is at stake here.

RT HON JACK STRAW: Can I put it this way: I readily accept that leaks are pernicious wherever they have come from and they will certainly undermine confidence and trust and if there is a suspicion -- although I cannot ever think of an occasion where I was subject to a leak, or maybe one, but it is very rare for the official concerned to be causing the leak, extremely rare -- that would make it worse, but I am talking about, as it were -- and this is a subtle -- I am not arguing, of course,

that the material should never be disclosed, this is about the time at which it should be disclosed.

It is very difficult to put your finger on this but if officials who, you know, can be middle-ranking officials these days, quite young, are having to tell senior ministers some truths which the senior ministers may not be terribly keen on hearing, it will just make their life more difficult if there is a possibility that what they are saying to these senior people, which could be embarrassing if it comes out, is going to be disclosed. Is that something you accept?

MR FRANKEL: I do accept that.

RT HON JACK STRAW: Okay.

MR FRANKEL: I think that is a question of how sensitive the content of what the official said is and how long after it has been said the question of disclosure is raised.

But I do accept that, if an official is telling the minister "what you are doing is unworkable, minister, in my opinion", you have to look at the implications of disclosing that, certainly in the immediate, in the near, future certainly.

RT HON JACK STRAW: One last set of questions I wanted to raise which is about the position of contractors, including charities.

First, it is right, isn't it, that at the moment, some contractors are covered by the Act, for example, under, I think, paragraph 43A of schedule 1, general practitioners are already covered and these are entirely private institutions. I don't think we have had any evidence at all from general practitioners that this has been too great a burden on them. Are you aware of any evidence to that effect?

MR FRANKEL: There have been cases where the vexatious test has come in at a much earlier stage in relation to general practitioners who are public authorities

individually in their own right and so in that way they are not exposed to as much work, the Commissioner will not expose them to the same level of burden. But they are thought of as part of the National Health Service although in law they may be contractors.

RT HON JACK STRAW: I mean, in reality they are contractors as well.

MR FRANKEL: Okay.

RT HON JACK STRAW: But overall your view is, although they are private contractors, which they are -- I mean, they really are -- it is very different from a hospital doctor, them being subject to FOI has been relatively uncontroversial.

MR FRANKEL: Yes.

RT HON JACK STRAW: Okay, and your view is that this provision, the same principle, should follow in respect of people, say, contracting with Social Service departments and other local authorities, and indeed more widely with the NHS?

MR FRANKEL: Yes.

RT HON JACK STRAW: Would you have a **de minimis** level for very small --

MR FRANKEL: We would not bring all contractors under the Act as public authorities. What we would say is we would bring the major contractors in as public authorities, particularly the very large players whose work is mainly with public authorities.

THE CHAIRMAN: So would that mean all of their work was then subjected --

MR FRANKEL: No, only their public authority. Those who still had private sector work wouldn't be affected in that respect.

The general run of contractors would be covered by means of a request to the public authority. Now, they are already, but the difference is that the right of access is to the information held by authority, and that includes information held by

somebody else on behalf of the authority, so the question is does the contractor hold the information on behalf of the authority?

There is no dispute that the contract is done on behalf of the authority, the function is on behalf of the authority but peculiarly, the information relating to the performance of the function is not held on behalf of the authority unless the contract, either by a sufficiently wide general contractual clause or by specifically requiring the contractor to record that information and provide it if required, that is the test.

Where the contract does not do that, then there is usually no right of access by means of a request to the contractor. So what we have proposed is you have simply an amendment to the FOI Act which says all information held by contractors or contractors providing public services relating to the performance of the contract is deemed to be held on behalf of the public authority and that deals with that problem, it brings it immediately within the scope of the FOI Act and in that case, I don't think it matters too much, though I can still talk about it, whether a contractor is very small charity or not, because all they have to do is explain to the authority what they have done that meets the terms of the request to the authority. They don't have to learn how the Act operates.

LORD CARLILE: Can I just follow that up on the point, just to be clear, and I think you have made it clear: are you saying there is no distinction in principle to be drawn between a contractor and a charity, provided the charity falls within the test that you have described of holding information on behalf of the public authority?

MR FRANKEL: What I am saying is that, where the charity is a contractor. That where the charity is a contractor there is absolutely no difference. I would not

distinguish in any way, they are all contractors.

LORD CARLILE: Thank you.

THE CHAIRMAN: Can I follow up with you the point I have raised with one or two of the witnesses already, what seems to me to be almost a stand-off position that we have reached on some of the issues to do with 35 and 36, which is that when I go through the cases about which you recite in detail in your evidence, where the Commissioner has found against the public authority, by and large there is very little of the material I can see in that that has been damaging to Government. We also have the case where a much higher proportion of FTT cases overturn the Information Commissioner on section 35/36 issues than for the bulk of their business, which suggests something to me about the uncertainty of it all, and I contrast that with the evidence that we had from Lord O'Donnell about the deep uncertainty that is felt in Whitehall about how all this is working. The challenge that we have been looking at is there any way in which you can reduce that degree of uncertainty whilst leaving, broadly speaking, unchanged the amount of information that would be released as opposed to that which would not be released because there seems to be an unnecessary amount of tension, in a way, between the two sides of this debate.

MR FRANKEL: Obviously I picked up that question that you put to other witnesses. When you say the Tribunal overturns the Commissioner, are you using the survey, the analysis that we provided, or are you using your own analysis or the officials' analysis?

THE CHAIRMAN: We are using our own analysis that we have done, where we get numbers that are -- the FTT overturns the Information Commissioner on 35, 36

issues in both directions. I mean, it is not saying it is all in favour of the public authority. But it just strikes me as being a rather more uncertain territory because the public interest test is probably more difficult in this area.

MR FRANKEL: I didn't find -- based on the three years of FTT cases we looked at, we didn't find that to be the case. We had 26 cases in the three years that we looked at. In 18 cases, the Tribunal agreed with the Commissioner. In two cases the FTT was more open than the Commissioner; it ordered disclosure of more information. In four cases they were more restrictive; in other words they would have satisfied Lord O'Donnell, although in one of those that was the result of the intervention of the Upper Tribunal.

So in general, based on that sample, I would not say that the First Tier Tribunal was more likely to overturn the Commissioner in favour of disclosure at all. I think there was quite a high degree of sympathy between the two and, if anything, they were more likely to be sympathetic to the public authority.

THE CHAIRMAN: What about the general question though about -- this charge about uncertainty versus whether there really has been any damage from the release of information? I mean, is Whitehall sort of chasing a ghost here**.**

MR FRANKEL: Yes. In our submission, we said we think that ministers and senior officials have probably got a distorted view because they are dealing with a distillate of the most difficult and, to them, troublesome cases that come along. I thought Lord O'Donnell perfectly illustrated that last week. When Lord Howard pressed him for an example of the chilling effect, he came up with the meeting between the coalition partners where he was asked is this FOI-able and he said "I cannot guarantee you that it will not be disclosed," and so they met without

an official present.

Three days after that meeting an FOI request was received for the minutes of the meeting and any briefings that officials had produced to inform the meeting or for whatever subsequent purpose. I should say it took 72 working days for the Cabinet Office to respond to that request, by the way, working days. I invite you to imagine how many working days it took the Cabinet Office to decide it was not in the public interest to disclose it. I think it would have been a matter of seconds, if not minutes, at the outset. So that is just by the way.

It finally went -- and I think it may be worth looking at why it takes the Cabinet Office so long and what it says about the Cabinet Office, which is now in charge of this whole process, to be responding to FOI in this spirit.

It went to the Commissioner and the Commissioner said:

"At this critical point in the formation of a government, political parties must have the greatest possible confidence in relying on the services and support of the civil service, without any concern that information provided, consulted or relied on may be compromised by being revealed at a later date."

They say 36 is engaged, the balance of public interest comes clearly down against disclosure.

Lord O'Donnell has used this example not only here but also to the Post-legislative Scrutiny Committee and there is a point at which he has to recognise, I think, and perhaps Whitehall has to recognise, that, although he may have legitimately had that question at the time he was asked, it was answered by the Commissioner's decision in that case. The Commissioner's decision did what he would have hoped to do and I don't believe the Tribunal will have come to a different decision

because, on all the very sensitive cases that we have reviewed, the Tribunal has said you don't have a conversation between a Chancellor and a former Chancellor about a current policy disclosure. This is absolutely in that line of cases.

RT HON JACK STRAW: Did that decision on the coalition discussions go to appeal?

MR FRANKEL: No, it didn't go to appeal. It didn't, but I am saying I very much doubt that that is a case in which -- I mean, Lord O'Donnell ended by saying, once it goes into the FOI process, no one has any idea how it is going to come out, as if you might as well throw a dice as an attempt to predict it. I don't believe that is at all the case. When you have very sensitive political discussions, when you have very frank exchanges, where you have stuff that is going to be very damaging to the official's position if disclosed, where you have splits between ministers, it is predictable.

THE CHAIRMAN: But Lord O'Donnell is not alone in thinking that this is unpredictable and the question is how do we reduce this feeling of unpredictability? Is there any drafting to be done in relation to..

MR FRANKEL: I don't think this is a drafting matter and, although Lord O'Donnell is calling for greater clarity, I think the clarity that he wants is to say, for this type of information, this will not normally be disclosed unless A, B or C is true. So he wants a near absolute exemption, except in specified exceptions. That is not clarity that is a substantial narrowing of the right of access and of the discretion the Commissioner and Tribunal has to decide on public interest.

So one can try and provide more clarity but, if you read the Tribunal decisions, you very often see the Tribunal starts by saying, "As a result of the previous decisions, these are the key principles we apply here." So you see that they will tend to do

that and you will tend to find it in the Commissioner's guidance that it is possible he might be able to provide it in a clearer way but I think what Lord O'Donnell is asking for is guidance that is, in effect, quasi-binding on the Commissioner and the Tribunal.

There I agree with what Lord Carlile said last week, which is that, you know, there is a big risk in constraining the public of the freedom of the system to respond to the changing public interest. You are better off leaving it open. I don't think the system has come up with factors of public interest which you would look at and say, "How could that be a serious public interest factor, that is unbelievable, somebody has taken leave of their senses." I don't think there is anything of that in the case law that has happened. I think it is all very sound and it has all worked on perfectly reasonable views.

LORD CARLILE: I think I used the example last week of child sexual abuse, of which the perspective has changed dramatically during my working life, from incredulity that it ever happens to trying to find out who did it, where and when on the assumption that there has been a great deal of it.

Do you regard that as a decent example for the proposition that, actually, the concept of public interest evolves just as issues evolve?

MR FRANKEL: Yes, I do. I think although you say over your working life, the greatest acceleration of that change has been since the Jimmy Savile case. So that is quite a short period.

LORD CARLILE: Yes. Four years or something like that, yes. Three years.

MR FRANKEL: Yes.

RT HON LORD HOWARD: You say in your evidence that you don't think the

Government should have the Executive override, a veto. But Parliament clearly thought that it should.

MR FRANKEL: Yes.

RT HON LORD HOWARD: Do you accept that the decision of the Supreme Court in the Evans case substantially calls the veto into question, creates greater uncertainty about the circumstances in which it can be exercised and effectively narrows it very significantly?

MR FRANKEL: Yes. In my view that is almost indisputable.

RT HON LORD HOWARD: Right. That is a very helpful answer. Thank you very much.

THE CHAIRMAN: I think you might want to add to that.

RT HON JACK STRAW: That was not what the man from Liberty said. He was trying to suggest it made no difference.

MR FRANKEL: That is my view, that it does restrict it. I think, as you will remember, Mr Straw, we were always opposed to the idea of the veto in principle.

There is a second thing, which is that, after the Supreme Court ruling, the Prime Minister and other people put out statements saying this undermines the will of Parliament. Now, we have questioned that. We haven't questioned whether Parliament intended there to be a veto, we have questioned whether Parliament intended there be a veto applying to the Tribunal and courts.

The veto was pretty controversial, as it was, with people believing that it applied to the Commissioner. I think they believed it applied to the Commissioner, since there is there reference from a minister that it would apply beyond the Commissioner.

The Divisional Court made clear it applied to the Supreme Court as well, in other words, although it is difficult to imagine a minister actually being prepared to do this, that in theory a minister could veto a decision of the Supreme Court subject only to the safeguard of judicial review, possibly on the standard Wednesbury test that the minister had a rational alternative view. It may not be a good or a best view, but just a rational one.

I don't think Parliament envisaged that. I think Parliament would have exploded. If you had said to Parliament, the House of Lords, as it then was, can be overturned by a minister and all the minister has to do is say "There is something sensible that can be said for my point of view." I don't think they believed -- I don't think they understood that that was the case.

RT HON LORD HOWARD: Right. Well, we are not concerned with the hypothetical circumstances of whether the ministers should overrule or should have the right to overrule the Supreme Court.

Let's take it step by step. On the question of the existence of a veto, there is no doubt that Parliament thought there should be a veto. So, in terms of our consideration, when we have to put on one side the clear view of Parliament that there should be a veto, and your view that there should not be, we are obviously bound to give effect to the clear view of Parliament.

MR FRANKEL: I don't understand how you are bound by the view of Parliament. You are here to give your view on policy. The courts might be bound by the view of Parliament.

RT HON LORD HOWARD: To use the language of Yes Minister, it would be very courageous of us to say that Parliament got it all wrong but Mr Frankel got it right.

MR FRANKEL: But, I mean, what could happen to you? Are you going to lose your peerages if you say it?

RT HON LORD HOWARD: No, it's a question -- well, it may affect the seriousness with which our report is taken, if we were to take that view.

MR FRANKEL: Okay. Of course, you can take that line if you want to but you are not obliged to. But I am not trying to seriously -- I am not going to have a long debate with you about that.

RT HON LORD HOWARD: Okay. We are agreed that Parliament expressed the view that there should be a veto.

I would suggest to you that Parliament also clearly envisaged, if you look at the terms of the Act, that the veto could be exercised on a decision of the Upper Tribunal, because, if you look at section 53, which defines the effective date, the effective date includes the day and, specifically, expressly says "The day on which that appeal or any further appeal arising out of it is determined or withdrawn."

So that language clearly demonstrates that Parliament not only wanted there to be a veto but accepted that there could be a veto on the decision of the Upper Tribunal.

MR FRANKEL: That is what Lord Neuberger and two other Supreme Court judges did not accept. They didn't accept that that was crystal clear.

RT HON LORD HOWARD: That is what they said.

MR FRANKEL: That what they said, yes, but you are inviting me to say that I think that a Supreme Court was wrong.

RT HON LORD HOWARD: Well, if you have said Parliament was wrong, I don't quite see why you shouldn't say the Supreme Court was wrong.

RT HON JACK STRAW: Mr Frankel, he must speak for himself, he always does, Lord Howard, but I don't think he is inviting you to offer sort of a judgment on the merits but it is just a fact, is it not, that section 53(4) envisages that the veto can be used on appeal. I mean, that is what the words say.

MR FRANKEL: It envisages it, but the Supreme Court quoted the Court of Appeal in other cases. So that is the line of argument. I don't think we are going to settle it here between us.

LORD CARLILE: No, we are not.

RT HON LORD HOWARD: Okay. So if there is to be a veto, do you have a view -- put aside Parliament's view, put aside the Supreme Court's view -- do you have a view as to when that veto should be exercised?

MR FRANKEL: Well, we have got two -- Professors Forsyth and Ekins put two options on the table, one being that -- one of them, I must say, I didn't quite understand because I understood them to be saying that you would treat the exercise of the veto as an exercise of discretion by the Commissioner. Sorry, not the veto, the decision on public interest, as an exercise of discretion by the Commissioner. Now, I mean you would be much better placed to know whether this is right or not but my understanding is that is not an exercise of discretion, the decision on where the public interest lies is not a matter of discretion, it is a matter of law. It may be one where it is difficult to see very clear boundaries, but it is a matter of law, not discretion. Discretion is if the Commissioner decides to issue an enforcement notice or not to issue an enforcement notice. There is nothing in the Act which tells him that he has to do that, not a decision notice, an enforcement notice which can be used in other circumstances.

So I don't think -- if I understood what the professors were saying correctly, I would just question that bit of it.

It seems to me we have several different options. We have the Commissioner's suggestion that there should be some kind of prospective veto in relation to a decision which is in support of his decision anyway, in case it should be overturned at a later stage. You have the Policy Exchange author's suggestion that you cut off the right of appeal on public interest grounds once it gets to the Commissioner stage and don't go beyond it. I think that would be the worst of all possible worlds, myself. I mean, it may be constitutionally neat but it undermines the Act very substantially.

I think you have another option, which is to apply a stricter standard to the use of the veto as you go up the chain. It doesn't necessarily have to be in exactly the terms that either of the two groups of judges in the Supreme Court put it. In other words it doesn't have to be as restrictive as Lord Neuberger put it, but it seems to me there was a valid point in saying that, you know, the Act says the minister on reasonable grounds believes that the decision was wrong and, effectively, the issue that concerned the courts all the way through is does reasonable grounds have the same meaning at every stage of the appeal and it seems to me that they obviously decided that something that might be reasonable in relation to the Commissioner would not be reasonable in relation to the Court of Appeal, or the Supreme Court, which I think, in common sense terms, has something for it.

So the alternative way is to have a stricter set of tests the higher up you go. You don't have to put Lord Neuberger's formulation into statute to do that, you can come up with a different formulation.

RT HON LORD HOWARD: But you mentioned, without expressing a view on it, the Commissioner's view that there should be the provision not only for a veto of an adverse decision by him but also a kind of confirmatory veto of his decision, and you identified that but you didn't express a view on it. What do you think about that? Then an appeal from that, on judicial review terms or a point of law to the Upper Tribunal.

MR FRANKEL: I agree with what Dominic Grieve said about that, which is that the full implications of that decision -- it is not so much the full implications. The Government believes that it is indisputably right in saying, "If that decision goes further, we are going to veto it." It is possible the Tribunal at some stage may say something which casts new light on the issue which changes their minds and it is a factor of the Tribunal process that, because they are putting decisions under closer scrutiny than the Commissioner can do, with counsel present, with written evidence present, with witnesses present, a decision acquires new dimensions that could not have been apparent to the Commissioner.

Very often there is new information discovered that was not recognised at the time it went before the Commissioner. It bypasses the Commissioner and appears on the scene at the First Tier stage.

So I am attracted by that if there is a way of doing it.

LORD CARLILE: I apologise for going back half a step, please forgive me. I just want to be clear about the difference between yourself and the duo of professors that gave evidence earlier. They appear to be saying that the Commissioner exercises a discretion.

MR FRANKEL: Yes.

LORD CARLILE: What you are saying, is this, is it, that under section 50, the Commissioner is obliged to make a decision?

MR FRANKEL: Yes.

LORD CARLILE: And therefore it is unarguable that he is exercising a discretion because he is obliged to make a decision --

MR FRANKEL: Yes.

LORD CARLILE: -- and that the decision has to be made on legally tenable grounds, so that turning it into a discretion would be a fundamental change in the law. Is that a fair summary?

MR FRANKEL: Yes, I mean -- well, my understanding is, when the Commissioner makes a ruling on a public interest, he is not exercising his discretion.

LORD CARLILE: No. Okay, just so I understand the difference.

RT HON LORD HOWARD: I am now moving away from questions on the veto. So if any of my colleagues have any further questions on the veto, this would be the moment to ask questions?

Right. So, in relation to the length of the process, you have suggested that there should be no extra time for the public interest test, except where some external consideration is involved. Do you want to elaborate on that in any way?

MR FRANKEL: Well, the environmental information regulations provide a model for that. They allow a further period of 20 working days, or one month, on the grounds of the volume and complexity of the information. There are other ways of putting it. You see, I don't believe the need for extra time is to do with the public interest, it is to do with complex cases or the need to consult third parties, in reality and, just as I suggested with the case Lord O'Donnell mentioned,

the idea that the Cabinet Office needed 20 days to think about whether this --

RT HON JACK STRAW: The idea of...?

MR FRANKEL: That the Cabinet Office needed 20 working days to decide whether this fell within section 35 or 36 and then some longer period to think about the public interest is absurd. Obviously they must have reached their decision the moment they addressed their minds to it.

The only circumstance in which they would need more time is if they really had to go and consult externally, or perhaps even internally, or if there was just a giant pile of material which had to be looked through and there were different considerations on every page. But, in general, you don't need extra time, and we raised this with officials while the FOI Bill was going through and the officials agreed that the volume and complexity would be a better approach, if I am not disclosing policy advice here.

RT HON LORD HOWARD: You really are.

MR FRANKEL: Well, they agreed with me. They said it is not a ministerial communication. But they said it is not worth trying to unstitch anything now because the whole package would fall apart if we try and undo it.

That just gives public authorities some extra time. It is not actually needed for public interest reasons.

RT HON LORD HOWARD: In terms of streamlining the process, do you see any attractions in the Scottish system, whereby you don't have the First Tier Tribunal and you just go straight to the Upper Tribunal?

MR FRANKEL: No, I don't. The Scottish system draws on the decisions of the First Tier Tribunal here. The UK system does provide them with some guidance.

They are not binding precedents but they draw on them when they find them helpful. Secondly, the Scottish system was set up from scratch and they employed people at a level and paid them at a level where they needed to take those decisions.

The UK system built on the existing Commissioner structure, which were people doing decisions purely on Data Protection, never published, never subjected to scrutiny, no right of appeal to the Tribunal, which was there but was not available to the requester. I don't think their decisions are -- although they have improved very substantially, they are not at a level where I would be very happy.

RT HON JACK STRAW: In Scotland or --

MR FRANKEL: No, here -- to say we can do away with the First Tier Tribunal and just have occasional on a point of law appeals. I think sometimes the Commissioner's decisions get it wrong and I would be sorry to see -- if you look at the statistics on appeals to the First Tier Tribunal, I think the figure is some 17 per cent of requester appeals -- this was over a period of January 2014 to March 2015 -- 17 per cent of requester appeals were fully or partly upheld or resulted in a consent order, which I think at least involves partly upheld by agreement.

I mean, it is not a massive number but it is a reasonable number to suggest that the First Tier Tribunal are providing a useful function in relation to requesters' appeals.

RT HON LORD HOWARD: Were any of the 17 per cent reversed by the Upper Tribunal?

MR FRANKEL: They don't list them. They just give you the number, so I can't tell.

RT HON LORD HOWARD: That would be a relevant consideration.

MR FRANKEL: It would, but it is a very small number that have been reversed by the Upper --

THE CHAIRMAN: On the streamline, could I just raise two other points. One is what is your view now about the role of the internal review? Is that necessary or should this not be got right first time with the right kind of escalation within the department?

Secondly, the role of the qualified person in section 36 seems to me to be a hangover from an earlier draft of the bill and is causing a lot of public authorities, clearly local authorities, et cetera, quite a lot of problem, as we heard this morning of a decision being taken at one level and having to then be reviewed by somebody at a different level in the organisation.

MR FRANKEL: On internal review, I always thought there were only two possible justifications for it. The first is that it led the decisions by the time they went to the Commissioner to be much more fully argued and set out so they simplified the Commissioner's decision by making sure that the requester's arguments were heard once, and so that made it easier for the Commissioner.

The other argument was that, 25 per cent of cases, some benefit to the request, some the request was upheld, but, as I thought about it, it occurred to me that I had never seen a case -- not that I see that often the actual correspondence -- where the internal review says "We were wrong to say this should be withheld." It is more often "We agree that we didn't comply in 20 working days". If that is the case, if most of those cases which uphold the request for an internal review are just saying "You are right, we took more than 20 working days, there is no point.

Now, I recently, in connection with the Lansley diaries case, I made an FOI request to the Department of Health for the cost of taking that case as far as it has gone so far, which is First Tier, Upper Tier and Permission to Appeal to the Court of Appeal, because I think that, basically, the argument that is being run is largely the argument that, if ministers have empty spaces in their diaries and that is revealed, they will schedule unnecessary meetings.

Well, both the First Tier and the Upper Tribunal said that is ridiculous, that is absurd and I have no doubt the Court of Appeal will say that is absurd as well.

So how much money has been spent trying to promote that argument? The Department of Health -- and this was not the Department of Health on its own because I think they are a proxy for the Cabinet Office here -- said -- this was their answer:

"We are going to publish that when the case is finally over. It is in the public interest it should be published when the case is finally over."

RT HON JACK STRAW: What is for? The cost?

MR FRANKEL: The total cost of external legal advice. This can be ascertained from three or four invoices that they have had from the external lawyer, so this couldn't be less work. There is no complexity, there is no complex statistical series that will be interrupted. So all they said, and the test is that it is reasonable to withhold it until the date of publication and the balance of public interest favours withholding it. All they said was it is in the public interest that it should be published when it is all over. They didn't say why it wasn't in the public interest to publish it now. I asked for internal review; they simply repeated exactly the previous argument without addressing the shortcomings that I pointed out to them

about their argument.

I went to the Commissioner and, as a result of the Commissioner coming on the scene, the Department of Health/Cabinet Office decided to release the information. The internal review played no part at all, and the cost, by the way is, over £30,000. The cost of the better Regulation Committee Appeals, which have gone to the First Tier, Upper Tribunal and back to the First Tier, that decision, I guess -- I have not asked for it -- is £20,000 to £25,000. The information that they have spent that money on is the figure 13. There have been 13 meetings. That has cost the public purse £20,000 or £25,000 to stop us knowing that, which they have now told us. What is the point of spending that kind of money?

I can't remember how I got here.

THE CHAIRMAN: What about a qualified person?

MR FRANKEL: The qualified person I think may be a hangover from the time when section 36 was perceived as a quasi veto for public authorities other than Central Government, and that they thought that, once the qualified person engaged the exemption, the chances of a decision on public interest on public interest grounds were minimal. That has not proved to the case. In Scotland there is it no qualified person, it works in the same as any other exemption. I think you possibly could get away with that here without bringing the house down.

But, if you do that, you might as well remove the reasonable opinion at the same time and make it a straightforward exemption, it would prejudice the effective conduct of public affairs and this test will end the same way.

RT HON JACK STRAW: Could I just ask you this about on the qualified person. One argument we've had is, if you remove the qualified person test, then the public

authorities would be engaging section 36 more frequently.

MR FRANKEL: Yes, they would.

RT HON JACK STRAW: So you would have more information refused publication.

MR FRANKEL: Yes.

RT HON JACK STRAW: So isn't that a danger?

MR FRANKEL: That is the danger. That is the danger and that is what you would have to look at. The point is that that is a catch all. It just says "Any other harmful effect on public affairs". It is not limited in any way and that is the danger.

RT HON LORD HOWARD: You have already told us that you think that the Act should apply to charities when they are acting as contractors to public authorities. What about the extension of the coverage of the Act to charities more generally?

MR FRANKEL: That is a difficult question for us. We have discussed that and it is one of those where we would want to actually go and talk to a lot of people ourselves before we decide on it because it has got a lot of implications.

RT HON JACK STRAW: Are you a charity?

MR FRANKEL: No. We don't have any problem if somebody said to us "You should be subject to the Freedom of Information Act." Since we demand that everybody else should be, yes, of course we should as well. So I don't have any problem about our own status whatsoever. I will happily go along with whatever, whatever the position is.

We get money from charitable foundations for work we do which is charitable in nature, but we are not a charity ourselves. But it is a large question, it is not the kind of question that we would try and answer off the top of our heads. Public schools are charities. You have the giant charities who are involved in the call

centre problems, which I must say makes everybody feel the more scrutiny the better. You have small charities who are campaigning organisations where a right of access applying to them and not to the organisations who are campaigning against their views might raise an imbalance.

So I just don't know the answer to that question. It is not that I don't want to answer it, but I don't want to answer if off the top of my head.

RT HON LORD HOWARD: No. Thank you.

We have heard and you have heard numerous requests for an extension of the vexatious requests provision.

MR FRANKEL: Yes.

RT HON LORD HOWARD: What is your view on that?

MR FRANKEL: My view is a public authority had quite a substantial extension of that term now, as a result of a case that has gone through the Upper Tribunal and the Court of Appeal, so that it can now be -- requests can now be refused on the grounds of burden alone, even if there was no sense in which the requesters were behaving vexatiously.

In other words I might ask, completely innocently, for information on a particular subject without realising there is a filing cabinet worth of stuff there and, under this decision, that request could be treated as vexatious. Well, that is a harsh term to apply to a request made in that context but it protects the -- it does give the authority the protection it is looking from having to do a lot of work.

THE CHAIRMAN: Can it not be rebatched?

MR FRANKEL: It can be rebatched, and that might be the solution.

RT HON LORD HOWARD: The case you have referred to does not protect the

authority for what might be regarded as frivolous requests. The burden test helps in one sense, but there are other complaints about requests which ought to be treated as vexatious but do not really come within the terms of the legislation as currently drafted.

MR FRANKEL: Well, I think they probably do now, because the Commissioner's guidance in response to the Upper Tribunal decision was to say to authorities, in any case where you feel that a request involves a disproportionate burden or disruption or distress or harassment, or whatever it is, not justified by the value of the information, that is the test.

To be honest, if somebody said, can you -- I mean the how many people called David is not worth it -- I think as Kent County Council said, the work involved is retrievable fairly easily, so you may not bother about it.

THE CHAIRMAN: But they had another case where it was not quite so easy.

MR FRANKEL: No, but if it is actually laborious to retrieve that and it is 12 or 14 hours, and no one can see any conceivable purpose for it, you might say, "I am inclined to the view that this is vexatious in the sense that -- and there is no serious purpose to it -- unless you persuade me otherwise, that is how I am going to decide," you say to the requester. I think that is probably standup-able now.

RT HON LORD HOWARD: What about the cost of necessary redaction and taking that into account in the cost calculation?

MR FRANKEL: The problem with the cost limit at the moment is it is an absolute ceiling. It makes no allowance for public interest of any kind.

So there are all kinds of tweaks that authorities are calling for in order to take more things into account. I thought, by the way, the NHS Providers came up -- their

solution, which was to turn it into an eight hours or one day's work, plus consideration time and redaction time, would kill FOI all together, by the way, because it is one thing to say one person spends a day looking at it, but very often you have three offices, and three people have to look, and if you have consideration time as well, you will find very few requests have to be answered --

THE CHAIRMAN: I think Lord Howard's question was just redaction, and those redactions which are required by law, which would basically be personal information and those things to do with commercial and confidence, and maybe combined with accepting that this limit should go up over time, as most other --

MR FRANKEL: I don't make any distinction between redaction required by law or redaction of other exempt information. It's going to cause harm --

THE CHAIRMAN: Sorry, I am characterising exempt information as being required by law.

MR FRANKEL: Okay. Because section 40, you might argue, is required by law.

THE CHAIRMAN: Yes.

MR FRANKEL: Obviously that is a workload. The question is this: if you have an inflexible level and a large document, is the introduction of redaction time without a provision for expanding the cost limit, in case this is a really serious issue, is that going to cause a restriction beyond what is justified by the workload? I think it may do in some cases.

RT HON LORD HOWARD: So what you are really suggesting, although you have not quite articulated it, is that you could have a provision which said you can take into account redaction time as a factor in deciding whether or not the information should be disclosed, but not as an absolute exemption.

MR FRANKEL: Yes. I mean the new definition of vexatious is primarily based on redaction time. That is actually what it takes account of mainly.

THE CHAIRMAN: Yes. We have had many examples that have been given of some of these commercial requests for IT contracts, et cetera, which, it seemed to me, would -- very often the thing that causes the problem for the authority is the redactions that are involved in those things.

MR FRANKEL: Well, I am not sure whether it is the redaction -- when you were asking for the IT information, there is usually no -- I know what Kent County Council said -- I don't think there is usually any redaction. It is the pain of collecting the information, where they think they don't see a public interest in the release of the information.

Can I just say on this, the issue of how much time authorities take came up on a mailing list that authorities subscribed to which is open to outsiders as well, three years ago, and all the authorities were asked how many requests they get and how many exceed the 20 days and one authority said "We get 520 requests a year and it takes me -- and I am the person who deals with it -- one day a week to deal with them all and this is one of many jobs that I have." The universe collapsed on these people. All the other FOI officers said you are trying to put us out of -- how do you manage to do that?

It is Barrow-in-Furness Council and I went and looked at their requests on what do they know and they seem to be no less complex than anybody else's. I spoke to the FOI officer on Friday in anticipation of this, and they do it because the FOI officer, who has been replaced by somebody else, but still the same thing, has been there a long time, is trusted to take decisions herself and knows what goes

on in her authority and isn't a junior person who cannot take a decision and go up the chain. That is how they do it. It is a matter of the process and the experience they have.

In 2013 they had 556 requests and in 2014 they had 748. It went up by 35 per cent. The following year it went down to 594 per cent. How did you do that, I said to her. She said "We studied all the requests that we have had and we decided to publish as much as that as possible as a data set." That is what has brought it down.

The police, when they came here, said, well, you can publish more information, but it doesn't help, but I suspect they are publishing the wrong information. I don't think they are looking what the requests are. They are getting requests for what software they are using and, when their contracts come up for renewal, that is what they should publish.

What they are doing -- and Parliament did this with the publication schemes. We publish Hansard. Parliament put Hansard in its publication scheme when this provision was introduced, something that has been published for 200 years.

They were just listing the things they were already doing without extending them.

RT HON JACK STRAW: Just going back briefly to the issue of the veto, Mr Frankel, because you said a moment ago, in a different context, "the whole package would fall apart". I acknowledge, as a matter of record, that your campaign, and you were to put it at its mildest, were not keen on its veto when it came up in the year 2000, but would you accept that the veto was an essential part of a balanced package which government put forward to secure a broad consensus on the Freedom of Information issue after a lot of controversy and that was, as it were,

balancing the power that was given to the Commissioner to make otherwise binding decisions?

MR FRANKEL: Well, I accept that you put it forward as a quid pro quo and that was what persuaded you and the Government to make that concession in terms of making the public interest test legally binding. So, in that sense, yes, I do accept it.

But I just want to point out about our veto that there is no veto. If the Ministry of Defence says the disclosure of this information is harmful to defence and the Commissioner says, "no, it is not, there is no veto, and the same for foreign relations and the same for law enforcement. It is a particular aspect of how --

RT HON JACK STRAW: I understand that but it is also fair to say, isn't it, that right at the end of process the Campaign for Freedom of Information was sufficiently happy about the outcome that they made awards which may now appear to be eccentric to those who had been responsible for the Act.

MR FRANKEL: We were concerned about it actually. We were concerned the veto would be used very heavily. It has not been used very heavily, which I think has been a relief to us and I think it has strengthened the Act that it hasn't been used so heavily.

RT HON LORD HOWARD: Mr Frankel, my last question is a rolled up question which I hope I will not regret asking.

First of all, are there any things in your view which fall within our terms of reference where we could improve transparency in the operation of the Act and, secondly, is there any comment you want to make on the evidence you have heard which you have not already made during the course of your evidence this

afternoon?

MR FRANKEL: I hope -- you are not going to regret this, I don't think, because I am going to be very brief. I think the role of the Cabinet Office in being such a reluctant participant in FOI, and its view that every individual decision is a precedent when that is not the case, I think in terms of the change that is needed, and change is needed in that area, in that department, in its central coordinating influence over the whole of government. That is what I think is particularly needed.

There are other specific changes like the Justice Committee recommended a change to the time limit on the shredding offence which has not been implemented. I think that is overdue and would be useful.

RT HON LORD HOWARD: Any comments on other evidence that you have heard?

MR FRANKEL: I have deliberately tried to not comment on everything that I wanted to comment about because otherwise we would take up another hour.

THE CHAIRMAN: Okay. Well, if you feel like writing in response to it, then do not hesitate.

I have one final question, which is one I kept putting to people during in the course of these sessions. I am very surprised to discover that many public authorities do not publish the answers that they give on FOI, which always seemed to me to be a way of defusing some of this, and why should the information not be made generally available, that basically there seems to be a tendency to give requesters information for them alone, unless they happen to be on a public web -- through other means, and do you have a view about this and the disclosure logs?

MR FRANKEL: I think -- I completely agree with you. I think it is perverse of

authorities to go to the trouble of vetting the information for disclosure and releasing it to somebody who may put it in their drawer and never make any use of it. Put it on the website, it does the authority's reputation a lot of good and it is available for anybody who wants to see it in circumstances which may not even be anticipated at the time it has been requested.

THE CHAIRMAN: Okay. Well, thank you very much and thank you so much for your evidence. It has been very helpful and important, and for sitting through and joining us through sitting through all of the sessions.

Thank you very much.

(4.35 pm)