The Campaign for Freedom of Information

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Response to the Call for Evidence

by the Commission on Freedom of Information

(Updated 27.11.15)

This paper is an updated version of the submission previously made to the Commission on Freedom of Information. In particular, it adds further Tribunal cases to the survey at paragraphs 36 to 76 and a discussion of their implications.

The Campaign

1. The Campaign for Freedom of Information was established in 1984 to promote freedom of information legislation in the UK. We played a key part in encouraging the government to introduce what became the FOI Act and in improving the bill during its Parliamentary passage. We work to improve the operation of the legislation, assist requesters in using it, promote good practice and provide training to both requesters and public authorities.

INTERNAL DISCUSSION

2. The Campaign's view is that the FOI Act's existing approach to the disclosure of internal discussion provides more than adequate protection for sensitive information. There is no case for providing greater protection.

The public interest test

3. The FOI Act's exemptions for internal discussions are found primarily in section 35(1)(a) for information relating to the formulation and development of government policy; section 35(1)(b) for information relating to ministerial communications; section 36(2)(a) for information likely to prejudice collective responsibility; and sections 36(2)(b)(i) and (ii) for information likely to inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation.

4. These provisions are all subject to the Act's public interest test. Exempt information can only be withheld if the public interest in maintaining the exemption outweighs that in disclosure. The public interest test is of particular importance in relation to the section 35(1)(a) exemption because of its vast and indiscriminate approach. It protects all information relating to policy formulation, regardless of its source, content or sensitivity. It does not focus on advice, assessment or exchange of views but catches anything which relates to policy under consideration, including newspaper editorials, published reports, purely factual information, research studies, consultation responses and other material which may reveal little if anything about the particular options under consideration or the views of the officials or ministers considering them.

Without the public interest test all such information would be protected for 20 years, regardless of its sensitivity.

5. The public interest test is also the route by which the public may obtain technical insight into the background to policy issues. It may explain the shortcomings of statistics, the reasons why a statutory definition has taken a particular form, why specific research findings need to be treated with caution or why a problem falls outside the reach of legislation which might be thought to address it. Access to such material may improve the public's understanding of an issue or allow those with the knowledge and interest to discuss it with government in ways that contribute to better decisions. It may also highlight shortcomings in the official approach to an issue, which government itself may not recognise or prefer not to acknowledge. It may assist those trying to persuade the government to pay attention to an issue not on its agenda – or those trying to dissuade it from taking action of which they disapprove. The public interest test is what opens those doors. Without it the exemptions would keep them permanently shut.

6. The suggestion that these exemptions might operate without the public interest test, whether for 20 years or some shorter period, would be an enormously retrograde step entirely at odds with the public's expectations, the requirements of accountability and the government's own declared commitment to openness.

7. In this context we note the prime minister's 2010 declared intention that Britain should become 'the most open and transparent in the world'[1]. We also note the recent statement by the Leader of the House of Commons, Chris Grayling, that FOI:

> 'is a legitimate and important tool for those who want to understand why and how governments make decisions, and this government does not intend to change that'.[2]

That strongly suggests that access to internal discussions should *not* be restricted.

'Safe space' and 'chilling effect'

8. In considering requests for information about internal discussions, the Commissioner and Tribunal apply two separate concepts: 'safe space' and the 'chilling effect'. The first refers to the shielding of the decision-making process from the difficulties that may be

[1] http://www.opengovpartnership.org/country/united-kingdom
[2] House of Commons debates, 29 October 2015, col. 522

caused by the public peering over the shoulders of officials or ministers as they develop their thinking. An early decision of the Information Tribunal explained:

> 'The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy'[3]

9. By definition, the need for this 'safe space' is held to come to an end once the decision is announced or shortly afterwards. That does not mean that advice or other policy materials are then freely available on request. Any harm to the public interest that may then be caused also has to be assessed and this is often done by focussing on whether disclosure would have a 'chilling effect' on the recording of similar material in future. The chances of that are assessed in light of factors such as the frankness of any views, the sensitivity of the issue, the age of the information at the time its disclosure would occur and the consequences of the disclosure. Particular weight is given to disclosures that might damage working relations within government, perhaps as a result of an official's comments being used by critics to attack the minister, in turn making the minister less likely to seek such views in future. If such a 'chilling effect' is likely, a further question is asked: whether the public interest in avoiding that harm outweighs the public interest in disclosure.

10. It may be difficult to demonstrate whether a 'chilling effect' has occurred. The Upper Tribunal (UT) has recently overturned a First-tier Tribunal (FTT) decision precisely because the FTT gave weight to the fact that after 10 years of FOI the government had still failed to provide direct evidence of it. The FTT had suggested the department should have compared records before and after FOI to look for such changes. The Upper Tribunal described this as an 'unrealistic and unattainable' expectation.[4] We think that overstates the problem. The exercise may be complex, but it is certainly not unattainable.

11. Such research was carried out in 2001 by the National Archives of Canada as part of a review of Canada's Access to Information Act (ATIA). Archivists examined numerous

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[3] EA/2006/0006, Department for Education and Skills & Information Commissioner & The Evening Standard, 19 February 2007.
[4] Department for Work and Pensions v Information Commissioner, John Slater and Tony Collins [2015] UKUT 535 (AAC) (20 July 2015)

series of government records to see whether any difference could be found between similar records created before and after the Act's 1983 introduction. The selected series of records included minutes of a permanent secretary level committee dealing with fisheries, minutes of a ministerial advisory council on the environment, records relating to two prime ministerial visits to Moscow one before and one after the Act, records used to advise ministers on the progress of public works projects and all the operational files of four central agencies including the Treasury Board, a body with many of the functions of the UK's Cabinet Office.

12. The study examined the volume, comprehensiveness and completeness of narrative of records before and after the ATIA.

13. The researchers assumed that they would discover that the Act 'had a significant and negative influence on record-keeping'. In fact their results showed that:

- 'the quantity of records was stable before and after the Access to Information Act'.
- 'The issues dealt with in records after 1983 remained as significant and complex as they were prior to the legislation.'
- 'The content/narrative remained unchanged after the introduction of the…Act. All elements of records were captured from beginning to end in a comprehensible fashion and consistently for all Government areas we examined.'
- The only detected changed was a reduced volume of central agency records following changes to archiving instructions but in these cases the retained records 'were more substantial…quality made up for quantity'

14. The National Archives concluded:

> 'At the outset of the investigation, it was expected that we would find differences in record-keeping in the Government with the implementation of the Act in 1983. However, after extensive analysis, this was not found to be the case.'[5]

[5] The Access To Information Act and Record-Keeping in the Federal Government, August 2001, National Archives of Canada. Available online at the time of writing at http://fs.huntingdon.edu/jlewis/FOIA/CanATI/Attallah02paper-records1-e.html

15. This study does not of course tell us what has happened in the UK. Its significance is that it demonstrates that *assumptions* about a 'chilling effect' may not withstand critical examination. They should not be the basis for legislative changes.

16. The Tribunal has often asked officials giving evidence to it whether FOI has deterred them from recording what should have been recorded. The standard reply appears to be for witnesses to insist that they have never done so, but fear that weaker-willed colleagues elsewhere may have.

17. If officials *fear* that what they write will be disclosed under FOI, their recording may well become more careful. It does not follow that this will involve the omission of significant information, let alone omissions which undermine good government. It may simply involve a reduction in the use of uninhibited language or expressions of exasperation that occur, particularly in emails, between colleagues who know each other well.

18. A more important question may be whether their fear of disclosure is well founded – or based on a misunderstanding of the level of protection actually provided under FOI.

19. The Justice Committee's 2012 report on its post legislative scrutiny of the FOI Act reported the evidence of the former Home Secretary, Jack Straw, a member of the present Commission, who had been responsible for taking the FOI Bill through Parliament. Mr Straw told the committee that he and ministers:

> 'sort of believed that in section 35 we were establishing a class exemption, but that has not turned out to be the case because of the way it has been interpreted by the courts. It has also led to, frankly, some rather extraordinary decisions by the Freedom of Information Tribunal, in which *they suggested that it can apply only while policy was in the process of development but not at any time thereafter. That is crazy and it is not remotely what was intended*.'[6] (emphasis added)

20. In July 2015, the chair of the House of Commons Public Administration committee appeared on BBC Radio 4's 'Today' programme to discuss the work of the present Commission. He spoke in similar terms:

[6] House of Commons Justice Committee, Post-legislative scrutiny of the Freedom of Information Act 2000, First Report of Session 2012-13, Volume 1, paragraph 159.

> 'The restrictions on policy advice were intended to be permanent but they have been reinterpreted to mean that *unless the policy is actually under discussion, well, the policy advice can be disclosed*'.[7] (emphasis added)

21. Both comments express the mistaken view that policy advice has no protection from disclosure once a policy decision has been taken.[8] Officials hearing this from such distinguished sources are likely to become more guarded in what they record in the belief that everything they write will be disclosable after the decision. Such comments are likely to produce a 'chilling effect'. The answer to that is not to restrict the Act but to promote a more accurate explanation of the protection it provides for sensitive discussions.

22. We assume that similar comments are also made by ministers and senior officials, whose view of FOI is coloured by the particular FOI cases which come to their attention, which will be a distilled concentrate of the most sensitive and to them most troublesome cases.

23. We have been privately told by the head of a major body, that FOI has severely restricted the willingness of his board colleagues to express views in writing. When asked which organisation he was referring to, he named a body which is not subject to either the FOIA or the related Environmental Information Regulations (EIR). The contamination of this debate by unrealistic fears highlights the need to look with particular care at claims that the FOI Act has had, or threatens to have, a harmful effect on the government's ability to carry out its functions.

24. Concern about a chilling effect may partly echo concerns about leaks. Their effect is likely to be far more drastic than FOI disclosures. A leak is likely to occur at the time of maximum sensitivity, not months or years later. It may have been deliberately selected for greatest political impact and is not subject to the scrutiny of a regulator before it is made. The former Cabinet minister Kenneth Clarke wrote in his memoirs that during John Major's term as prime minister 'the Cabinet became as leaky as a sieve and no minister wished to raise any serious business there'.[9]

25. Lord O'Donnell, the former Cabinet Secretary has said that Tony Blair 'was reluctant at times to take as many Cabinet discussions as possible, because he felt that they would

[7] BBC Radio 4, 'Today' programme, 18 July 2015

[8] The views above may partly result from differences in terminology. To a specialised FOI audience, the terms 'safe space' and 'chilling effect' refer to two distinctive concepts the former, by definition, ending with the taking of a decision. In Whitehall parlance the term 'safe space' may embrace both. For those who use the term in the latter sense, it may come as a shock to read that the Commissioner and Tribunal believe the need for a 'safe space' (which in their terms may mean any protection at all) comes to an end once the policy decision is taken.

[9] Quoted in Peter Hennessy: "The Prime Minister: The Office and its Holders since 1945" (Palgrave Macmillan 2001)

become very public very quickly'. The same was true of Cabinet Committees because Mr Blair 'would have thought that that wasn't a safe space'.[10]

26. Government may not believe it can do much about leaking, particularly by Cabinet ministers. But it may feel it can do something about FOI, which is a creation of statute. It is possible that a degree of anxiety about the former has been transferred to the latter, perhaps even colouring Mr Blair's own well-known regret over the introduction of FOI.[11]

27. A feature of many section 35 tribunal cases is the disconnect between the severe consequences that government maintains would flow from *routine* disclosure of policy advice and the innocuous content of the disputed material involved in the particular case.

28. The very first section 35 case to be heard by the Information Tribunal (as it then was) was a request for minutes of senior DFES management meetings which had discussed the response to a schools 'funding crisis'.[12] It led to the department providing emergency funds and making new funding arrangements for future years.

29. The FOI request, in January 2005, related to minutes of meetings between June 2002 and June 2003. The Information Commissioner found that sections 35(1)(a) and (b) of the FOIA (the exemptions for policy formulation and ministerial communications) were engaged but ordered disclosure on public interest grounds. The decision was appealed.

30. Those giving evidence at the tribunal included Lord Turnbull, the former cabinet secretary. He warned that the disclosure of policy discussions would strike at the heart of civil service confidentiality, threaten the role and integrity of the civil service, reduce the neutrality of the civil service, undermine frank policy-making, lead to the transfer of accountability for decisions from ministers to officials and expose officials who were

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[10] Evidence of Lord O'Donnell to the Chilcot Inquiry, 28 January 2011.

[11] Although Mr Blair complained in his memoirs that FOI inhibited the expression of views in policy making he also acknowledged he regretted FOI because it might help expose his own administration's 'scandals'. These, he said, were just as damaging as those of the previous government:

"What I failed to realise is that we would also have our skeletons rattling around the cupboard, and while they might be different, they would be just as repulsive. Moreover, I did not at that time see the full implications of the massive increase in transparency we were planning as part of our reforms to 'clean up politics'. For the first time, details of donors and the amounts given to political parties were going to be published. I completely missed the fact that though in Opposition millionaire donors were to be welcomed as a sign of respectability, in government they would very quickly be seen as buying influence. The Freedom of Information Act was then being debated in Cabinet Committee. It represented a quite extraordinary offer by a government to open itself and Parliament to scrutiny. Its consequences would be revolutionary; the power it handed to the tender mercy of the media was gigantic. We did it with care, but without foresight. Politicians are people and scandals will happen. There never was going to be a happy ending to that story, and sure enough there wasn't. The irony was that far from improving our reputation, we sullied it." Tony Blair, A Journey, Hutchinson, September 2010, page 127. For a fuller account see: www.cfoi.org.uk/2010/10/the-blair-memoirs-and-foi-2.

[12] EA/2006/0006, The Department for Education and Skills & Information Commissioner & The Evening Standard (19 February 2007)

apparently identified with the policies of an outgoing government to suspicion from new ministers. Other senior officials referred also to the loss of frankness and candour, the impact on record keeping, the danger of government by cabal and the increased risk of 'sofa government'.

31. The Tribunal did not dispute the importance of these arguments. But it held that the public interest in withholding the disputed minutes by the time of the request 18 or more months later was 'tenuous at best' particularly as the minutes themselves were 'fairly skeletal'. The public interest in confidentiality did not outweigh the public interest in disclosure.

32. The disclosed minutes can be found at *Appendix 1.* Elements of the documents (marked in green) had already been disclosed following internal review. Further passages (marked in purple) were released prior to the Tribunal hearing. The disputed information consisted solely of the non-highlighted passages.[13] These included comments such as:

> 'Andrew Wye[14] confirmed that it would be possible to provide 3-year declarations of amounts available and the formulae for distribution. Action: Tom Goldman to complete list of grants.'
>
> 'Stephen Kershaw to produce a note on how the Department is channelling significant funds into remodelling and why this is such a top priority'
>
> 'There was a discussion around extra funding for local authorities to take into account changes to the level of Standards Fund grant. It was noted that this will lead to a softening of some cliff edges but not all.'
>
> 'Local Authorities had not consciously sought to divert funds and the public debate was unfortunate'
>
> 'It was crucial to balance our response and maintain our room to manoeuvre for both this and next year.'
>
> 'It was very difficult to get meaningful figures as there was such a mix of different factors in their individual positions.'

[13] The highlighting is by the Tribunal or the DfES
[14] The department did not attempt to argue that the names of officials mentioned in the minutes should be withheld under section 40 of the FOIA.

> 'The difficulties rose from lack of action rather than anything deliberate. Part of our strategy should be to lead those authorities who genuinely did have the money to ease school difficulties to make a rapid decision.'

33. The only undisclosed passage which referred directly to policy options stated:

> 'Stephen Crowne updated on ongoing work the purpose of which was to arrive at a package of measures built around a commitment of a guaranteed per-pupil increase to create stability for the next two years. Remaining questions were how this was to be achieved and there were two funding routes:
>
> i. via EFS (with passporting)
>
> ii. via a ring-fenced grant to LEAs.
>
> Which option is a matter of ongoing discussion with the centre but we needed to move fast for an announcement before the end of the month. Both had risks: there is the potential for passporting to be unsuccessful or even perverse; the ring-fenced grant ran the risk of squeezing local services and /or leading to a rise in Council tax. Discussion brought home the seriousness of the issue.

34. In fact, the commitment to a guaranteed per-pupil increase in funding was announced in Parliament in July 2003, 17 months before the FOI request, together with an account of the combination of means by which it would be achieved.[15] The only additional information provided in the minute is the recognition of the fact that neither of the two options mentioned was entirely risk-free. This would not have been news to anyone familiar with school funding.

35. The case illustrates a theme which has regularly recurred in section 35 and 36 cases. The government resists disclosure not (we assume) primarily because of the consequences of releasing the particular information at issue but because it fears that it will set a precedent for the future disclosure of related but more contentious information. The response of the Commissioner and Tribunal is that their decisions are based on the facts of each case and that the disclosure of innocuous examples of information does not mean that sensitive material will be treated in the same way.

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[15] Hansard, House of Commons Debates, 17 July 2003, cols. 454-8

TRIBUNAL DECISIONS

36. In this section we describe decisions involving central government departments issued by the First-tier Tribunal (FTT) or Upper Tribunal (UT) involving the FOI exemptions relating to internal discussions.[16] It does not attempt to deal with cases involving the corresponding EIR exceptions. The summaries cover, as far as we are aware, all the cases decided during the three years from December 2012 to November 2015. We have not focussed on Information Commissioner (IC) decisions as these have been dealt with by the IC's own submission. However, the tribunal cases are sometimes more revealing as they include cases where the government has not accepted the IC's findings.

37. The effect of disclosure and the public interest arguments are assessed at the time that the request was refused or the refusal upheld on internal review. The passage of time between that time and the date on which the Commissioner or Tribunal considers the case is disregarded.[17] The question asked is whether the refusal was justified at the time it took place and not whether it can be disclosed at the time of the appeal.

EXEMPTION UPHELD

38. This group of cases describe the FTT cases during the last three years which found that the public interest test favoured the withholding of the disputed information. Some of these cases also involve exemptions other than those relating to internal discussions. The summaries below generally disregard these other exemptions.

Two Chancellors

39. A request was made for information relating to meetings between the Chancellor of the Exchequer, George Osborne, and the former Chancellor, Lord Lawson, over the previous 22 months. The Treasury said it held the transcript of a telephone conversation between the two which it withheld in part under section 35(1)(a). The Information Commissioner confirmed that the exemption was engaged and found the public interest favoured withholding the information. The FTT agreed. It accepted there were public interest factors in favour of disclosure, but the need for a safe space was 'very strong'. The Chancellor needed to be able to consult people like former chancellors on matters of fiscal and banking policy while that policy was being formulated and developed. The request, six months later, was made 'relatively soon' after the conversation, policy was 'live' and the conversation related to policy of 'extreme importance to the country's financial stability'. Disclosure might also have a chilling effect on the willingness of

[16] These are described in paragraph 3 above. The survey does not include cases decided on the basis of section 36(2)(c)
[17] Evans v Attorney General, UKSC 21, paragraph 73.

senior figures from business and politics to engage in discussions of this sort and to allow them to be recorded if they were liable to be disclosed prematurely.[18]

Bradford and Bingley

40. The Cabinet Office was asked for information about the sequence of events leading up to and after the nationalisation of Bradford & Bingley (B&B) in 2008. The request also asked whether the matter had been discussed at Cabinet. The IC found the public interest favoured withholding the information and refusing to confirm or deny whether Cabinet discussions were held. The FTT agreed. 'The argument that the detail of scenarios that needed to be considered in the B&B situation may have to be revisited in the future by Ministers and their advisers is a powerful one' and was 'the most significant factor'. The policy issues were still 'live' at the time of the request in March 2011 and a safe space continued to be required. Disclosure of whether Cabinet had discussed and approved the nationalisation would 'intrude upon the Cabinet's discretion to decide how such decisions are made' and would 'create expectations or pressure for certain types of decisions to be taken at Cabinet level'.[19]

Domestic abuse

41. Minutes of meetings of a task group set up by the Welsh Assembly Government to assist with proposed legislation on domestic abuse were requested. At the time of the request, a few weeks after the white paper consultation ended, policy formulation was 'still underway (and indeed at quite an early stage)'. The Information Commissioner decided the public interest favoured withholding the information to protect the Welsh Government's safe space to develop policy. The FTT agreed, particularly 'when viewed at the time when the request was submitted'. The requester argued that the public interest favoured disclosure because the focus of the proposed legislation had changed during the group's deliberations from being gender neutral to targeting violence by men upon women. The FTT found that the issue of gender balance was addressed in the group's report and there was no evidence of any concealed shift in emphasis in the disputed records themselves.[20]

Briefings on PQs

42. The FTT upheld the Information Commissioner's refusal under section 36(2)(b) to order disclosure of the briefing notes provided to the prisons minister in support of draft answers to a series of Parliamentary Questions. These sometimes dealt with the background to the question and the possible motive or interest of the MP asking it. The Tribunal gave substantial weight to the need to avoid deterring: 'any possibly astute

[18] EA/2013/0074, Brendan Montague & Information Commissioner & HM Treasury (7 January 2014)
[19] EA/2012/0251, Bradford & Bingley Action Group & Information Commissioner & Cabinet Office, 10 June 2013
[20] EA/2013/0278, Tony Stott & Information Commissioner & Welsh Assembly Government, 16 July 2014

advice that might appear risky, hostile to a member or simply indiscreet but which nevertheless, in the opinion of the official, needs to be given'. It continued:

> 'The Tribunal is frequently pressed by government departments with claims as to the "chilling effect" on frank communication of disclosure of internal discussions and reports. The Tribunal is not always impressed by them. Here, though, we are dealing with a vital and sensitive interface between minister and civil servant. This is an area of government where the need for confidentiality is clear because the points that need to be made to a minister may be based on evidence of varying strength and may involve strong criticism of the questioner or another member or third party. The official offering advice may be understandably reluctant to make them public, whilst properly concerned that they should be before the minister. It is for the minister to decide what should be used, what rejected, what is too tenuous to be relied upon…
>
> Whether or not disclosure of these particular notes would affect the way that the officials concerned perform their duties is less significant than the question whether the threat of publicity might affect briefings generally in future. We consider that there is considerable force in the contention that a very important channel of communication would be seriously inhibited.' [21]

Building Schools for the Future

43. In 2010 the government announced the cancellation of Labour's 'Building Schools for the Future Programme'. Following judicial review, the decisions relating to a number of affected councils were retaken in July 2011. One of the affected authorities, Sandwell Metropolitan Borough Council, later made an FOI request for information about the decisions affecting its funding which was refused in part in February 2013. The IC ordered disclosure. The disputed information consisted of 7 submissions to the Secretary of State. The FTT found the information fell within section 35(1)(a) and that the public interest favoured its withholding. 'It would expose a very significant part of the relationship between Ministers and the politically neutral civil service to a deeper and not necessarily constructive degree of scrutiny.' There was a 'plausible risk' that disclosure would cause policy submissions to be written differently with 'an eye to a public audience' and ministers may be less inclined to seek and rely on formal advice.[22]

Education Secretary's letter to schools

44. A request sought information about the Education Secretary's decision to write to local schools about workshops offered to them as part of the Tottenham Palestinian Literary

[21] EA/2011/0267, Angela Kikugawa & Information Commissioner & Ministry of Justice, 20 May 2012
[22] EA/2014/0079, Department for Education & Information Commissioner, 28 January 2015

Festival. The letter, in September 2011, had reminded schools of their statutory duty to provide a balanced account of opposing views about political issues and asked for assurances that this would be done. The request, sent a few weeks after the letter – and therefore after the need for 'safe space' - sought the correspondence with a third party which had expressed concerns about the festival to the Secretary of State and the associated internal discussion. The requester argued that the public interest justified disclosure as the Secretary of State, who had intervened personally, had also received and declared a donation from a Zionist organisation. The Tribunal accepted that this could create a perception of bias but found that the advice given to ministers did not display bias and the sending of the letters was not unreasonable in the circumstances. The FTT upheld the ICO's refusal to order disclosure, agreeing that this would be likely to prejudice frank discussions between officials and between officials and third parties (section 36(2)(b)(i) and (ii)). It would also discourage third parties from reporting concerns about the promotion of potentially extreme views at schools. (section 36(2)(c)).[23]

Request about a request

45. The requester sought information about the handling of a previous request he had made to the Home Office about the appointment process for selecting a chief constable. The new request was made 3 months after the decision on the previous request. The IC found that the information contained frank comments and had been properly withheld under section 36(2)(b)(i). In its decision, the FTT agreed finding that 'stakeholders would be less free and frank in their input' to future decisions and that 'this "chilling effect" would have a significant negative impact on responses to requests under the Act'. The Tribunal found no evidence of inappropriate behaviour by the Home Office and held that the public interest favoured withholding the information.[24]

Boating accident

46. The request sought information about a boating accident which had occurred in Cherbourg Marina in September 2011. Some ministerial correspondence relating to the incident was held. The IC upheld the MOD's refusal to disclose the advice under section 36(2)(b)(i). The FTT also did so, finding that: 'there was a compelling argument that a Minister should be able to receive candid confidential advice from his or her civil servants and that this would be undermined if the advice provided here was liable to disclosure and public scrutiny.'[25]

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[23] EA/2012/0204, Dr Bart Moore-Gilbert & Information Commissioner & Department for Education, 23rd September 2013.
[24] IEA/23/0059, Howard Roberts & Information Commissioner & The Home Office
[25] EA/2013/0214, Nick Dunnett & Information Commissioner & Ministry of Defence, 26 March 2014.

Archbishop of Canterbury

47. Correspondence between the then Archbishop of Canterbury, Rowan Williams, and the Prime Minister David Cameron during the PM's first 13 months in office was withheld under section 36(2)(b)(ii). The IC upheld the refusal finding that disclosure would have a 'severe' inhibiting effect on exchanges between them. The FTT agreed finding that there was 'a public interest in the PM being able to develop that relationship in order to have confidence that the Archbishop would not feel inhibited in his correspondence'. It added that 'had there been (which there wasn't) evidence of the Archbishop saying things in private which were not consistent with what he was saying in public, that would have significantly influenced our judgment on the public interest test.'[26]

Blair/Bush telephone conversation

48. A request was made to the Foreign and Commonwealth Office in February 2010 for a record of a telephone conversation between the Prime Minister Tony Blair and the US President George Bush in March 2003 in the run-up to the invasion of Iraq. The requester alleged that a comment, made by the former Foreign Secretary Jack Straw to the Chilcot inquiry, indicated the heads of state had agreed to misrepresent a comment by the French President in order to justify abandoning further efforts to secure a UN resolution before taking military action. The FCO withheld the information under section 27 (international relations) and under s.35(1)(b) as the record had been passed from Mr Blair to the then Foreign Secretary, and was therefore a ministerial communication. The IC upheld the refusal to disclose Mr Bush's comments under s.27 but ordered the disclosure of Mr Blair's side of the conversation. The FTT largely upheld the decision. However, the Upper Tribunal set it aside, finding that it was unrealistic to isolate one side of the conversation from the other and would encourage potentially misleading speculation. A different FTT panel reconsidered the case and found that the public interest favoured withholding the information: the 'overwhelming considerations' were the 'highly confidential' nature of the information and existence and stage of the Chilcot Inquiry. It added that it had not found the disputed information to contain any 'smoking gun'.[27]

Getting your bill through the Lords

49. A request was made for a copy of "Getting your bill through the House of Lords" a guide produced for officials handling government bills by the Government Whips Office in the House of Lords. The version of the guide had been produced for the coalition government in 2013. The IC had found that although the guide did not relate to any specific policy proposal, the process of passing a bill related to the formulation of

[26] EA/2012/0245, Adam Roberts & Information Commissioner & Cabinet Office (25 October 2013)
[27] EA/2011/0225 and 0228, Stephen Plowden & Foreign and Commonwealth Office & Information Commissioner, 28 January 2014 (rehearing).)

government policy and a guide to that process also engaged section 35(1)(a). The public interest in improving public understanding of the Parliamentary process justified disclosure except for specific passages referring to the handling of the bill during a coalition government. The Cabinet Office (CO) appealed. The FTT accepted its argument that the guide was also a ministerial communication. It had been produced on behalf of the Chief Whip, a minister, for communication to other ministers. The Tribunal found that parts of the guide repeated information that was publicly available but that parts would reveal tactical advice which could enable peers to delay or frustrate the passage of legislation and indirectly have a chilling effect on future editions of the guide. If ministers' decisions about the handling of legislation appeared to conflict with the guide's advice this could also undermine collective responsibility. The FTT found that the guide should be disclosed with the passages capable of producing these effects redacted, but rejected the CO's argument that even disclosure of a redacted copy of the guide would be damaging. [28] The CO has appealed to the Court of Appeal.

Legal action against the Pope

50. In the run up to the Pope's September 2010 visit to the UK some campaigners had sought to have him arrested. A request in November 2011 sought information from the Cabinet Office about its strategy to deal with such legal threats. Most of the information was withheld under section 27 (international relations) but a small amount was withheld under section 35(1)(a) and (b). The FTT upheld the Commissioner's decision that the public interest favoured withholding these materials.[29]

Huntingdon Life Sciences

51. A request sought information from the Department of Business, Innovation and Skills about its provision of banking and insurance services to Huntingdon Life Sciences Limited (HLS) since 2001. DBIS and its predecessor departments had taken this unprecedented step because HLS had been unable to obtain these services due to the threat of violence from animal rights groups against firms doing business with it. The request was made in April 2011. The withheld documents included two ministerial communications to colleagues. The FTT upheld the refusal under section 35(1)(b) commenting that 'Government ministers must feel free to exchange candid opinions, options and possible solutions without fear that their exchanges may be disclosed, perhaps long after they look place, thereby endangering the commercial interests of HLS and other identified entities or, still worse, the personal safety of their staffs.' Such concerns remained 'very serious live issues, even after the passage of several years'. The case for withholding under s.35(1)(a) was 'much less compelling' because

[28] EA/2014/0223, Cabinet Office & Information Commissioner, 22 July 2015
[29] EA/2012/0259, European Raelian Movement & Cabinet Office (6.12.13)

decisions had been taken 10 years before the request, 'time has passed and policy has been formed and maintained'. Other exemptions were also upheld.[30]

EXEMPTION NOT UPHELD

52. This section describes FTT decisions which have *rejected* the department's claims under section 35(1)(a) or (b) or section 36(2)(b) of the FOI Act. This does not necessarily mean that the information has been disclosed: in some cases the information may have been withheld under other exemptions or further appeals may still be pending. The case of the badger cull risk logs was dealt with under the EIR not the FOIA but is included here as it is referred to in the Commission's call for evidence.

Badger cull risk logs

53. Four 'risk and issue' logs relating to the badger cull were withheld by DEFRA following an EIR request. The IC ordered disclosure. DEFRA's appeal was dealt with by the UT because of its power to make an enforceable order relating to the anonymity of witnesses. The UT dealt with the case on its merits, not on a point of law.[31]

54. A DEFRA project board had considered the risk logs in the summer of 2010. The UT considered that at that time there had been 'powerful pointers' to the need to maintain a safe space to protect its ability to think in private. The public interest in withholding information did not last only until a policy had been formulated and announced. Nor did the UT consider that the issue was whether at the relevant time (in this case the date of DEFRA's internal review, September 2012) the department still needed a 'space to think privately'. Instead, it said, the question was 'whether at that date the public interest in keeping the 2010 thinking private outweighed the public interest in its disclosure.' DEFRA listed a series of adverse consequences it felt would flow from disclosure. Disclosure would increase the chances of the identified risks, particularly legal challenge, materialising; require a substantial diversion of resources to be spent on explanation; endanger farmers; jeopardise relations between the NFU (who were represented on the project board) and its members; deter the NFU or other bodies from participating in future projects or lead to such material being drafted in a less frank fashion in future.

55. The UT found the contents of the risk logs themselves to be 'anodyne' and DEFRA's arguments so unconvincing that it did not ask the other parties to even present their

[30] EA/2012/0158, Rhonda Moorhouse & Information Commissioner & Department of Business Innovation and Skills, 12th June 2014
[31] DEFRA v Information Commissioner and The Badger Trust [2014] UKUT 526 (AAC) (28 November 2014)

case. By the time of the request's refusal, the risks well known; the logs contained no legal advice or information that would assist opponents in bringing a legal challenge and in any event an unsuccessful judicial review had already occurred; the proposed counter measures were not 'surprising or informative'; disclosure would not increase the risk to farmers, as none were identified; and people of the calibre selected to serve on the project board would not be inhibited by the prospect of future disclosure. Moreover, the contents of the logs were so 'anodyne' that the UT spent time considering whether it was actually possible to draft them in a *more* anodyne manner. They contained 'nothing that an intelligent reader would not expect to see'. It found that the public interest arguments against disclosure 'were effectively spent' by the date of the request's refusal, 'including those advanced that disclosure would inhibit future robust discussions and risk assessments'. But the public interest in favour of disclosure remained.

56. The disclosed logs are attached as *Appendix 2*. An indication of the lack of details can found in their account of the risks legal challenge being brought. This it is said could delay implementation and damage DEFRA's reputation. The proposed steps to mitigate this risk are:

> '1.Process in place to ensure all evidence and options are presented to Ministers. 2. There is an audit trail. 3. Early and close working with lawyers to identify and consider all potential legal issues. 4. Examine/learn from the Welsh legal challenges'

If the risk materialises, the suggested contingency measures are described as: 'Use current information/knowledge on the potential legal challenges'.

57. A separate entry deals with the possible 'failure to get industry acceptance' resulting in 'no delivery of a cull'. The mitigation steps in full are 'Early and close working with the industry'. The contingency plan should the risk materialise is described as: 'Take into account current knowledge of how the industry see a cull working'.

Planning Aid

58. At the end of November 2010 the Royal Town Planning Institute was informed that government funding for its Planning Aid England service, on which it was almost wholly dependent, would cease from the following March. Shortly afterwards it applied to the Department for Communities and Local Government (DCLG) for information about the decision including any background papers that had informed it. The DCLG, which had had its own budget cut by 33%, said the decision was based on 3 ministerial submissions which it withheld under section 35(1)(a). The IC found that the public

interest balance favoured their disclosure. The department appealed. It argued that at the time of the request it was still considering new arrangements to fund a range of organisations to provide community planning advice and policy formulation was still underway. New arrangements would be made in the context of the Localism Bill then before Parliament. Planning Aid might be eligible for funding under these (it subsequently received some funding).

59. The FTT accepted that decisions on new funding arrangements were still underway but found that the decision to cease funding of Planning Aid was 'a 'sufficiently discrete decision' that had been 'definitely decided by the minister' with the 'implications and processes having been thought through and advised upon; announced; and at the initial stage of implementation'. The public interest favoured disclosing information about this decision to inform the ongoing debate, partly stimulated by the ending of the service's funding. The fact that the decision had been taken without a clear idea of what would replace the service added substantially to the public interest in disclosure. However, decisions on the *new* arrangements were still continuing at the time of the request. The FTT found that the public interest favoured withholding information about these to allow the department to formulate policy 'free from premature disclosure and distracting scrutiny.'

60. The documents disclosed in this case are attached as *Appendix 3.* They mainly describe the service provided by Planning Aid and the implications for it of various options, much of which had been discussed with Planning Aid at the time. Some recommendations are contained in the documents though these are also described in the FTT decision, presumably having been disclosed by DCLG in open session at the hearing.[32]

EC Infraction proceedings

61. The DWP refused to disclose a letter from the UK government to the European Commission setting out its position in relation to infringement proceedings against the UK for contravening EU social security legislation. In 2011, the European Court of Justice had issued a decision requiring a revision to UK policy. The DWP claimed that at the time of the request in September 2013 its policy was still being discussed and a safe space was still required. The FTT did not agree that the UK's letter to the Commission related to policy formulation or development at all. It was a 'snap-shot' of the UK's position on the issue in 2013. The fact policy may change did not mean a statement of

[32] EA/2012/0071, Department of Communities and Local Government & Information Commissioner & Nic Posford, 23 January 2013

the existing policy involved policy formulation. The FTT observed that had it accepted that section 35(1)(a) was engaged it would not have accepted that a 'safe space' was still necessary. The proceedings had been ongoing for four years at the time of the request with no indication of resolution in the foreseeable future. The DWP case amounted to a 'denial of information' for 'an indefinite period', 'an untenable and unacceptable claim'.[33]

62. The case was appealed to the UT which found an error in the FTT's approach to the section 27 exemption, which had also been involved. Section 35 is not mentioned in the UT decision. By the time of the UT hearing the infraction proceedings had been withdrawn and the DWP was prepared to release the disputed letter.[34]

Free school applications

63. The Department for Education refused a number of FOI requests for the list of applications to open new free schools during a specified period, the areas in which they would operate, the faith, if any, and details of applications to open university technical colleges or technical academies. The IC ordered disclosure and the DfE appealed. It argued that at a later stage public comment would be invited on the applications which had not been filtered out by then. At the time of the requests decisions on free schools policy were still being made and the department was drawing on the lessons learnt from these applications. The FTT found that the requests did not seek any deliberations or advice nor any selection of the facts that might have been fed into policy making. They sought 'the whole factual matrix without any selection, prioritisation or evaluation' and this did not engage the s.35 exemption. The Tribunal was also 'unimpressed' with the department's argument that negative publicity might discourage further applications, prejudicing the effective conduct of public affairs (s.36(2)(c)). It was critical of a survey submitted in support of the DfE position which purported to show that almost half of the proposers of new schools would have been less likely to apply if they knew that details would be made public. The question wrongly led applicants to believe that their personal details would be disclosed and this bias 'fatally undermines' the results. The Tribunal ordered disclosure finding that 'The benefit of transparency and the ability to inform the public debate was of far greater

[33] EA/2014/0197, Sir Roger Gale MP & Information Commissioner & Department for Work and Pensions, 21 December 2014

[34] Department for Work and Pensions v Information Commissioner and Sir Roger Gale [2015] UKUT 0599 (AAC), 4 November 2015.

importance than the slight administrative inconvenience for civil servants of receiving representations and arguments at a time that was not convenient to them.'[35]

Andrew Lansley's ministerial diary

64. A journalist sought access to the ministerial diaries of a number of Department of Health ministers, later narrowed to that of the then Health Secretary Andrew Lansley. The entries related to the period during which the Health and Social Care Bill then before Parliament. The IC upheld reliance on a number of exemptions (for personal information and security bodies) for certain entries but did not accept that section 35(1)(a) applied. The FTT held that section 35(1)(a) and (b) did apply. However, it concluded that because the diary entries 'give no detail about the anticipated discussions or the intended objectives, disclosing them would in general be unlikely to compromise the freedom to think the unthinkable, consider all options and argue for and against positions. The evidence has not satisfied us that there are entries in Mr Lansley's diary which required protection for the preservation of substantive safe space.' The FTT gave high weight to the public interest in revealing which external organisations the minister had met during this time, particularly lobbyists. Personal engagements referred to in the diary were exempt under section 40(2). It was particularly unimpressed by the evidence of senior civil servants. One witness said that the quarterly releases of information about ministerial engagements 'fully met' the public interest in transparency, although the releases for the relevant period had not been published at the time and were not in fact published till many months later. They also omitted telephone or video conference contacts. The witnesses' argument that the public therefore already had a complete record of who the minister had met 'did not correspond with reality and lacked rational justification'. The Tribunal was particularly critical of their argument that if the diary entries were released showing blank spaces, ministers would feel obliged to schedule entirely pointless meetings simply to ensure that they were not criticised for inactivity, a suggestion the Tribunal described as 'incredible'. The Upper Tribunal dismissed the department's appeal. It is currently appealing to the Court of Appeal.[36]

Universal Credit

65. Several documents used to assess the risks in implementing the Universal Credit Programme (UCP) were requested under FOI in March and April 2012. Universal Credit is a new benefit that is replacing 6 existing benefits and tax credits. The FTT observed

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[35] EA/2012/0136, EA/2012/0166 and EA/2012/0167, Department for Education & Information Commissioner & British Humanist Association, 15 January 2013

[36] Department of Health v Information Commissioner & Lewis, [2015] UKUT 0159 (AAC)

that the programme offered 'immense' savings to the exchequer, but if the highly complex system for calculating benefits broke down there would be 'widespread anxiety and hardship' and 'a major threat' to the whole venture. Both the National Audit Office (NAO) and the Public Accounts Committee (PAC) had produced highly critical reports on the management of the programme. The requested documents were a high level 'Project Assessment Review'; a 'Risk Register' evaluating likelihood and severity of potential risks and the measures to prevent them; an 'Issues Register' describing problems and failures; and a 'High Level Milestone Schedule' setting out the projected and actual completion dates for key milestone events. The DWP argued that disclosure would undermine candour and robust comment both by those interviewed for such reviews and by the drafters. Disclosing the risk and issues registers would destroy their 'blunt and pithy' quality, damage relations with external parties and make it more likely that some of the risks would result. The Milestone Schedule could easily mislead if the assumptions were not understood. Providing the necessary explanations would divert resources from the project itself.

66. The FTT noted the sharp contrast between the NAO and PAC criticism and the 'unfailing confidence and optimism' of DWP press releases and ministerial statements. It highlighted the fact that the government seemed to be suggesting that the programme would be completed on schedule even though milestones had not been achieved on time. There was a particularly strong public interest in allowing the public to judge whether criticism of the programme was well–founded.

67. The government should have been able to document a 'chilling effect' after 10 years of FOI. In the absence of such evidence, the FTT was not persuaded that this would occur, particularly in light of the large measure of courage, frankness and independence likely from senior officials assessing risk and providing advice. The PAR itself was drafted in management consultancy terminology, not 'designed to proffer blunt or biting opinions nor speculative suggestions'. The problems described in the Issues Register were of a predictable kind, unlikely to prompt much public reaction. The Milestone Schedule listed a variety of completed and missed milestones in the past, not the current situation. The public's views would not be distorted by the fact that the Risk Register focussed on problems rather than successes, once its purpose was explained. Although there might be some prejudice of the kind claimed by the DWP, the public interest required disclosure.[37] This decision was set aside by the Upper Tribunal. It held that the FTT was wrong to attach weight to the government's failure to document evidence of a chilling effect, which might have occurred but be difficult to prove. It was also wrong to

[37] EA/2013/0145, 148 & 149, Slater & IC & DWP, 24 March 2014

draw conclusions about the absence of a chilling effect from the release of a related document, which it had not seen. The case will be reheard by a new FTT panel.[38]

Reducing regulation

68. The Cabinet Office (CO) refused to disclose the number of times the Reducing Regulation Committee, a cabinet sub-committee, had met in the past two years. It argued that disclosure would damage collective responsibility by exposing the committee structure to external accountability. The pressure of public opinion might lead ministers to schedule meetings that were unnecessary but deemed prudent in presentational terms. The IC found the public interest favoured disclosure and the FTT agreed. A rehearing was ordered after the UT found that the FTT had misunderstood one part of the CO's argument.[39] The new FTT panel also ordered disclosure. It was critical of the CO evidence, which had suggested that what it called 'the pollutant of publicity' would lead ministers to change their behaviour. The CO evidence was 'materially flawed and its reasoning unpersuasive'. The request 'did not ask for any details, sensitive or otherwise about the meeting', it 'simply asked for a global figure'. The FTT found it hard to believe that 'hard bitten, street wise, fighting politicos would scurry about trying to fill a mental quota of meetings simply because this release had taken place'. It was possible that the information might of little value but it noted that this particular committee 'may be a species that merits deeper consideration – it was a new animal in Whitehall; it was very much trumpeted by the 2010 incoming government'.[40] At the time of writing a further appeal was still possible.

Steiner schools

69. The British Humanist Association (BHA) applied for Department for Education documents discussing whether Steiner schools would be likely to meet the criteria to enter the Free Schools programme. The DfE argued that policy on the criteria was still being formulated, disclosure would have a 'chilling effect' and undermine public confidence in its approach towards Steiner schools. The IC found the public interest favoured disclosure. It argued that free schools were a radical new policy, Steiner schools have unique philosophical and educational features, the public was entitled to know how DfE engaged with those and there was strong public interest in a fully informed debate about them. It doubted whether policy formulation rather than decisions on individual school applications was taking place and 'struggled' to understand what impact disclosure would have. The FTT found the IC's submissions on

[38] DWP v IC, John Slater and Tony Collins [2015] UKUT 535 (AAC), 20 July 2015
[39] Cabinet Office v Information Commissioner 2014 [UKUT] 0461 (AAC)
[40] EA/2013/0119 (remitted), Cabinet Office & Information Commissioner, 12 November 2015

the public interest test 'persuasive to the point of being overwhelming' and DfE arguments weak and ordered disclosure.[41]

70. The disclosed documents are attached at *Appendix 4*. They highlight areas where the approach of Steiner schools conflict with Ofsted requirements, although the outcomes at age 16 are above national standards. They suggest questions that should be raised with Steiner schools making free school applications. Most significantly, they discuss serious complaints received from some parents (publicly available on the Internet) about the alleged failure of Steiner schools to deal with bullying. This is said to be linked to the belief in 'karma' or destiny, part of the philosophy underpinning Steiner schools, and the suggestion that to be bullied may be a child's 'karma', a concern of substantial public interest.

'Go Home' campaign

71. The Home Office withheld emails sent to the Home Secretary in July and August 2013 relating to the 'Go Home' campaign. This was a pilot project in which vans were driven round six London Boroughs with the message, targeted at illegal immigrants, 'Go Home Or Face Arrest'. The FTT upheld the IC's decision that the emails should be disclosed. It found that by the date of the request, the day the pilot exercise concluded, the need for a safe space had ended, although the evaluation phase of the project was continuing. The emails had accompanied weekly situation reports for ministers, which had already been disclosed. The FTT held that there was 'nothing particularly remarkable or compelling about the withheld information' which was largely factual and did not contain opinions or subjective assessments. It demonstrated 'the unexceptionable but still reassuring fact that considerable care and attention was given by Home Office officials to reporting progress on the pilot so that proper ministerial oversight could be exercised'. It revealed 'the mechanisms by which decisions about this pilot were taken and this attracts a very strong public interest in favour of disclosure.'[42] This decision is currently under appeal to the Upper Tribunal.

72. Although the FTT in this case considered whether the 'safe space' was needed at the time of the *request*, it would have been entitled to consider the issue at the date of the *refusal*[43] which has sometimes been taken to be the date of internal review.[44] In the present case the HO refused the request on 21 October 2013, the day before the Home

[41] EA/2014/0017 Department for Education & Information Commissioner & Richy Thompson on behalf of British Humanist Association, 24 June 2014

[42] EA/2014/0310, Home Office & Information Commissioner, 29 June 2015

[43] See the Supreme Court decision in Evans v Attorney General, UKSC 21, paragraph 73.

[44] [2013] UKUT 526 (AAC), Cabinet Office v Information Commissioner & Gavin Aitchison, paragraph 15.

Secretary told Parliament that the project had been evaluated and would not be continued. The internal review upholding the refusal was completed 5 months later, in March 2014.

Tweeting arrests

73. The Home Office had carried out a series of arrests of suspected illegal immigrants in August 2013. It tweeted information about the operation as it happened, accompanied by photographs and video footage. This use of Twitter itself proved highly controversial. An FOI request about the decision use Twitter was refused under section 36(2)(b). The FTT found that the HO no longer required a safe space at the time of the request and doubted that there would be a chilling effect. The information was neither 'startling nor dramatic', revealed evidence of 'good administration' and contained nothing that would alarm those considering the impact on future exchanges. It ordered disclosure.[45]

Data Protection Directive

74. The Ministry of Justice (MOJ) was asked for letters from the European Commission (EC) to the government in 2004 and 2006 concerning deficiencies in the way the UK Data Protection Act (DPA) had implemented the Data Protection Directive. The FTT found that the information was exempt under section 27(2)[46] but not under section 35(1)(a). At the time of the request, in May 2011, most of the alleged infraction issues had been resolved and those remaining were not being pursued. The lead official responsible for the negotiations was not even aware of which remained outstanding. The negotiations appeared to have been 'parked by both sides' as attention had shifted to the shaping of the EC's proposed new Data Protection Regulation, which would replace the Directive. The FTT found there was 'no evidence before us' that the alleged infractions represented live policy issues or that a safe space had been needed at the time of the request. However, it was in the public interest to understand the deficiencies of the DPA to allow public participation in influencing the government's approach to the new law.[47]

Employment Judges' remuneration

75. In a March 2011 report, the Senior Salaries Review Body (SSRB) recommended that the role of salaried Employment Judges should be re-graded, with a consequent pay increase. The government deferred any decision on the recommendation due to its public sector pay freeze without undertaking to implement it later. The SSRB complained about the matter in its March 2012 report. A September 2012 request for

[45] EA/2015/0030, Home Office & Information Commissioner & Alistair Sloan, 20 July 2015
[46] Information provided in confidence by another state or international organisation
[47] EA/2012/0110, Ministry of Justice & Information Commissioner & Dr Chris Pounder, 23 July 2013

information about the issue was refused under section 35(1)(a). The MoJ argued that, in the absence of any final decision, disclosure would intrude on the safe space and lead to less candid policy discussions. It would also make it 'impossible' for officials to offer ministers advice, a claim the FTT considered to be 'overstated'. The Tribunal found that the MoJ had relied 'mainly on generic considerations' without giving sufficient consideration to the specific contents of the documents or the particular public interest in disclosure. The documents did not contain 'blue sky thinking' or 'specially robust discussion' nor was the subject matter particularly sensitive. There were also special features particular to the case such as 'the public interest in the preservation of an independent and high quality judiciary' and 'the constitutional significance of the protection of judicial remuneration through a mechanism such as the SSRB'. The MOJ had not even acknowledged these as relevant to the public interest test even after the requester had expressly drawn attention to them. The failure to implement SSRB recommendations for several years was a 'very significant departure from previous practice' which 'tends to undermine the standing and credibility of the SSRB'. The FTT found the public interest in disclosure outweighed the ordinary need for safe space for policy making.[48] The MOJ appealed against the decision to the Upper Tribunal but subsequently withdrew the appeal.

Ministerial portfolio

76. In November 2012 the Guardian newspaper reported on an interview with the then Secretary of State for Energy and Climate Change, the Liberal Democrat Ed Davey MP.[49] He revealed that he had asked the Prime Minister to remove responsibility for renewable energy from his Conservative Minister of State, John Hayes MP, known for his vigorous anti-windfarm stance. FOI requests were made for Mr Davey's letter, and related correspondence. The FTT found that section 35(1)(b) was engaged but the public interest in upholding it was limited as the minister had voluntarily made the contents of the letter public. This 'undermines the usual or normally high public interest in protecting sensitive ministerial correspondence on a matter of internal governance'. The Tribunal was not been persuaded that the space for frank discussion between the P.M. and a Cabinet Minister has been impaired or that future discussions would be affected. It added: 'On the contrary, we are of the view that when government ministers voluntarily conduct a discussion, argument or debate in the public forum, it is important that the public are properly informed of the facts, the background and the

[48] EA/2013/0127, Jonathan Brain & Information Commissioner & Ministry of Justice, 15 September 2014
[49] http://www.theguardian.com/politics/2012/nov/23/ed-davey-interview-energy-deal; http://www.theguardian.com/politics/2012/nov/23/lib-dems-tories-green-energy

context'. It was in the public interest 'to ensure that the public know and understand what such dispute is about and the effects if any on public policy, and governance'.[50]

SOME OBSERVATIONS ON THESE CASES

77. These accounts indicate that the FOIA provides substantial protection for internal discussion. The protection applies both to information requested while policy formulation is underway and to information sought afterwards, where disclosure might affect future discussions. Examples of material withheld because of the likely chilling effect include information about:

- the DfE's refusal to disclose officials' submissions on the Building Schools for the Future programme, decided 11 months before the request (paragraph 43)
- background notes to Parliamentary Questions which had been answered between 2 and 4 years before the request (paragraph 42)
- information about the nationalisation of Bradford and Bingley, 3 years before the request (paragraph 40)
- a record of the Blair/Bush telephone conversation, which took place 7 years before the request (paragraph 48)
- ministerial exchanges about the provision of banking and insurance to Huntingdon Life Sciences, where the relevant decision had been taken 10 years earlier (paragraph 51).

78. The cases where the FTT has *not* upheld the government's claim are those where it has found that:

- *the relevant exemption was not engaged* because the information did *not* relate to the formulation or development policy. See the cases of the EC Infraction proceedings (paragraphs 61-2) and the Free school applications (paragraph 63)
- *the decision-making process had come to an end without a decision* (eg the case of the Data Protection Directive, paragraph 74)
- *the information was judged too anodyne to have a chilling effect.* These include the cases of the badger cull risk logs (paragraphs 53-7), the Lansley diary (paragraph 64) and the number of meetings of the Reducing Regulation Committee (paragraph 68).

[50] EA/2013/0287 & 0288, DECC & Information Commissioner, 4 November 2015.

- *the particular circumstances justified disclosure on public interest grounds of information which might otherwise have been withheld*. Examples include information about the withdrawal of Planning Aid funding (paragraphs 58-60), the risk assessments on the Universal Credit Programme (paragraphs 65-67), concerns about Steiner schools (paragraphs 69-70), employment judges' remuneration (paragraph 75) and the ministerial correspondence whose substance the minister himself had publicised (paragraph 76)

79. Some of the above decisions are not final and are subject to a further appeal (Lansley diary) or a rehearing (Universal Credit) or at the time of writing could still become subject to further appeals (Better Regulation Committee).

80. We comment further on some these issues below.

Risk assessments

81. One of the cases where the FTT has found the disputed information to be anodyne involves the badger cull risk and issue logs. This is a particularly significant as it falls into a category which the Commission's call for evidence suggests may require special protection. Risk assessments are not a special case. The impact of disclosure depends on the sensitivity and frankness of their contents and the timing of the request. Policy advice generally often includes the discussion of risk. The UT decision in the badger cull case made it clear that had the information been requested 18 months earlier, it would have ruled against disclosure. By the time of the actual request, the case for confidentiality had lost its force. The public, and the public interest, benefit from such a discriminating approach. To exclude risk assessments from access, permanently or for a given period, as a class would deny the public significant information whose disclosure may do no harm at all.

82. Not all risk assessments are anodyne. Some are clearly more substantial including those relating to the Universal Credit Programme described above. In the past the Tribunal has ordered the disclosure of reviews dealing with the Identity Card Programme.[51] It has supported the government's refusal to disclose a strategic risk register dealing with the NHS reforms finding a safe space was required at the time. It ordered the disclosure of a transitional risk register dealing the risks in implementing the NHS reforms which it found did not involve policy formulation.[52] That decision was vetoed. It has been

[51] EA/2006/0068 and 0080, Office of Government Commerce & Information Commissioner (2 May 2007). This decision was quashed by the High Court because the Tribunal's use of a select committee's findings was held to contravene Article 9 of the Bill of Rights 1689. A new hearing dated 19 February 2009 also ordered disclosure.

[52] EA/2006/0068 and 0080, Department of Health & Information Commissioner & John Healey MP & Nicholas Cecil, 5 Aril 2012

prevented from ruling on the release of assessments of the HS2 rail project by the last minute withdrawal of an appeal to the FTT and the use of the veto instead.

83. In those decisions on which the Tribunal has expressed a view, it has recognised the need to protect the safe space but not been persuaded that any chilling effect outweighs the public interest in disclosure. Indeed, in its earlier decision on the Identity Card reviews, the Tribunal quoted an experienced former civil servant involved in producing such reviews who said he already drafted them with the possibility of disclosure in mind, as a result of leaks:

> 'There is always a concern that these reports, like other public documents, may occasionally enter the public domain, for example as a result of leakage. For myself, therefore, I always try to ensure that the reports are drafted diplomatically so that if this did happen there would be no unnecessary political embarrassment and no unnecessary damage to the relationship between Government and officials. The style of the reports is therefore sensitive to that consideration.'[53]

84. If other reviewers already adopt this approach there may be little risk that any disclosure under FOI would produce a further 'chilling effect'.

Ministerial behaviour

85. The Lansley diary case (paragraph 64) involved a request for slightly more comprehensive information about ministerial meetings, than that which the government already publishes proactively. The government's witnesses failed to persuade either the FTT or UT that disclosure would be damaging. Among their arguments was the suggestion that ministers would be so worried about the implications that could be drawn from blank spaces in their diaries that they would be obliged to schedule completely pointless meetings to avoid criticism - and a disclosure which forced them to misuse their time in this way would not be in the public interest. The UT observed that if ministers were capable of deliberately wasting their time for such reasons, the public interest in scrutinising their diaries was even greater. It found that these views 'undermined the weight to be given to…[the witnesses'] objectivity, accuracy, and reasoning as a whole'. There are other criticisms of the civil service witnesses, for making claims that were 'unrealistically absolute', 'did not correspond with reality' or being 'keener to repeat generalised lines to take than to give direct answers to…questions'.[54]

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[53] EA/2006/0068 and 0080, Office of Government Commerce & Information Commissioner, decision of 2 May 2007, paragraph 89

[54] EA/2013/0087, Department of Health & Information Commissioner

86. Remarkably, the government is using *this* case to try and establish the principle that the FTT should show 'deference' to civil servants' evidence[55] – an extraordinary claim in light of the serious criticism of officials' evidence in the case. It is currently appealing to the Court of Appeal.

87. The FTT and UT accounts of the government's case in the Lansley diary (paragraph 64) case may be contrasted with that in the FTT's decision in the Buildings Schools for the Future case (paragraph 43), where the more balanced approach of the department's witnesses significantly enhanced its case.[56]

Cabinet committee meetings

88. The FTT has not been prepared to accept that disclosing how often the Reducing Regulation Committee had met (paragraph 68) may be 'very damaging' out of context.[57] This appears to be another example of 'anodyne' information. The supposed harm flows from the fact that the committee is a Cabinet committee and that any disclosure about such committees is assumed to be harmful. It should be recalled that it was formerly asserted that even revealing the *names* of Cabinet committees would be damaging. This view evaporated overnight when the then Prime Minister, John Major, authorised the regular release of the names and composition of Cabinet committees in 1992.[58]

89. There may be cases where revealing a sudden flurry of activity by a particular committee may indicate that a specific policy issue has suddenly become 'live'. If so, that may qualify for exemption on the facts of the case. Revealing the number of meetings over a 2 year period on an issue which the government itself has declared to be a priority raises no such issue.

90. An illustration of what the government *has* been prepared to accept in relation to disclosures of Cabinet Committee papers, is shown at *Appendix 5,* a 2005 paper of the Ministerial Working Group on Asylum and Migration, part of the Cabinet Committee

[55] According to Mr Justice Charles in the Upper Tribunal 'Effectively, this generally based argument was that, having regard to the novel subject matter of this request under FOIA, the deference due to the Department's two witnesses meant that…what the FTT (and the Information Commissioner before them) should have done…is to effectively accept the Department's view, and thus the validity of the reasoning and opinions of its witnesses, without subjecting them to critical analysis or such a degree of critical analysis. *Department of Health v IC and Lewis* [2015] UKUT 0159 (AAC), paragraph 61

[56] 'Mr McCully was an entirely open and candid witness. The fact that he was willing to accept there would be no particular harm from disclosure of certain material and, for example, that there would be a heightened public interest following the Judicial Review challenge, gives his evidence in relation to his principled position in relation to disclosure of Ministerial submissions considerable weight.' EA/2014/0079, Department for Education and Information Commissioner, 28 January 2015.

[57] EA/2013/0119, *Cabinet Office & Information Commissioner* (decision of 12 November 2015) paragraph 18.

[58] House of Commons debates, 6 May 1992, col.64

system. This paper was released under FOI in response to a 2009 Tribunal decision.[59] A key part of its reasoning was that the report 'set out the pros and cons neutrally without assigning views to any Minister or department'. The report was released without a further appeal or veto, indicating that disclosures within this class are possible.

91. Any attempt to exclude Cabinet, and particularly Cabinet committee, papers from access would be particularly damaging. Much government discussion between departments takes place via the Cabinet committee system. Much of this is dealt with by correspondence and does not involve meetings at all. At the time of the coalition government the official guidance on the Cabinet committee system stated:

> 'Policy or other proposals will require consideration by a Cabinet Committee where they meet one or more of the following conditions:
>
> - the proposal takes forward or impacts on a Coalition agreement
> - the issue is likely to lead to significant public comment or criticism
> - the subject matter affects more than one department
> - the Ministers concerned have failed to resolve a conflict between departments through interdepartmental correspondence and discussions...
>
> The kind of proposals which will almost certainly require collective consideration include:
>
> - any issue which would have an impact on the good operation of the Coalition, or which takes forward government policy in an area covered by the Coalition Agreement
> - publication of consultation documents and Green and White Papers
> - responses to Select Committee Reports
> - adoption of negotiating stances for international meetings
> - agreeing final policy proposals before legislation is introduced
> - new regulatory or deregulatory proposals.'[60]

Similar principles, minus the references to 'coalition government' no doubt continue to apply.

92. The fact that issues likely to result in 'significant public comment or criticism' are required to be dealt with under the Cabinet committee system highlights how unacceptable a new exemption for Cabinet or Cabinet committees would be. It would

[59] EA/2008/0073, Cabinet Office & Information Commissioner, 7 January 2009.
[60] Cabinet Office, 'Guide To Cabinet and Cabinet Committees'

automatically exclude all contentious proposals from FOI. It would also provide a means of guaranteeing secrecy for any inconvenient information, on any subject, by ensuring that it was circulated 'for information' through the Cabinet committee system.

93. We note the view of the then Attorney General, Dominic Grieve, who in his 2012 evidence to the Justice Committee (albeit before the Supreme Court's ruling in *Evans*) opposed the idea of a new FOI exemption targeted merely on Cabinet 'minutes':

> 'there may at times be good arguments for Cabinet minutes to be revealed. One argument might be that this is all a long time in the past and is essentially a request for historical information early. I suppose another argument might be - again, I am dealing with hypotheticals - that, if there was something so extraordinary in the Cabinet minutes that concealing it from the public was maintaining a fiction that might, for example, be regarded as scandalous, that might have a bearing on it. It all depends on what the minutes are about, what they show and the context in which the meeting took place...
>
> I have heard it suggested, and it has been suggested in the past, that one might exempt Cabinet minutes and remove the veto; it is a decision for Parliament. As I said earlier, if you do that, you may inadvertently lose the benefit of sometimes being able to get Cabinet minutes revealed. There would be a potential loss there because Westland illustrates that there was a circumstance in which it was possible to do that'[61]

Policy advice disclosed in the public interest

94. We have identified at paragraph 78 (4th bullet point) FTT cases where the weight of the public interest arguments have led to decisions for disclosure of information from civil service submissions that might otherwise have been withheld. The category includes one case (Universal Credit Programme) where the FTT decision has been set aside and a new hearing ordered. These account for a very small number of the cases dealt with by the FTT in the last 3 years. Since these cases presumably include those where the government has been dissatisfied with the IC's decisions, that small number is significant. The chances of any one of the large numbers of Whitehall submissions produced each day being requested and ordered to be disclosed having gone through the appeals system is extremely low. The number of officials directly affected must be tiny. That is relevant to any assessment of a 'chilling effect'.

95. In those cases disclosure was based on a variety of different public interest arguments. These include the fact the information in question related to:

[61] Justice Committee, Post–legislative scrutiny of the Freedom of Information Act 2000, First Report of Session 2012–13, Volume II, evidence given on 16 May 2012, Questions 488 and 489

- a ministerial communication whose substance had been openly disclosed by the minister making it
- potentially serious concerns about a group of schools that had applied to enter the Free Schools programme
- the decision to withdraw funding for a significant public advice service at short notice and without a clear idea of what would replace it
- a decision affecting the credibility of the Senior Salaries Review Body and the quality of the judiciary
- the management of the Universal Credit Programme, a reform of immense significance which if not handled effectively could cause 'widespread anxiety and hardship'.

96. These are all serious arguments about the public interest. It is in the nature of the balancing exercise involved that there may be weight on both sides of the case. The question is not whether these decisions are all indisputably correct but whether the public interest is served by a system which allows for such decisions to be taken by independent, experienced tribunals, carefully considering the evidence and argument both ways, without their options being restricted to exclude particular information altogether. We have no doubt that it is.

THE MINISTERIAL VETO

97. The veto, in section 53 of the FOIA can be used to overturn an order to disclose exempt information under the section 2 public interest test.

98. In the proceedings involving Prince Charles' correspondence (in which the Campaign for Freedom of Information intervened) the government appeared to maintain that the power of veto went beyond this. It suggested that it could be used to overturn the common law public interest test incorporated into the section 41 exemption for breach of confidence and the balancing test applied under the section 40(2) exemption for personal data. The Supreme Court decision in *Evans v Attorney General* UKSC [2015] makes clear that veto is available only in relation to the section 2 public interest test.[62]

99. The veto can be used if a Cabinet minister or the Attorney General has 'on reasonable grounds'[63] formed the opinion that the balance of public interest favours withholding

[62] See in particular the judgement of Lord Wilson at paragraph 172(b). His approach was supported by Lord Mance and Lady Hale at paragraph 124.
[63] FOIA section 53(2)

exempt information. The government argued that this merely meant that the minister's grounds needed to be rational.

100. However, the decision which the government vetoed in *Evans* had been taken by the Upper Tribunal, a superior court of record with the same status as the High Court. Its decision had been reached after a six day hearing in which the parties had been represented by leading and junior counsel, arguments had been vigorously tested and constitutional experts from both sides had given evidence and been cross examined. It resulted in a 65-page decision, described by the Divisional Court as 'a most elaborate, thorough and fully reasoned determination'[64] plus several annexes one of which was 109 pages long.

101. Lord Neuberger, the President of the Supreme Court, supported by Lord Kerr and Lord Reid concluded that to overturn a judicial decision required a minister to do more than merely hold a different rational view and prefer that view that of a court or tribunal:

> 'A statutory provision which entitles a member of the executive (whether a Government Minister or the Attorney General) to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United Kingdom. It would cut across two constitutional principles which are also fundamental components of the rule of law.
>
> First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive. Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen. Section 53, as interpreted by the Attorney General's argument in this case, flouts the first principle and stands the second principle on its head. It involves saying that a final decision of a court can be set aside by a member of the executive (normally the minister in charge of the very department against whom the decision has been given) because he does not agree with it.'

102. To overturn these principles required the legislation to be 'crystal clear' that this was Parliament's intention. Lord Neuberger did not find such clarity in section 53 and the use of the veto had therefore been unlawful.

103. Two other Supreme Court judges (Lord Mance and Lady Hale) adopted a different approach to Lord Neuberger's but agreed that the veto had been unlawful. Section 53 required 'a higher hurdle than mere rationality'. Although a cabinet minister could

[64] [2013] EWHC 1960 (Admin) at paragraph 55

substitute a different view on the weighing of the public interest arguments, the Attorney General had in effect substituted his own findings on the evidence for those of the Upper Tribunal without even explaining why he considered its factual findings had been wrong. The Supreme Court held, by a majority of 5 to 2 that the veto had been unlawfully used.

104. By a majority of 6 to 1 it also found that the veto could not be used at all in relation to environmental information, because its use was incompatible with the EU directive which gave rise to the UK's Environmental Information Regulations.

Parliament's intentions

105. The government maintains the Supreme Court's ruling that something more than the normal judicial review test of rationality is required for the veto to be exercised undermines Parliament's clear intentions. A statement issued by the prime minister, on 26 March 2015 said:

> 'Our FOI laws specifically include the option of a governmental veto, which we exercised in this case for a reason. If the *legislation does not make Parliament's intentions for the veto clear enough*, then we will need to make it clearer.' (emphasis added)

106. Mr Straw, who as Home Secretary took the FOI Bill through the House of Commons and was closely involved in decisions about the veto told BBC Radio 4's Today programme on 14 May 2015:

> 'Parliament was absolutely clear that there should be protection for this kind of correspondence and…Parliament was exceptionally clear that if necessary the Attorney General could be given a right of veto over the Information Commissioner's and Tribunal's decisions to publish. And one of the really worrying aspects about this case which has not received enough attention is that *the Supreme Court on a split decision decided in their wisdom to literally to rewrite what Parliament had decided* and there is a serious question there for justices of the Supreme Court to reflect on whether they are exceeding their power which in my view they are' (emphasis added)

107. The Commission's call for evidence states:

> 'in March this year, the Supreme Court ruled that the veto could no longer be used *as Parliament had understood it would work when its provisions were being enacted*. One consequence of the Supreme Court's judgement is that the circumstances in which the veto can be exercised are now extremely narrow, although there remains considerable uncertainty about the precise scope of the veto. This judgement raised serious questions about the constitutional implications of the veto, the rule of law, *and the will of Parliament.'* (emphasis added)

108. The above statements all suggest that the Supreme Court's decision has undermined the will of Parliament. However, there is no indication in Hansard that Parliament was ever told that the veto could be used against a decision of the *tribunal or courts*. It is *this* use of the veto which the Supreme Court (like the Court of Appeal before it) has found to be unlawful.

109. When the FOI Bill was originally introduced, the public interest test was purely voluntary - the Information Commissioner would only have been able to *recommend* not *require* disclosure on public interest grounds. This would have meant that a public authority would have decided for itself whether it was in the public interest for it to disclose exempt information which, for example, revealed its own incompetence or misconduct.

110. During the Bill's Commons stages, Mr Straw agreed to make the public interest test legally binding. However, he insisted that ministers should have a power of veto over the *Commissioner's* decisions under the public interest test. There was no suggestion that the veto could also be used against a decision of the *Tribunal or High Court*, both of which dealt with appeals under the scheme set out in the bill as originally drafted.

111. In the extracts below, the veto is sometimes referred to as an "Executive override" or "exemption certificate". The italicising is ours.

112. Thus, Mr Straw told the Commons during the FOI Bill's report stage on 4 April 2000:

> 'The issue remains of what happens if, notwithstanding *the commissioner's order*, the public authority continues to believe, for sound reasons, that the information should not be disclosed. Most regimes that we have surveyed have some sort of Executive override of one sort or another, and we propose to have one.' [col 921]

113. A few moments later he said:

> 'In practice, it would be an extremely unwise Cabinet Minister who chose to issue an exemption certificate amounting to *a veto of a decision made by the commissioner* to order disclosure without consulting his or her Cabinet colleagues' [col. 922]
>
> 'I do not believe that there will be many occasions when a Cabinet Minister with or without the backing of his colleagues will have to explain to the House or publicly, as necessary, why he decided to require information to be held back *which the commissioner said* should be made available. [col. 923]
>
> 'The possibility of an Executive override means that a Minister will *not be able to appeal against a decision by the commissioner.* Such a provision would otherwise

be otiose. I accept that if we removed the Executive override, we would need to provide for an appeals mechanism. [col. 923]

'Circumstances could arise in which Ministers genuinely considered - we are talking about fine judgments - that the public interest *overrode the commissioner's judgment* about disclosure or non-disclosure '[col. 924]

114. The following day, 5 April 2000, Mr Straw said:

'I do not happen to believe that a Minister would seek to use an exemption certificate to prevent the release of factual and background information when that was *ordered by the commissioner*. '[col.1023]

'Hon. Members are aware that as a result of representations that were made to us, we have changed the Bill, partly in its text and partly by tabling amendments on Report…so that that the *commissioner will have a power to order disclosure subject only to Executive override* in the limited circumstances which I described yesterday' [col. 1094]

'I believe that, from the Government's point of view, it would be disingenuous for us to send the Bill to the other place having incorporated *the change to the position of the commissioner* - who would have a power to make an order for disclosure rather than simply what is at the moment a provision for recommendation - without also having on the face of the Bill the balancing arrangement by which there could, in limited circumstances, be an Executive override.' [col. 1095]

'However, it is my judgment…that the new clause is better in the Bill because then the complete scheme of change in principle - the change from discretionary disclosure to a *power to the commissioner* and a duty to abide by that *save for the circumstances of Executive overrid*e - is there.' [col. 1106]

115. At the bill's second reading in the Lords on 20 April 2000, Lord Falconer the Minister of State at the Cabinet Office explained:

'Clause 52 sets out the exception to the duty to comply with decision or enforcement notices. This is the so-called executive override provision. It is important to note the limitations on this provision…First, this is not a general override *of the commissioner's decisions*; it applies only to decisions taken under Clause 13.[65] Secondly, the Minister must explain publicly why *he has chosen to disagree with the commissioner*. Thirdly, the decision is subject to judicial review and *the commissioner will have the locus* to seek such a review. Thus, this is not an easy provision for Ministers to use.' [col. 828]

'If the *information commissioner* rules against the Minister, under Clause 52 the Minister is entitled to override it. In another place my right honourable friend said that if possible he would introduce amendments to ensure that, as far as

[65] The order of clauses was later changed, and what was clause 13 is now section 2 of the FOI Act.

> concerned central government, only a Cabinet Minister could override the *decision of the information commissioner* after a collective process had taken place.' [col. 890]
>
> 'If the Minister *overrides what is said by the information commissioner,* he or she must explain why. The Minister must have the support of Cabinet colleagues and his or her decision is subject to judicial review. It is for this House to decide whether or not Cabinet Ministers would *regularly overrule the information commissioner* and persuade all their Cabinet colleagues to take a political risk in relation to this matter.' [col. 891]

116. At Committee stage in the Lords on 25 October 2000, Lord Falconer said:

> 'There will be a limited, defined, restricted override…We believe that in such cases, which will be those dealing with the most sensitive issues, it should be a senior member of the Government, able to seek advice from his Cabinet colleagues, who should decide. Cabinet Ministers are accountable in a way *which the commissioner cannot be*. It is right that responsibility and accountability should rest at that level for this aspect of the freedom of information regime.' [col. 442]
>
> 'The clause is drawn in this way because the circumstances in which it will be necessary for the Cabinet, in effect, *to override the information commissioner* are not predictable from where we stand at present' [col. 445]
>
> 'it is worth noting that the effect of this provision is not that *any decision of the information commissioner* can be overridden: the only decision *of the information commissioner that can be overridden* is one on the balance of the public interest under Clause 13. If, for example, the *information commissioner* determined that something was not covered by an exemption, then the ministerial override would never apply.' [cols. 445-446]

117. Finally, at Report stage in the Lords on 14 November 2000, Lord Falconer said:

> 'the Government believe that there will be certain cases dealing with the most sensitive issues where a senior member of the Government, able to seek advice from his Cabinet colleagues, should decide on the final question of public interest in relation to disclosure. We believe that Cabinet Ministers are accountable in a way in which *the commissioner* cannot be. It is right that responsibility and accountability should rest at that level for this very important aspect of the freedom of information regime.' [col. 258]

118. The debate in both Houses therefore took place entirely on the assumption that the veto could be used to overturn decisions of the Information Commissioner - not the Tribunal, still less the High Court.[66]

[66] The High Court's functions under the FOI Act have since been transferred to the Upper Tribunal.

119. It may be that ministers themselves were not aware of this possibility. But if they were, they did not share their knowledge with Parliament.[67]

120. The only way in which Parliament could be assumed to have intended that the veto could be used against the tribunal or court would be if Parliamentarians were assumed to have worked this out for themselves, from the text of the bill, without the benefit of any indication to this effect from ministers.

121. However, Lord Neuberger supported by two other justices pointed out the Supreme Court had previously held that Parliament would not be assumed to have intended to interfere with fundamental rights unless 'it had made its intentions crystal clear'.

122. The Court of Appeal had held that fundamental rights:

> 'cannot be overridden by general or ambiguous words. This is because there is too great a risk that the *full implications of their unqualified meaning may have passed unnoticed in the democratic process*'. The text of the relevant provisions of the Act fell short of these standards.[68] (emphasis added)

123. The italicised words precisely describe what has happened in relation to the veto. Lord Neuberger concluded that FOIA itself 'falls far short' of providing the necessary clarity.

124. At the time of the FOI Act's passage, the proposition that ministers could veto decisions of the *Information Commissioner* had itself been controversial, not least because the government's 1997 FOI white paper had explicitly rejected it, saying:

> 'We have considered this possibility, but decided against it, believing that a government veto would undermine the authority of the Information Commissioner and erode public confidence in the Act.'[69]

125. The idea that the veto could also be used not merely against the Commissioner but against the *tribunal and courts* including the House of Lords, now the Supreme Court

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[67] The proposed arrangements for the veto changed during the bill's House of Lords stages. The initial position was that a government department had no right of appeal against a notice ordering disclosure on public interest grounds. Its only option would have been to exercise the veto. That was subsequently changed to the present position which allows departments to either appeal against such a decision or use the veto. (House of Lords debates, 25 October 2000, cols 444-5)
However, even as the bill stood during this interim stage, the possibility that the veto might be exercised against the tribunal or court should have been apparent to the government. A requester would have been able to appeal against a decision notice by the Commissioner which failed to order disclosure in the public interest. If the tribunal found in the requester's favour, the government is likely to have considered whether the veto could then have been used against the *tribunal* decision. If the requester lost an appeal to the tribunal but then successfully appealed to the High Court, the possibility of a veto against the *High Court's decision* should then have been apparent.

[68] Paragraphs 56-58

[69] Your Right to Know. The Government's Proposals for a Freedom of Information Act', Cm 3818, December 1997, paragraph 5.18

(which the Lord Chief Justice has confirmed to be the case[70]) would have been explosive. It is clear that Parliament had no idea that this was possible. The Supreme Court decision could not be said to disregard the will of Parliament.

126. We do not believe a veto should exist at all, particularly in light of the Act's elaborate appeals process. We note that on 4 of the 7 occasions on which the veto has been exercised so far it was used against a decision of the Information Commissioner which had not been appealed against to the Tribunal. In those cases the government had not attempted to secure the outcome it sought by use of the conventional appeal mechanism.

127. If a revised veto power is to be introduced, we do not believe it would be acceptable for the only substantive safeguard to be the standard judicial review test requiring merely that the minister's view should not be irrational. That is not a proper basis for overturning the considered decision of court or tribunal, reached after detailed consideration of argument and evidence. A more appropriate test, which accords weight to the degree of scrutiny and argument applied to the decision by the decision taker, is essential.

ENFORCEMENT

128. There can be substantial delays in dealing with FOI requests, both at the initial response stage and in completing internal reviews. Section 10(3) of FOIA allows the normal 20-working day deadline to be extended when considering the public interest test. The extension is not subject to any statutory limit, other than the requirement that it be 'reasonable in the circumstances'. This provision has clearly been abused on occasions. The former National Offender Management Service (an MOJ executive agency) in the past issued 12 consecutive monthly extensions under this provision, delaying its response to an FOI request by a whole year.[71]

129. We do not consider that the public interest test requires extra consideration time. The need to consider whether an exemption applies and if so whether disclosure on public interest grounds should take place are part of a single continuous process. No government department requires 20 working days to decide whether particular information relates the formulation of government policy – and then a further 20 working days to consider whether disclosure should take place on public interest grounds. If there is a case for extending the time scale it should be where significant

[70] Evans v Attorney General, [2013] EWHC 1960 (Admin), paragraph 8
[71] Information Commissioner, Practice Recommendation, National Offender Management Service, 10 March 2008

external consultation is involved, for example with third parties whose commercial interests may be affected by disclosure or where a request involves a substantial volume of information. The maximum extension should be specified, as has been done in regulation 7(1) of the EIR.

130. Delays in carrying out internal reviews are a greater problem, because there is no statutory basis for such reviews under FOI. This means the Information Commissioner has no power to take formal enforcement action against an authority for excessive or even deliberate delays at this stage.[72]

131. The MOJ recommended a statutory 20 day maximum extension to the public interest test in its 2012 report and similar statutory limits for internal reviews. The government did not accept these recommendations. It indicated in its response that it was minded to amend the Code of Practice under section 45 of the FOIA to suggest that internal reviews should normally be completed within 20 working days,[73] but has not done so.

132. We question the value of internal review. It may merely impose a further delay on the requester while reducing the pressure on authorities to reach a correct decision initially. MOJ statistics suggest that the requester's case is partly upheld at central government internal reviews in 13% of cases, and fully upheld in a further 8%.[74] We suspect that these 'successes' may be illusory and largely involve upholding complaints that time limits for initial responses have been exceeded

BURDEN

133. The Commission's call for evidence raises the question of whether the FOI Act creates a disproportionate burden on public authorities.

134. We believe the Act provides exceptional value for money. The most recent costing for central government bodies, referred to in the call for evidence, suggest the Act's annual cost to central government is £8.5 million. Moreover, the figures indicate that the volume of requests to central government bodies has grown by only 23% over 10 years, a surprisingly low figure given the Act's high public profile. We think the Act provides

[72] The government's response to the Justice Committee's report appears to have assumed that such a power exists. While that is the case under the EIR the IC has no such power under FOIA. See: Government Response to the Justice Committee's Report: Post-legislative scrutiny of the Freedom of Information Act 2000, November 2012, Cm 8505, para 28

[73] Paragraph 31

[74] Ministry of Juistice, Freedom of Information statistics: Implementation in Central Government 2014 Annual and October-December 2014, 23 April 2015, Table 13.

substantial benefits both in terms of improved accountability and scrutiny – and pressure on wasteful spending.

135. Following the Justice Committee's report on post legislative scrutiny of the FOI Act, the coalition government published proposals to amend the Act's cost limits, to make it easier for requests involving 'disproportionate burden' to be refused. The target of these measures was said to be requesters making 'industrial' use of the Act.[75] The potential measures largely involved making it easier for public authorities to refuse requests on cost grounds.

136. However, the measures proposed did not target individuals making excessive use of the Act. They would have applied to *all* requests including those from people making modest and occasional use of the Act. The main proposals involved reducing the existing cost limits (of £600 for government departments and £450 for other authorities) to some lower figures (which would potentially affect all requests); allowing additional activities to be included when calculating whether the cost limit had been reached; and permitting unrelated requests by one individual or organisation to the same authority to be aggregated and refused if the total cost exceeded the cost limit for a single request.

137. The last of these proposals could have meant that an individual or organisation might be limited to just a single request to an authority in a 3 month period. One request which fell just short of the cost limit might then have prevented the requester making any further requests to the authority until the end of the 60 working day period referred to in the fees regulations, which would presumably have been applied.[76] The impact of such a proposal on, say, a specialist journal or journalist whose work focussed on a particular authority, or a local MP or councillor, or campaign or amenity group, would be particularly severe.

138. Shortly after these proposals were published, the Upper Tribunal issued its decision in the *Dransfield* case, subsequently endorsed by the Court of Appeal.[77] The terms of this decision are strikingly similar to the terms in which the coalition government set out the case for changes to the cost limit. The Upper Tribunal held that the purpose of the Act's provision on vexatious requests (section 14(1)) was 'to protect the resources (in

[75] Government Response to the Justice Committee's Report: Post-legislative scrutiny of the Freedom of Information Act 2000, CM 8505, November 2012.
[76] The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, regulation 5(2)(b)
[77] Dransfield v The Information Commissioner [2015] EWCA Civ 454 (14 May 2015)

the broadest sense of that word) of the authority from being squandered on disproportionate use of FOIA'.

139. The consequence of that decision has been a redrawing of the IC's approach to section 14(1) which previously did not permit a request to be refused *solely* on the grounds of the burden it might impose on the authority. Where *cost alone* was the issue, the IC had held that an authority would have to demonstrate that the cost of locating, retrieving and extracting the requested information exceeded the section 12 cost limit. However, the cost limit did not permit the costs of processing a high volume of easily found material to be taken into account. A request for the entire contents of a filing cabinet could not be refused under the cost limit, since the cost of finding and extracting that information was negligible. The burden lay in its *processing* and in particular in identifying and redacting exempt information. The new approach has permitted such requests to be refused if those activities involve a disproportionate burden not justified by the value of the information.[78]

140. This approach has a significant advantage over changes to the cost limit, since it takes account of both the burden and the public interest involved in complying with a demanding request. By contrast, the cost limit takes no account of the public interest. It is a purely mechanical calculation based on the number of hours needed to deal with the request, which allows the shutters to automatically be brought down once the cost limit is reached regardless of value of the information.

141. We believe the present approach addresses the concerns relating to 'disproportionately burdensome' requests and that further action to deal with that issue should not now be necessary.

Charges

142. We would be particularly concerned by any move to introduce charges for requests. The experience under Ireland's Freedom of Information Act, in which the introduction of application fees led to an immediate crash in the volume of requests to one quarter of its previous level, is a particularly acute warning of the potential consequences of any such approach. Ireland has now abolished application fees.

[78] See for example FTT decision EA/2013/0270, Department for Education & Information Commissioner & McInerney, which involved a request for what turned out to be 25,000 pages of material about free school applications; and Information Commissioner decision notice FS50544833, which involved a request for metadata about all emails sent to or received by the Home Secretary during a one week period, including the sender's name, the date and time, subject and names of attachments.

143. When the UK Act was passed, the government originally intended to allow authorities to charge a fee of up to 10% of the estimated costs of locating, retrieving and extracting the requested information. It ultimately decided not to adopt this approach.

144. We understand this was because the cost of generating the invoice would normally have exceeded the costs recovered. It would also have exposed FOI officers to a substantial additional workload, of routinely estimating the costs of complying with every request received, generating invoices and keeping track of whether payments had been received and cheques cleared, before work on the request could commence.

145. Scotland's experience suggests that the UK decision was correct. Charges similar to those initially envisaged under the UK Act can be made under the Freedom of Information (Scotland) Act 2002. No charge is made for the first £100 of estimated costs, but thereafter 10% of the estimated costs of locating, retrieving and providing the information can be charged.[79]

146. In practice, virtually no charges are made. The Scottish Information Commissioner's statistics show that although Scottish public authorities received a total of 44,863 FOI requests in the year from October 2014 to September 2015, fees notices were served on just 64 occasions, that is in relation to 0.14% of requests.[80] That suggests that charges are not an attractive proposition for authorities, perhaps because of the work involved in administering them.

147. The call for evidence raises the possibility of a standard flat rat application fee, similar to the £10 fee that can be charged for subject access requests under the Data Protection Act. However, this subject access fee is likely to be abolished under the new EU Data Protection Regulation which is now being finalised.

148. An application fee for FOI requests, at whatever amount, would cause a number of difficulties.

149. It would conflict with the existing principle that all written requests for recorded information must be dealt with under the Act (or the EIR) regardless of whether the requester cites it. At present, someone who requests information automatically benefits from the Act's legal rights, even if the requester is not aware of those rights and does not refer to the Act.

[79] The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004
[80] https://stats.itspublicknowledge.info/report/generate

150. An application fee would lead to a two-tier system, distinguishing between those who formally exercise their rights and pay the fee and those who ask for information without citing the legislation. Authorities would presumably be expected to continue answering informal requests free of charge. They could hardly refuse to reply to someone who wanted to know why the service which the authority was required to provide had not been received and who wanted figures about the authority's compliance with standards. However, in answering such requests without a fee they would presumably be freed from the obligation of complying with the Act's requirements. This would permit them to withhold information even where it was clear that this could not be justified under any FOI exemption. That would be a particularly unattractive proposition.

151. Application fees would also make the use of email for FOI requests difficult. Applications might have to be made by letter with cheques, unless authorities provided the facilities for online payment and for matching payments to requests. Existing web-based facilities for making requests would presumably have to be adapted to comply. A resource such as the *whatdotheyknow.com* website, which has become a valuable source of information for public authorities as well as requesters would no doubt become defunct.

152. Fees would also deter those who made more than occasional use of the FOI Act. Anyone wishing to compare their authority's performance with those of neighbouring authorities would quickly find the prospect of multiple application fees a problem. The use of FOI to produce surveys, often of information which is relatively simple for authorities to provide, is likely to cease if requesters were obliged to pay a fee to each authority.

153. Such surveys have made a valuable contribution to public debate. For example:

> The All Party Parliamentary Group on Vascular Disease has produced a report, based on an FOI survey, comparing the rate of amputations for patients with diabetes by NHS trust and Clinical Commissioning Group. This showed that the likelihood of losing a limb because of shortcomings in the quality of medical care was twice as high in the South West as in London.[81]
>
> An FOI based survey published in the British Medical Journal in 2014 revealed that nearly 60 per cent of NHS trusts were failing to routinely monitor several

[81]http://appgvascular.org.uk/media/reports/2014-03-tackling_peripheral_arterial_disease_more_effectively__saving_limbs__saving_lives.pdf

common hospital-acquired infections and 75 per cent kept no records of associated deaths.[82]

HealthWatch, the statutory consumer body dealing with the NHS and care services, used an FOI survey to document the fact one third of NHS trusts fail to formally record or investigate complaints about poor healthcare or mistreatment of patients made by visitors, contractors or other 'citizen whistleblowers'.[83]

An FOI survey of taser use by police forces found that 57 per cent of taser shots struck the chest area, although the manufacturer of the device expressly warns that the chest areas should he avoided because of the risk of inducing cardiac arrest.[84]

The Howard League for Penal Reform used an FOI survey to reveal that there were approximately 53,000 overnight detentions of children under the age of 16 in police cells in 2008 and 2009, some less than 10 years old.[85]

154. Finally, fees would substantially undermine the value of the Act in exerting pressure on wasteful public authority expenditure. The threat of exposure via FOI is a potent deterrent against extravagance. For example:

Glasgow councillors spent over £24,000 in three years visiting overseas flower shows. The councillors had attended horticultural events in Tokyo, Madrid, Barcelona, Paris, Amsterdam, Dublin, Belfast and the German spa town of Baden Baden. The Tokyo trip alone had cost over £6,500. An official claimed that the trips helped to keep Glasgow at "the forefront of world-class horticultural achievement". The practice stopped after the expense was revealed by an FOI request.[86]

Local authorities and NHS trusts spent £220m over 12 months buying and leasing luxury cars. One local authority hired a Lotus Elise while another leased a Jaguar XJ, the same model as the Prime Minister's official vehicle. Between 2010 and 2011, public bodies hired almost 600 Mini Coopers and more than 650 BMWs, and purchased 17 Audis. Sunderland was the biggest spending city council, spending more than £800,000.[87]

A FOI request has revealed that West Midlands police spent £19,000 on two Unmanned Aerial Vehicles, which according to a senior officer cannot be used at night or in the rain. Two of the high-tech machines were purchased at a cost of £8,502, while training cost a further £10,620. The force's response to the request admitted that no arrests have been made from their use.[88]

[82] http://www.bmj.com/content/349/bmj.g5656
[83] http://www.healthwatch.co.uk/news/those-who-witness-poor-care-being-denied-right-complain-nhs
[84] http://www.guardian.co.uk/uk-news/2013/jul/14/police-tasers-cardiac-arrest-warnings?INTCMP=SRCH
[85] http://www.howardleague.org/research_overnight_detention/
[86] Cash-strapped Glasgow council sends staff on £24K overseas jaunts to flower shows, Daily Record, 11 April 2008
[87] £220m for official cars, The Sunday Times, 7.8.11
[88] West Midlands Police's £19k drones 'can't fly in the rain', Birmingham Mail, 15.11.15

Durham Free School, which was open for less than two academic years before being closed by the Education Secretary, cost the taxpayer almost £1 million. In response to an FOI request, the Department for Education confirmed the School received £300,000 in pre-opening funding, the flat-rate grant given to all secondary free schools. In addition, £304,881 was spent on capital costs; £212,663 on construction works, furniture, fittings and equipment and ICT (the Department said much of the ICT equipment could be re-used); and £92,218 on legal and technical adviser fees.[89]

NHS England's axed patient feedback service, Care Connect, cost £1.2 million, an average of £1,600 for every patient query resolved during the pilot phases. The service enabled patients to use a number of channels: online, phone, text or social media, to ask a question, provide feedback or log concerns on their experiences of the NHS. It was due to be rolled out across England by February 2014. However, the service was never widely picked up by patients and consequently cost the NHS extortionate amounts per use.[90]

It cost Medway Council almost £350,000 during two school closures just to cancel existing photocopier leases.[91]

London Underground spent £933,000 in 2009-10 hiring fake passengers to observe the "ambience" at stations and to test the knowledge of staff.[92]

Speaker of the House of Commons John Bercow billed the taxpayer £172 to take a chauffeur-driven car from Parliament to Carlton Terrace, a journey of less than one mile. The data was requested by the Press Association under the FOI Act. The request also revealed that the Speaker spent £367 on being driven 34 miles to Luton to give a speech on how MPs were restoring their reputation after the expenses scandal.[93]

An NHS scheme to give patients more control over their personal care has resulted in millions of pounds being spent on luxuries such as summer houses, a boat ride and holidays, according to a widely-reported investigation by Pulse, a magazine for GPs. Information obtained by Pulse under the FOI Act showed that Clinical Commissioning Groups (CCGs) in England expected to spend £120m on 4,800 patients taking up the personal health budgets scheme this year. FOI responses from NHS Nene CCG and NHS Corby CCG revealed that patients had been funded to go on holiday, purchase an iRobot and build a summer house. NHS Kernow CCG spent over £2,000 on aromatherapy as well as allocating funds for horse riding and pedalo boating.[94]

The Government's policy of culling badgers to stop the spread of tuberculosis to cattle has cost £16.8m to-date, which works out at £6,775 for each of the 2,476

[89] 'The £1m free school (now shut), Schools Week, 15.5.15

[90] Axed patient feedback service cost £1.2m, Digital Health News, 16.11.15

[91] £350k just to take away photocopiers, The Medway Messenger, 23.9.11

[92] Rapid rise of the citizen shopper spies for hire, Sunday Times, 30.1.11

[93] John Bercow slammed by colleagues after claiming £172 on a taxi journey of less than a mile, Independent, 25.7.15

[94] Revealed: NHS funding splashed on holidays, games consoles and summer houses, Pulse, 1.9.2015

badgers culled. The information was obtained by the Badger Trust from the DEFRA via an FOI request.[95]

The Ministry of Justice paid Serco over £1m to run an empty secure unit for children over a seven-week period. Serco had been contracted to run the Hassockfield secure training centre near Consett since 1999. This expired in September 2014 but was extended by the MoJ before the unit closed on 20th November 2014, when the remaining children were moved elsewhere. However, Serco continued to be paid to manage what was by then an empty building until 9th January 2015. The money it received during those 50 days came to a total of £1.1m. The information was obtained under the FOI Act by Article 39, a charity which aims to protect the rights of children living in institutions.[96]

The IRIS recognition system, which scans the unique patterns of travellers' irises to confirm their identities, was so under-used that it cost nearly £2 per arrival. The system had been used just over 4.7 million times between 2006 and 2012. The technology cost just over £9m, the equivalent of £1.94 for each person that had used it. Earlier in 2012 year the government announced the system was being scrapped after revealing the software used was already out of date.[97]

Between 2012 and 2014, the London Borough of Tower Hamlets sold off more than 50 homes using out of date valuations, costing taxpayers thousands of pounds on each transaction, according to data released under the FOI Act. Tower Hamlets sold one two-bedroom flat in 2012 based on a valuation made seven years earlier, failing to take advantage of a 30 per cent price rise in the area over that period. It sold a one-bedroom flat for £42,000 when it was valued at £142,000. A two-bedroom maisonette was sold for £40,000 when it was worth at least £125,000. The London borough of Sutton also revealed that it had sold off several flats at a 70 per cent discount, allowing one tenant to buy a £173,000 home for just £70,000. Discounts of 70 per cent are allowed under the policy for tenants who have lived in their homes for many years, but critics of the policy insist they are too high.[98]

A council spent £330,000 in redundancy payments to 25 staff who were subsequently re-employed by the authority. One worker who agreed a redundancy package with Stoke-on-Trent City Council spent just 27 days away from the authority before returning to a new position. A further two workers waited just 32 days after agreeing a settlement before being re-employed. The council stated that redundancy agreement had now been redrafted to provide that nobody can return to work at the Council within a year and a day.[99]

Councils in England have inherited more than £30m debt as a result of schools converting to academies, FOI requests by the BBC have revealed. Under the academies scheme, when local-authority-run schools choose to convert to academies, councils pick up the bill for the costs of conversion including the cost of

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[95] Culling costs £6,775 per single badger, figures reveal, Daily Mail, 2.9.2015

[96] MoJ paid Serco £1.1m for running secure children's unit after it closed, Guardian, 21.10.15

[97] Revealed: failed airport eye scanners have cost £2 for every passenger who used them, The Independent, 1.5.12

[98] Council houses have been sold at 70% under their market value,Guardian, 11/09/2015

[99] Council spends £330,00 in redundancy payments then rehires staff 27 days later, The Daily Telegraph, 10/08/2011

any deficit and legal fees. The FOI responses showed that £32.5m has been spent by councils on clearing debts since the Academies Act was introduced in 2010.[100]

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[100] Schools converting to academies cost councils £300m, BBC reveals, BBC, 25.7.2015

Appendix 1
Disclosures from EA/2006/0006, DfES & IC & Evening Standard

DfES vs INFORMATION COMMISSIONER AND EVENING STANDARD

Information considered by the Information Tribunal on 4-5 January 2007

Key:

- - highlights disclosure after internal DfES review on 15th April 2005
- - highlights further disclosure on 22nd November 2006 provided in the course of preparation for the tribunal hearing.
- - All items not highlighted comprise protected target material

WEEKLY KIT MEETING of the SCHOOLS DIRECTORATE MANAGEMENT GROUP held 2 September 2002

[Helen Williams] - Last month of consultation period on SSA reform options. Ministers will need to decide early October. Is currently rethinking schools capital priorities with David Miliband.

WEEKLY KIT MEETING of the SCHOOLS DIRECTORATE MANAGEMENT GROUP held 30 September 2002

A presentation to Ministers on a Capital Strategy to support TSE was planned for October. Consultation on SSA reform had ended, with advice going to Ministers later this week/early next with announcement planned for early December. A meeting that day with the Treasury on the follow-up to the SR to explore options on ESS/grant split.

WEEKLY KIT MEETING of the SCHOOLS DIRECTORATE MANAGEMENT GROUP held 7 October 2002

Need for progress with Treasury on ESS grant balance – another meeting needed.

WEEKLY KIT MEETING of the SCHOOLS DIRECTORATE MANAGEMENT GROUP held 14 October 2002

Key meeting of GL – official committee on local government – to discuss ring fenced grants.

WEEKLY KIT MEETING of the SCHOOLS DIRECTORATE MANAGEMENT GROUP held 21 October 2002

On LEA funding reform, SoS and David Miliband are meeting to discuss the whole package;

STRATEGIC MEETING of the SCHOOLS DIRECTORATE MANAGEMENT GROUP held 20 November 2002

3 year budgets

Schools
LEAs have been sent a letter asking them to give schools indicative budgets up to 2005-06.
Department does not have the power to enforce 3 year budgets.
Action: Andrew Wye to consult with CONFED on this and continue work with LEAs. Andrew Wye to get Ministerial sign-off to these proposals

Department
Andrew Wye confirmed that it would be possible to provide 3-year declarations of amounts available and the formulae for distribution.
Action: Tom Goldman to complete list of grants.

WEEKLY KIT MEETING of the SCHOOLS DIRECTORATE MANAGEMENT GROUP held 3 March 2003

Issues on passporting. Now going to get an idea of the actual level of schools Budgets

SDMG programme management meeting MINUTES FROM MEETING ON 6 MARCH 2003

Update on School Budgets

The group discussed a draft paper for David Miliband to send to the SoS on school funding in 2003-04, in light of complaints of underfunding from schools. Stephen Crowne noted that SDMG need to look at the scale of the Department's agenda and how the situation set out in the note would impact on policy areas. The group agreed that it was important that officials understood the implications of the note, in order to handle queries from schools and LEAs.

Actions

Stephen Kershaw to produce a note on how the Department is channelling significant funds into remodelling and why this is such a top priority

Stephen Crowne to produce a one-sided brief on the situation regarding school budgets to raise awareness among staff

Simon Rea to ensure that Michael Barber is aware of the situation

WEEKLY KIT MEETING of the SCHOOLS DIRECTORATE MANAGEMENT GROUP held 24 March 2003

School Budgets

There was a discussion around extra funding for local authorities to take into account changes to the level of Standards Fund grant. It was noted that this will lead to a softening of some cliff edges but not all.

WEEKLY KIT MEETING of the SCHOOLS DIRECTORATE MANAGEMENT GROUP held 31 March 2003

School Budgets

It was agreed that a note should be put up to the Secretary of State on the short and long term handling of school budgets.

Action

Stephen Crowne to ensure that advice is sent to SoS and circulated to SDMG

SDMG programme management meeting MINUTES FROM MEETING ON 10 April 2003

Schools Budgets

The group discussed Tom Goldman's paper on school budgets for 2004-05. It was agreed that:

- the paper needs to be developed in scoping form and submitted to David Miliband and Robert Hill for comments
- we need to get an agreed position by the beginning of July

Action

Tom Goldman to develop paper further and submit for comments

May 2003 Board Meeting

(Item 4) School Funding

Stephen Crowne summarised the position on school funding, how we got here and what the future might hold.

Key points in discussion were:

- Local Authorities had not consciously sought to divert funds and the public debate was unfortunate.
- It was crucial to balance our response and maintain our room to manoeuvre for both this and next year.
- It was very difficult to get meaningful figures as there was such a mix of different factors in their individual positions.
- The process on reaching decisions next year should be brought forward by 2 to 3 months, if possible.
- There was some risk of a similar row with the FE Sector.

David Normington expressed thanks for the update. The difficulties rose from lack of action rather than anything deliberate. Part of our strategy should be to lead those authorities who genuinely did have the money to ease school difficulties to make a rapid decision.

SDMG meeting MINUTES FROM MEETING ON 23 JUNE 2003

Funding

The group discussed preparation for the funding meeting with David Miliband.

Action points

- **Philip Nye to revise presentation to reflect SDMG comments**

Stephen Kershaw to expand note on LEA funding

Peter Housden to revise paper on grant in light of SDMG comments

WEEKLY KIT MEETING of the SCHOOLS DIRECTORATE MANAGEMENT GROUP held 30 June 2003

Funding

The group discussed papers for the meeting which would follow with David Miliband. It was agreed that:

- Following the meeting, more time needed to be spent on refining the Secretary of State's letter.

July 2003 Board Meeting

Item 5: School Funding – update

Stephen Crowne updated on ongoing work – the purpose of which was to arrive at a package of measures built around a commitment of a guaranteed per-pupil increase to create stability for the next two years. Remaining questions were how this was to be achieved and there were two funding routes:

i. via EFS (with passporting)
ii. via a ring-fenced grant to LEAs.

Which option is a matter of ongoing discussion with the centre but we needed to move fast for an announcement before the end of the month. Both had risks: there is the potential for passporting to be unsuccessful or even perverse; the ring-fenced grant ran the risk of squeezing local services and /or leading to a rise in Council tax. Discussion brought home the seriousness of the issue.

It was concluded that the chosen solution must be defendable and it was made clear that we need to get to an understanding of how this issue may affect the funding of children's social services.

WEEKLY KIT MEETING of the SCHOOLS DIRECTORATE MANAGEMENT GROUP held 7 July 2003

Funding

The group discussed the latest situation on school budgets and funding.

WEEKLY KIT MEETING of the SCHOOLS DIRECTORATE MANAGEMENT GROUP held 14 July 2003

Funding

The group discussed the latest situation on school budgets and funding.

Appendix 2

Risk Register

TB Badger Control Project

Risk number	Title	Description	Consequence	Current likelihood	Current impact	Current risk rating	Mitigation	Residual likelihood	Residual impact	Residual risk rating	Risk Owner	Contingency	Raised	Status
1	Legal challenge brought	A likely legal challenge to a policy decision on culling	1.Delayed implementation 2. DEFRA reputation damaged	H	H	H*	1.Process in place to ensure all evidence and options are presented to Ministers. 2. There is an audit trail. 3. Early and close working with lawyers to identify and consider all potential legal issues. 4. Examine/learn from the Welsh legal challenges	H	H	H*	X	Use current information/knowledge on the potential legal challenges	15-Jun-10	Open
2	Legal challenge upheld	The upholding of a legal challenge to a decision on culling	1.No implementation. 2. DEFRA reputation damaged. 3. Farmers unable to apply for licenses and therefore cull not permitted to take place.	M	H	H*	1.Process in place to ensure all evidence and options are presented to Ministers. 2. There is an audit trail. 3. Early and close working with lawyers to identify and consider all potential legal issues. 4. Examine/learn from the Welsh legal challenges	M	H	H*	X	Use current information/knowledge on the potential legal challenges	15-Jun-10	Open

Risk number	Title	Description	Consequence	Current likelihood	Current impact	Current risk rating	Mitigation	Residual likelihood	Residual impact	Residual risk rating	Risk Owner	Contingency	Raised	Status
3	Complaint to Bern Convention Standing Committee upheld	1. A complaint is made to the Bern Convention Standing Committee that the proposed action is in breach of the Bern convention; and 2. the complaint is upheld	1. Delayed or no implementation 2. DEFRA reputation damaged	M	M	M	1. Process in place to ensure all evidence and options are presented to Ministers. 2. There is an audit trail. 3. Early and close working with lawyers to identify and consider all potential legal issues. 4. Examine/learn from the Welsh legal challenges 5. Keep Bern informed of developments	M	L	M	X			
4	Local area delivery	Failure to identify a mechanism to ensure local area delivery of the policy on the ground	Criteria not met to enable any licences to be issued therefore no actual culling	M	H	H	Early and close working with the industry and NE to determine a workable mechanism	M	M	M	X	Consider currently known options with the NFU and NE preferred criteria	15-Jun-10	Open
5	Local area capacity	Resources not available at local level (industry) to operate a cull or vaccination strategy. The stricter requirement for vaccination will be affected by the lack of vaccinators.	No delivery of a cull. The programme of vaccination will be affected detrimentally and will cause further delay to the cull.	H	H	M	Early and close working with the industry	L	L	L	X	Take into account current knowledge of how the industry see a cull working and the vaccination strategy working. FERA will have responsibility for training more vaccinators	02-Jul-10	Open
6	Industry acceptance	Failure to get industry acceptance and potential costs for a cull if industry partnership the preferred route	No delivery of a cull	M	M	M	Early and close working with the industry	M	M	M	X	Take into account current knowledge of how the industry see a cull working	15-Jun-10	Open
7	Disagreement on evidence base	No shared understanding on the evidence base	Conflicting messages given to Ministers	M	H	H	Engage early with those in key advisory positions in DEFRA and its Agencies.	M	H	H	X	Be prepared to set out for Ministers where agreement can not be sought and the reasons behind this.	15-Jun-10	Open

Risk number	Title	Description	Consequence	Current likelihood	Current impact	Current risk rating	Mitigation	Residual likelihood	Residual impact	Residual risk rating	Risk Owner	Contingency	Raised	Status
8	Project resources-core DEFRA	Insufficient resources - staff and time - to deliver to a very tight timescale	Slippage to tight time scales resulting in delayed implementation	H	M	M	1. Early planning of work and forewarning to those involved 2. Prioritisation of resources 3. Obtaining additional resources when required	M	M	M	X	Investigate options for extra resources	15-Jun-10	Open
9	Project resources-DEFRA family	Insufficient resources to deliver a cull (e.g. Staff available to assess licence applications)	1. Slippage to tight time scales for a cull to commence	H	H	H*	1. Early planning of work and forewarning to those involved 2. Identification of key milestones to enable cull delivery 3. Prioritisation of resources 4. Obtaining additional resources when required	M	M	M	X	Investigate options for extra resources	15-Jun-10	Open
10	Public acceptance	Strong public opposition to the policy	Could delay or stop policy development and delivery	H	H	H*	1. Proactive communications 2. Local area understanding	H	M	H	X	Be prepared to acknowledge outcome of consultation	15-Jun-10	Open
11	Political will	A change in political will	Change in the package of measure to control TB	L	M	M	Regular contact with the Ministerial Office and ensure sufficient meetings in Ministerial calendar	M	L	M	X	Be prepared to revise plans	15-Jun-10	Open
12	Welsh Legal Challenge	Legal challenges to the Welsh Pilot culling	The outcome if upheld may delay or stop the project	M	H	H	Awareness of grounds and dates of Welsh legal proceedings. Early planning of options if legal challenges upheld.	M	M	M	X	Proceed with project keeping close liaison with the Welsh on significant issues that we need to be considered	15-Jun-10	Closed

Risk number	Title	Description	Consequence	Current likelihood	Current impact	Current risk rating	Mitigation	Residual likelihood	Residual impact	Residual risk rating	Risk Owner	Contingency	Raised	Status
13	Security	Security risks to staff and farmers	May delay implementation	M	M	M	Early engagement and planning with DEFRA Security and the Home Office to ensure security procedures in place for ways of working and early comms planning with farmers and local police forces. Awareness of security issues experienced by the Welsh.	M	L	L	X	Understanding and awareness of security measures.	15-Jun-10	Open
Long term post project risks														
15	Illegal Culling	An increase in illegal culling in areas not within the early cull areas	An increase in TB could be seen in areas where illegal culling	H	M	H	Engagement with the Home Office and Wildlife Crime Unit on procedures to follow. Engagement with NFU on likelihood	L	L	L	X	Current procedures in place to deal with illegal culling	15-Jun-10	Open
16	An increase in herd breakdowns	An increase in herd breakdowns in cull or areas surrounding a cull	A stop to culling, revoking of licences. A need to defend rational behind project. Defra's reputation damaged	M	H	M	Ensure policy is based on evidence and all options presented to the Minister to inform his decision. Ensure other TB control measures are in place and being adhered to. Ensure suitable monitoring is in place. Plan an appropriate exit strategy.	L	L	L	X	Delay licences if not confident of positive effect of culling	15-Jun-10	Open

Risk number	Title	Description	Consequence	Current likelihood	Current impact	Current risk rating	Mitigation	Residual likelihood	Residual impact	Residual risk rating	Risk Owner	Contingency	Raised	Status
17	Civil action being brought by those adversely affected by culling in areas adjacent to cull areas	Potential increase in cattle herd breakdowns due to perturbation of the badger population on the edge of the cull area	1)A stop to culling, revoking of licences. 2)Legal action taken by those affected would not only have reputational consequences but may have financial implications. 3)A need to defend rational behind project. Defra's reputation damaged	H	H	H	1).Set licence criteria in line with science (size of area, boundaries). 2).Early and close working with lawyers to identify and consider all potential issues. 3).Engage with landowners/farmers in neighbouring areas	L	L	L	X	Be prepared to handle	02-Jul-10	Open
18	Negative and adverse publicity concerning the free shooting and trapping of non target species.	Increase in negative publicity from local and national press. Decrease in public acceptance of the policy. Potential for legal action to be taken	A need to defend rational behind project. Defra's reputation damaged	M	M	L	1)Early and close working with the industry. 2) Ensure other TB control measures are in place and being adhered to. Ensure suitable monitoring is in place. 3) Work closely with the Press office to issue positive communications.	M	M	L	X	Be prepared to handle	25/10/2010	Open
19	Habitats Regulations Assessment	To seek the view of the European Commission on IROPI in relation to possible effects on priority species.	Could delay the announcement of the policy	M	H	H	Preliminary engagement with UKRep and the Commission. Legal advice on wording to avoid delaying an announcement of Commission responses takes a while	M	M	M	X	Not requiring commission view	31/12/2010	Open
20	Consultation summary and responses	Although progressing well there is a risk of losing current FSR staff	Could delay the announcement of the final decision on badger control.	M	M	M	More resource to replace those that have moved on	M	M	M	X	Be prepared to handle	17/11/2010	Open

Guidance for completing the PPM risk register template

(Note: for guidance on printing, see the end of these notes.)

Risk Something happening that may have an impact on the achievement of the objectives of the Programme, Project or on-going Function (hereby referred to as Activity). It includes risk as an opportunity as well as a threat.

Risk register title The title for your Activity.

Version The date on which the register was revised.

Risk number A unique sequential reference number for each risk.

Title A brief descriptor for the risk.

Description Details of the nature of the risk - what it involves; what you are concerned about.

Cause The source of the risk. This may be a trigger that would cause the risk to materialise.
An understanding of the source helps you to keep an eye in the right place, to see if the risk is about to happen. This can help with early warning or escalation.

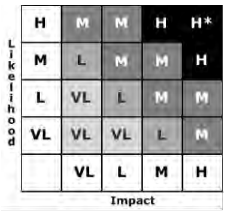
Consequence This is what happens when a risk is realised. You should consider the impact on time, cost and quality, in the context of what your Activity will deliver. You should consider wider consequences (e.g. financial, legal, social, environmental and reputational).
Your assessment of the consequences will feed directly into your assessment of the Current and Future impact (see later).

Objective affected This answers the 'Risks to what?' question. Flag the objectives in your activity that would be affected by this risk. If there is a direct influence on a DSO or PSA, flag this.

Current likelihood A qualitative description of the probability or frequency of the risk occurring, based on your current knowledge and the current controls that are in place.
Four options are available, ranging from very low to high. Depending on the duration of your Activity, you may want to develop specific definitions. Use the folowing as an opening guide:
High: very likely (significantly greater than 50:50 chance). The risk is very likely to occur this year or at frequent intervals in the foreseeable future (say the next 18 months to 3 years).
Medium: likely (around 50:50 chance). The risk is likely to occur this year or more than once in the foreseeable future (say the next 18 months to 3 years).
Low: possible (signifcantly less than 50:50 chance). The risk may occur this year.
Very Low: very unlikely to occur this year; unlikely to occur in the foreseeable future (say the next 18 months to 3 years).

Current impact The severity of the risk occurring, in terms of its effect on the objectives or delivery of your Activity.
Four options are available, ranging from very low to high. Depending on the nature of your Activity, you may want to develop specific definitions. Use the folowing as an opening guide:
High: huge financial loss or budgetary over-run; death or significant public health concerns; key deadlines missed; very serious legal concerns (e.g. high risk of successful legal challenge, with substantial implications for the Department); major environmental impact; loss of public confidence.
Medium: major financial loss or budgetary over-run; some public health effects; deadlines need to be renegotiated with customers; potentially serious legal implications (e.g. risk of successful legal challenge); significant environmental impact; longer-term damage to reputation.
Low: medium financial losses; minor or reversible health effects; local reprioritising of delivery required; minor legal concerns raised; minor impact on the environment; short-term reputation damage.
Very Low: negligible financial, public health, delivery, legal, environmental or reputational effects.

Current risk rating The classification given to a risk, based on its likelihood and potential impact, as per the matrix below.
Five categories are available, ranging from Very Low to H*.
The H* category is reserved for those risks that have both a high likelihood and a high impact.
This value is automatically calculated by your entries under 'Likelihood' and 'Impact'.



Countermeasure The current measures or controls you have in place to contain a risk or reduce it to an acceptable level, or the actions that need to be taken to address the risk. This should include the steps you will take to escalate the risk if its impact and likelihood are too great for you to deal with. These should indicate who needs to do what, by when. A brief note on how your attempts to address the risk are progressing. This should provide some context for the RAG rating.

Residual likelihood Not all risks can be eliminated. Some level of exposure to risk remains.
Describe the likelihood of the risk occurring *after* the controls and actions have been taken or set in place - and are effective.
Use the same definitions as for 'Current likelihood'.

Residual impact Not all risks can be eliminated. Some level of exposure to risk remains.
Describe the impact that would remain *after* the controls and actions have been taken or set in place - and were effective.
Use the same definitions as for 'Current impact'.

Residual risk The classification given to a risk, based on its residual likelihood and residual impact. This reflects the level of risk that remains *after* the controls and actions have been taken or set in place and are effective.
This value is automatically calculated by your entries under 'Residual Likelihood' and 'Residual Impact'.
If this level of risk is seen as unacceptable, additional controls or actions will need to be identified.

RAG This is shorthand for Red-Amber-Green.
This is a flag to indicate what progress is being made in tackling this risk and moving it down to the target or acceptable level of risk.
It does not simply replicate the risk rating (i.e. high-risk doesn't always mean Red). Use the following definitions:
Red: Stop - the approach to addressing this risk is considered to be poor, becoming critical. This may be because there is no coherent action plan prepared or the actions that have been taken so far seem to have had insufficient impact on the risk or a critical point is looming and decisive action is necessary to avoid serious problems, external criticism or funding being withheld.
Amber: Caution - the approach to addressing this risk is currently sitting between fine and poor. A good action plan has been prepared and is being implemented. The actions are currently containing the risk, rather than reducing the level of threat. There is still a significant likelihood that this risk could 'go wrong' very easily – there may be changing external circumstances or there may have been little time for the impact of the actions to 'kick in'. Some critical deadlines are on the horizon and important progress needs to be made relatively quickly.
Green: Proceed - the approach to addressing this risk is considered to be fine. A comprehensive action plan has been prepared and the risk is responding to early actions that have already been taken. Good performance monitoring information is in place to give early warning of problems with this risk. There may be a lengthy period before critical points are reached.

Risk owner The person who is accountable for the risk being addressed effectively.

Contingency An action or arrangement that can be put in place to minimise the impact of a risk that has occurred. This is your 'Plan B', if the risk actually materialises. Please consider if the contingency needs to involve escalation to someone else.

Raised The date when the risk was first raised. The person who raised the risk.

Status If the risk is live, and it could affect your activity, it is described as 'Open'.
If the risk has been effectively dealt with and is no longer a concern, it is described as 'Closed'.
The suggestion is that 'Open' and 'Closed' risks should be kept on separate worksheets in the same workbook.

Printing guidance There's nothing worse than a risk register that has to be printed out in such small font that it becomes very user unfriendly.
Before you print out your register, it is recommended that you sort it, for example by 'Current Risk Rating' or 'Residual Risk Rating' or 'RAG'.
There may be occasions when a summary of the register would be helpful. To do this in Excel, you can select a limited portion of the register to print, using the 'Print Area' option from the 'Page Layout' tab.

Issue Log

TB Badger Control Project

Issue number	Title	Description	Consequence	Current impact	Mitigation	Issue Owner	Raised	Status
1	State Aid	Before any monies are paid out we need to get State Aid Clearance	Unable to pay monies for delivery	H	Work closely with Y as options develop to ensure clearance to achieved in time for delivery	X	12/10/2010	Open
2	Welsh legal Challenge	Legal challenges to the Welsh Pilot on culling	The outcome if upheld may delay or stop the project	H	Awareness of the grounds and dates of Welsh legal proceedings. Early planning of options if legal challenges	X	15/07/2010	Closed
3	liabilities concerning buffers and boundaries	Identifying the liabilities to government and farmers regarding the disbenefits in non participant areas (including neighbouring areas)	Potential legal challenge. The delay/postponement or the prevention of policy implementation.	M	Seek legal and ministerial advice as early as possible	X	07/09/2010	Open
4	Coordinating culling and vaccination policy with WAG	Ensure approaches to vaccination policy are coordinated with development of policy on culling and vice versa. Interdependence of licence conditions has a significant impact on the delivery of the policy as a whole	Mixed messages from Government on how culling and vaccination might be used in combination; ineffective use of the two control measures in combination.	M	Culling and vaccination policy teams to liaise to ensure approaches are coordinated	X	18/10/2010	Open

5	Timetable for IA	Impact Assessment requires sign-off by the Reducing Regulation Committee which require a 3 week review by the Regulatory Policy Committee after Chief Economist sign-off. This means that the Chief Economist will need to sign-off the Impact Assessment before the MoS. has taken decisions on all aspects of the policy.	1. IA is inconsistent with the final policy decision. 2. Resource is tight to complete all work to the deadlines.	H	Base IA on MoS. early steers, ask for steer on outstanding issues before final policy submitted to MoS. Set out clear timetable for all involved to plan and prioritise workload to fit with busy period for IA. Send draft versions to reviewers to prepare for final review and cut down review time.	X	17/11//2010	Open
6	Delivery of costs and local law enforcement guidelines by Home Office and ACPO	Lack of resources to provide accurate cost of police resources and guidelines in the event of protest or criminal activity by Animal Rights or related organisations	Insufficient funds available to police activities. Delay in culls. Possible threat to participating farmers and their families and delivery agents	H	Continued engagement with ACPO and Home Office. Work closely to ensure continued resource of policing any protest activity is monitored and costed. Ensure consistency of advice through forces	X	15/11/201	Open

Appendix 3. Planning Aid

RESTRICTED – POLICY

To: Secretary of State [redacted]

Date: 25 May 1010

[redacted]

SPENDING APPROVALS (POST 1 JANUARY 2010) AND PILOTS REVIEW

Issue

1. The Chief Secretary has written to members of Cabinet asking them to re-examine spending approvals given since 1 January this year, as well as re-evaluate pilot schemes within Departments:

   - the requirement to **review spending approvals** applies to all approvals made between 1 January and the election on 6 May;

   - the requirement to **re-examine pilot schemes** applies to all pilots, regardless of when they were approved.

   This note describes the work we have done to date and sets out the next steps.

Timing

2. Routine – the Chief Secretary has requested that all spending decisions requiring re-evaluation by HM Treasury are submitted for examination by Friday 28 May.

Recommendation

3. That you consider the attached tables listings all Ministerial decisions made since 1 January 2010 and note the next steps:

   - your Ministerial team to **review spending decisions** requiring HMT approval in the course of this week and provide recommendations to you on each;

   - the Department's Analyst Quartet (Chief Economist, Chief Scientist, Chief Social Researcher and Chief Scientists) to review **departmental pilot schemes** to ensure they are affordable, consistent with the Government's priorities and the methodology is sufficiently robust. Where this is not the case they will recommend changes or stopping the pilot.

Consideration

Spending Approvals – Communities and Local Government Departmental Expenditure Limit (DEL)

4. We have identified 132 decisions taken by previous Ministers between 1 January 2010 and the election, of which 84 affect funding in 2010-11 or beyond to a value of £3,266m. The full list is at **Annex A**.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Next Steps

18. We propose to send summary information on each spending approval to the relevant Ministers in your team for consideration and recommendation on next steps.

[redacted]

[redacted]

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Date submitted to Ministers	Notes	Director	Title	Summary	Budget Cover?	R/C?	Link to Priorities	Update	Plans (£m) 2009-10	Plans (£m) 2010-11	Resource / Capital?	Approved by Ministers?	Overlap with Other?	To be submitted to Ministers for consideration	HMT clearance: General	HMT clearance: Grant agreement cleared with HMT?	Contractual position	Actual expenditure (£m) 2009-10	Actual expenditure (£m) 2010-11	Impact of stopping now (2010-11 expenditure only)
10 March submissions	[redacted]	[redacted]	Implementing Planning Reforms - Community Engagement	Funding for Planning Aid as an element of the Community Engagement programme. Planning Aid provides free and independent planning advice to individuals and community groups otherwise unable to afford it.		Earmarked		With BCB - approved by JH		4,500	Resource	Approved 11th March			-	Y (S30A, Town and Country Planning Act 1990)	Grant agreements in place with Planning Aid (signed 20 March)		0.970	Planning Aid specifically helps those who are financially disadvantaged or from socially excluded backgrounds e.g. voluntary and community organisations, black and minority ethnic groups and older people. Planning Aid has increased its engagement programme and some 37,946 individuals and 1,092 organisations/groups have been assisted with casework community planning in 2009/10. Not supporting Planning Aid would mean the loss of free independent support to disadvantaged individuals and community groups that helps them engage with the Planning system. Planning Aid employs some 60 staff, a cut in grant would mean redundancies.

Annex A - CLG DEL

Date submitted to Ministers	Notes	Director	Title	Summary	Budget Cover?	RAG?	Link to Priorities	Update	Plans (£m) 2009-10	Plans (£m) 2010-11	Resource / Capital?	Approved by Ministers?	Overlap with EBIs?	To be submitted to Ministers for consideration	NHT clearance: Granted	NHT clearance: Grant agreement cleared with HMT?	Contractual position	Actual expenditure (£m) 2009-10	Actual expenditure (£m) 2010-11	Impact of slipping new (2010-11 expenditure only)
[redacted]																				

To: PS/Greg Clark

From: [redacted]

Location:
Tel:
Date: 3 June 2010

Copies: [redacted]

SPENDING APPROVALS (POST 1 JANUARY 2010) – THOSE NOT REQUIRING TREASURY APPROVAL

Issue

1. This note sets out the outstanding decisions made by previous Ministers which require your consideration. These are highlighted yellow in the attached table which is based on material submitted to you on 25 May – any updates are marked in red text.

2. Further advice from the lead policy Director is attached where they consider there is insufficient information in the table to take decisions.

Recommendation

[redacted]

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No.	Neil ref	Fully spent to date?	Supporting advice	Minister	Director	Title	Summary	Plans (£m)		Resource / Capital?	Approved by Ministers?	To be submitted to Ministers for consideration
								2009-10	2010-11			
	30			[redacted]	Greg Clark	[redacted]	**Implementing Planning Reforms - Community Engagement**	Funding for Planning Aid is an element of the Community Engagement programme. Planning Aid provides free and independent planning advice to individuals and community groups otherwise unable to afford it.		4.500	Resource	Approved 11th March
										4.500		

Other text omitted.

HMT clearance		Contractual position	Actual expenditure (£m)		Impact of stopping now	
General	Grant agreement cleared with HMT?		2009-10	2010-11		
	-	Y (S304A, Town and Country Planning Act 1990)	Grant agreement in place with Planning Aid (signed 25 March)		0.970	Planning Aid specifically helps those who are financially disadvantaged or from socially excluded backgrounds e.g. voluntary and community organisations, black and minority ethnic groups and older people. Planning Aid has increased its engagement programme and some 37,946 individuals and 1,092 organisations/groups have been assisted with casework community planning in 2009/10. Not supporting Planning Aid would mean the loss of free independent support to disadvantaged individuals and community groups that helps them engage with the Planning system. Planning Aid employs some 60 staff, a cut in grant would mean redundancies.

0.970

To: P/S Greg Clark

From: [redacted]

Location: [redacted]

Tel: [redacted]

Date: 3 June 2010

[redacted]

PLANNING PROGRAMME SPENDING APPROVALS (POST 1 JANUARY 2010)

Issue

1. The Chief Secretary has written to members of Cabinet asking them to re-examine spending approvals given since 1 January this year, as well as re-evaluate pilot schemes within Departments:

   - the requirement to **review spending approvals** applies to all approvals made between 1 January and the election on 6 May;

   - this submission concerns the Planning programmes

   You have already reviewed the most urgent cases that require resubmission to Treasury. This note provides supplementary information to support your decision on remaining approvals.

Timing

2. Routine

Recommendation

3. That you:
   - review the attached annex;
   - agree to the spend proposals.

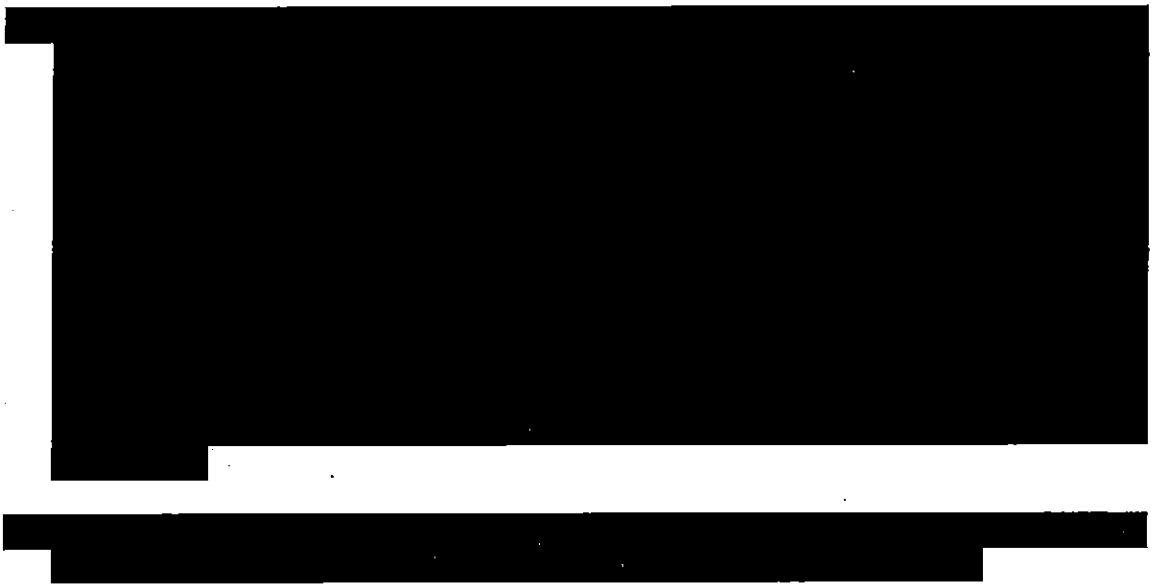
Consideration

4. This concerns a mixture of contractually committed programmes totalling £6.55m and un-committed programmes or smaller projects totalling £1.360m. The contractually committed programmes consist of Planning Aid, Planning Bursaries and the Regional Aggregate Working Party. [redacted] The attached Annex sets out the details of the programmes in more detail. In view of the legal commitments, the value for money, the promotion of localism and the potential for adverse reaction from delivery partners to withdrawal/cancellation of funding we recommend that you agree to all of these spending proposals.

[redacted]

[redacted]

[redacted]



4. ***Approval No. 30: Implementing Planning Reform – Community Engagement - Planning Aid***

- £4.5m is contractually committed and a signed Grant agreement is in place with the Royal Town Planning Institute (RTPI). £1m spent to date in this financial year.

- **What the programme delivers, the benefits and value for money.** Planning Aid has overall aims to empower individuals, groups and communities from disadvantaged and socially excluded backgrounds to effectively participate in the planning process. It plays an important role in helping to achieve a fairer planning system; one which is open, transparent, accessible, inclusive, democratic and has greater public support. The work of Planning Aid is delivered through a combination of casework support, community planning initiatives, capacity building, partnership working and skills development. Over the last three years it has helped nearly 100,000 individuals to engage with and influence the planning system and help to shape the places where they live. The programme delivery is managed on a local basis with the majority of Planning Aid staff (80%) based in regions, many working directly within the neighbourhoods they serve. The success is based on the support of over 1,200 volunteers, mostly chartered Town Planners, who have collectively contributed over 15,000hrs of unpaid time in 2009/2010. This means that for every pound the government invests, Planning Aid is able to almost double this through the use of volunteer time and expertise, promoting localism.

- **Risks if the programme was reduced or cancelled.** There are both financial and reputational risks associated with a reduction in the service during the current year. An early exit from the programme would see additional contractual costs for staffing, business premises, suppliers, etc, scalable up to £470,000 dependant upon the level of reduction. There will also be implications for the RTPI as the umbrella organisation for Planning Aid. In order to mitigate future risk associated with its grant dependant proportion of its income, Planning Aid is currently developing a funding diversification strategy which may progress incrementally post 2011/12 earliest. A reduction in funding in 2010/11 would also mean that the existing levels of engagement and support for individuals and neighbourhoods could not be maintained. The loss of regional offices, some of which were established over 20 years ago, would impact on

community planning, the communities and individuals they have supported and the volunteers who have given their time to work with them. Presentational, Greg Clark has been invited to attend the June RTPT conference and Bob Neill may consider attending the launch of Planning Aid's Good Practice Guide to Public Engagement.

- **How the programme fits with government priorities / strategic fit.** Through its work Planning Aid is able to raise public awareness and support the better understanding of issues which affect development; for example the need for new infrastructure to meet national and local needs, economic development, environmental constraints, and climate change mitigation. There would be reputational risk for the new government which not only promotes localism and the ability of neighbourhoods to shape the future of their areas, but also puts charities and volunteering at the heart of the 'Big Society, if Planning Aid was to be scaled down. Planning Aid is a leading advocate of good community engagement, providing Good Practice advice on the need for early engagement and showing how it can result in better decisions, reduce conflict and avoid costly delays – all key components for economic recovery. The work of Planning Aid England and Planning Aid for London can be mapped against the key themes contained within the 'Big Society'.

- **Affordability.** The £4.5m is committed within the budget allocation for the Implementing Planning Reform programme – Community Engagement workstream.

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To: PS/Greg Clark

From: [redacted]

Location:

Tel:

Date: 11 June 2010

Copies: PS/Eric Pickles
PS/Bob Neil
[redacted]
PDDMs
PS/Advisers

PLANNING DIRECTORATE SPEND APPROVALS - REMAINING CASES FOR REVIEW

Issue

Further to [redacted] submission of yesterday which covered the organisation and staffing of Planning Directorate, this submission provides the further information and advice you requested on specific approvals covered by the submission of 3 June from [redacted]

Summary of recommendations

Of the six programmes covered in the attached annex; we are recommending the following:

- One is discontinued (approval 10);
- Four where savings are recommended, totalling £0.8 million (approvals 15, 30, 56 and 64)
- One where we will shortly provide further advice on the case for funding (approval 3)

[redacted]

ANNEX

[redacted]

[redacted]

4. ***Approval No. 30: Implementing Planning Reform – Community Engagement - Planning Aid***

You asked if this could be reduced and requested a more comprehensive review of this with recommendations.

- £4.5m is contractually committed in 2010/11 and a signed Grant agreement is in place with the Royal Town Planning Institute (RTPI). £1m spent to date in this financial year.

- Planning Aid (PA) provides support to enable hard-to-reach groups from disadvantaged and socially excluded backgrounds to engage more effectively with the planning system. For example, they have run projects to engage with black and minority ethnic groups, young people, disabled people or tenants in particular localities; and experience shows there is a demand for such community professional planning assistance, which supports the localism agenda. Whilst any cut in PA funding would reduce the services PA can provide to these groups and neighbourhoods and could raise equalities issues, we have asked PA to look at efficiency savings that could be made in the current year whilst maintaining their ability to meet the key contracted targets which support this agenda.

- By not filling some posts and making savings in running costs PA have suggested that a £450k (10%) cut in this year's grant allocation from £4.5m to £4.05m could be achieved. The impact of these cost savings would be to stop paid support for community engagement on Major Infrastructure projects and to reduce partnership working and awareness raising by 10% (a reduction of an estimated 50 events or activities and support for some 825 individuals/groups due to loss of staff). PA would try to counterbalance this by increased volunteer recruitment. **Although we judge that at least in the short term this would reduce the level of service Planning Aid provides individuals and**

local communities we recommend that, if you wish to reduce funding in the current year, you consider a 10% reduction in funding. Anything above this would significantly impact the services provided. We will provide advice in the near future based on a review of options for future years.

[redacted]

ANNEX

[redacted]

ANNEX

[redacted]

To: PS/Greg Clark

From: [redacted]

Location: [redacted]

Tel: [redacted]

Date: 02 July 2010

Copies: PS/Eric Pickles
PS/Bob Neil
PS/Permanent Secretary
[redacted]
PDDMs
PS/Advisers

PLANNING AID - PLANNING DIRECTORATE SPEND APPROVALS

Summary

1. Further to [redacted] submission of 11 June, you asked for further information on funding options for Planning Aid. You will also be considering Planning Aid in the context of the Spending Review on Monday.

2. I would be very happy to discuss this with you.

Timing

3. The next quarterly grant payment is now due. Planning Aid urgently need to know their position so they can plan accordingly.

Recommendations

4. You asked that we submit more comprehensive and detailed options, including options for larger savings through to Planning Aid being abolished. The options are set out at point 8 in the attached Annex. We are recommending the following:

   - a 10% reduction in funding in 2010/11,
   - and within this revised budget greater resources to be directed at neighbourhood outreach.

5. The attached Annex sets out more detail.

[redacted]

Background

1. Planning Aid is a charitable trust affiliated to the Royal Town Planning Institute (RTPI) and at present entirely funded by CLG. Without CLG funding Planning Aid would have to find funding from elsewhere or be wound down as it is unlikely that they would be able to find alternative funding this financial year. Planning Aid supports local people and local communities, and in particular the hard to reach and disadvantaged. In this way communities can exercise real influence over the future development of their neighbourhoods in a positive, informed, inclusive and balanced manner. Often it is the Local Planning Authority which directs the applicant to Planning Aid who then support the individual or group with their own planning application or help them to engage with other local applications such as housing.

2. This community empowerment activity is delivered by over 1,200 volunteers (chartered town planners and planning professionals) who offer their expertise and knowledge free of charge to help those who cannot afford professional advice. In doing so they take back their experiences and the training provided by Planning Aid to their organisations. This work is supported by a small professional staff team.

3. Anyone can have 15 minutes of free advice from Planning Aid but otherwise unless they are from one of the target groups they are advised to seek professional advice from a Planning consultant.

4. There is a contractually binding grant letter in place committing CLG to funding of £4.5m in 2010/11. £1m has been spent to date in this financial year and the next grant payment is due on 1 July. In view of the contractual commitment, to cease funding Planning Aid would require an exit strategy with a redundancy programme, the cost of which would need to be borne by CLG.

Consideration

Value Added

5. A significant factor in providing value for money is the number of people Planning Aid support who are part of the 'wider' community; this is difficult to measure as not every participant at a community event or in community casework is recorded. To illustrate the extra reach that Planning Aid achieves, of the 2,755 groups that received either planning advice or attended a community event last year, on the basis that each group consisted of 25 members, an estimated 68,875 people received help. This is in addition to the 38,000 individuals who received help and advice. In providing this total service Planning Aid helped 106,875 people last year and for every £1 of public funding Planning Aid added an in-kind benefit of £5 through the use of its volunteers. This £ 5:1 ratio represents good value for money.

Delivering Localism

6. Planning Aid recognises that whilst people have different knowledge and abilities to enable them to engage, they all share a detailed local knowledge of the issues which affect their local neighbourhood. Planning Aid can help even the most disadvantaged with engaging with the planning system. For example an individual or community group seeking assistance will be assigned a local chartered planner who will provide advice until the planning application has been concluded. In this way inhabitants will always be provided assistance on a local basis with local knowledge to support more informed decisions about the future of local neighbourhoods. All through the process Planning Aid will engage with a group in such a way that the group can take ownership of their own planning process, providing embedded skills in the community to reduce their future reliance on Planning Aid. Last year Planning Aid was very involved in the consultations on National Planning Statements including events, producing leaflets and web-based materiel which helped disadvantaged groups engage in the process.

7. The legacy of Planning Aid's work can often extend beyond the initial involvement in planning into improved engagement by the hard to reach groups it serves in other aspects of local service provision. Planning Aid provides an independent, impartial and professional support to a section of society that otherwise would not be enabled to engage with the planning system. This supports the Governments objectives for greater community engagement in the planning process.

2010/11 Funding Options

8. You are asked to consider the following funding options for this current financial year:

Option1 - Delivering more with the currently contracted funding - £4.5m

9. Planning Aid is well placed to support a return of power to local communities. This could be undertaken with a new outreach service which would be developed to provide ongoing support. This approach would improve capacity within the planning fraternity in support of inclusive engagement, by expanding on the advice Planning Aid provides to local authorities and others on good practice engagement with local people.

Option 2 - 10% Reduction from £4.5m to £4.05m

10. A £450k (10%) cut in this year's grant allocation from £4.5m to £4.05m could be achieved through efficiency savings realised as a result of improved systems, processes, and halt of recruitment to planned new posts. Support for communities to engage with the successor to the Infrastructure Planning Commission (IPC) would be scaled back.

11. You asked for details of the 50 events previously proposed as cuts to achieve the 10% saving. These would have been the anticipated events run by the IPC for consultation with communities on infrastructure projects and which are not now needed. Planning Aid would still maintain its support in the consultation on National Policy Statements.

12. It's envisaged that even with a 10% cut Planning Aid could be asked to examine through management efficiency savings extending the neighbourhood outreach of its service by increasing the number of community planners in localities.

Option 3 - 20% Reduction from £4.5m to £3.6m

13. To scale back the operations to this level we would need to negotiate reduced contracted targets with Planning Aid. For example we would need to agree a reduction in the level of planning case work for individuals and number of neighbourhood planning events. The cost reduction would be achieved by not filling forthcoming vacancies, not renewing staff contracts that end during the period and by reducing the number of local offices. This would of course reduce the service Planning Aid provides and the precise effects of the reduction in outputs would need to be worked up.

14. Any reduction in the current year funding in excess of 20% would leave the Planning Aid service unsustainable.

Option 4 - Complete Withdrawal of Funding During 2010/11

15. A negotiated and planned exit strategy would need to be developed and undertaken in order to wind down the Planning Aid service. There would be liabilities due to contractual commitments this financial year which would need to be borne by CLG. The effect of a withdrawal in funding would be to immediately stop the service delivered by Planning Aid.

16. We recommend Option 2 as a means of making savings and being able to maintain the service Planning Aid provides.

To: PS/Greg Clark

From: [redacted]

Location:

Tel:

Date: 09 July 2010

PLANNING AID - PLANNING DIRECTORATE SPEND APPROVALS

Summary

1. Further to [redacted] submission of 2nd July, you asked for further information on funding options for Planning Aid in future years.

Timing

2. Not urgent: if you agree the recommendations a further submission will be presented giving options for the level and extent of future service provision. You have agreed this financial year's funding.

Recommendations

3. That we agree to fund Planning Aid for a further 3 years subject to

    - A detailed analysis of the service that can be provided with different funding levels.
    - A review of how the service is targeted to allow access to be more widely available to community users.

4. The attached Annex sets out more detail.

[redacted]

Introduction

1 Planning Aid has to date been a service targeted at deprived and hard to reach groups who would not access the services of the private sector planning consultancies and who often feel alienated from the decisions being taken by Local Planning Authorities on their behalf. Planning Aid provides professional, impartial and independent advice and as such has the confidence of these disadvantaged groups. As the client base has no funds to pay for these services (a prerequisite of the service being provided) there is no means to charge for the support and since 2003 the government has supported this service.

2 It is appropriate to challenge this delivery model at this time. Although Planning Aid was aimed initially to encourage more community engagement in planning and a deeper understanding of how to get involved in planning applications; there is greater opportunity for Planning Aid and to support the government's current localism agenda by providing advice and guidance to communities and individuals. This will enable them to both build neighbourhood plans and create the environment where the development is welcomed and sought. This is not a service which benefits local authorities. There is therefore no incentive for them to pay for the service. The public benefit from the service and it is for that reason government has seen the benefits of financially supporting it.

Budget

3 In order to operate at the lowest community level the Planning Aid Service (based on 2009/10 figures) operates through 9 offices co-ordinated through a National office. A separate London based service is also provided. Planning Aid argue that this service arrangement allows them to best serve the client base at the lowest point of engagement.

4 Ministers have already decided to reduce this year's budget to £3.6m and this will mean that the service will need to find £900.000 of operational savings this year. Half of that saving is predicted to be achieved through efficiency savings but the remainder will need to be found from a combination of savings on salaries and service provision.

Further Provisions

5 You have asked if the service can be totally self funding and we do not think it can be. If we believe there is merit in supporting communities to be involved in the planning decisions that affects their lives, we need to continue some level of financial support. We recommend however that we discuss with Planning Aid how a re-moduled service could be delivered for less. We can ask what the service would look like with a support grant of £3.4m, £3.2m, and £3.0m per annum.

6 This work would enable an informed decision to be made about the level of service we are prepared to support and the VFM that this would provide.

Additionally it is proposed that we challenge Planning Aid on who uses their service to try and ensure that the service is available to those who need it.

7 Do you agree with this approach?

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From: PSGregClark
Sent: Wednesday, June 23, 2010 11:23 AM
To: [redacted]
Cc: [redacted]

Subject: RE: Submission on spending approvals

[redacted]

No.30
- Please submit more comprehensive and detailed options, including options for larger savings and abolishment. Also, what are the '50 events' referred to in the third bullet

[redacted]

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From: PSGregClark
Sent: Monday, July 05, 2010 5:57 PM
To: [redacted] PSGregClark; [redacted]
Cc: [redacted]; PSAdvisers; PSEricPickles; PSBobNeill; PSPermanentSecretary; PDDMs_EH
Subject: RE: Planning Aid - Planning Directorate Spend Approvals Submission

[redacted]

Thank you for your submission which the Minister has considered. He has decided to go for option 3 (i.e. a 20% cut this year) but would also like you to urgently review how to remove all CLG funding from this in future years. He feels that if Local Authorities find it useful they should subscribe to it. Can you please proceed with option 3 and provide advice on the review by 2pm on Friday 9 July.

Many thanks
[redacted]

[redacted]
Private Secretary -- The Rt. Hon. Greg Clark MP
[redacted]

CLG staff: For Box times **click here**

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From: PSGregClark
Sent: Friday, September 10, 2010 9:24 AM
To: [redacted] PSGregClark
Cc: PSEricPickles; PSBobNeill; PSPermanentSecretary; PSAdvisers; PDDMs_EH[redacted]

Subject: RE: Planning Aid Future Funding.

[redacted]

Apologies for the delay in responding, Greg has now considered this submission and has commented as follows:

Greg does not agree with your recommendation to continue funding Planning Aid. We should use the budget for planning aid to support the development of community plans.

How we do this will be considered as part of Bill preparation. A 20% cut should be announced at the time of the Spending Review.

[redacted]

[redacted]
Assistant Private Secretary to The Rt Hon Greg Clark MP
Minister for Decentralisation
DCLG
[redacted]

CLG staff: For Box times **click here**

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From: [redacted]
Sent: Friday, September 10, 2010 6:33 PM
To: PSGregClark
Cc: [redacted]
Subject: RE: Planning Aid Future Funding.

[redacted]

We have some questions on the minister's comments:

"Greg does not agree with your recommendation to continue funding Planning Aid. We should use the budget for planning aid to support the development of community plans."

Q:The original sub at para 2 of the annex we suggest the support of community planning should be the main focus of Planning Aids work . Does the minister want Planning Aid to support the development of community plans with our funding support? Or is this money to be used for community plan work which Planning Aid might "bid for " ? Or should we tell planning Aid they need to wind up ? The Minister needs to be sighted on the original advice where we advised that there would be costs arising if Planning Aid were to stop delivering the agenda we asked them to help with and that we may need to build in an "exit funding " strategy. This has been done for other organisations. There are also reputational risks here for CLG and its role in supporting planning.

"How we do this will be considered as part of Bill preparation. A 20% cut should be announced at the time of the Spending Review."

Q: does this mean:

- announcing the already implemented 20% cut for funding in this financial year and no further specific funding for Planning Aid in the SR10 years, (but they might get some of the money if they are commissioned to do such work; or
- a further 20% cut commencing in the first of the SR10 financial years (2011/12) and no funding beyond that or
- a 20% cut in the first of the SR10 financial years and the funding continuing at that level for the remaining SR years

This an area where a face to face meting would really have helped and I am sorry to come back to you on this (I have seen the handwritten note.) I am now away until 27th Sept ; can you respond to [redacted] please.

[redacted]

Communities & Local Government

[redacted]

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From: PSGregClark
Sent: Friday, October 01, 2010 2:22 PM
To: [redacted]; PSGregClark
Cc: [redacted]
Subject: RE: Planning Aid Future Funding.

[redacted]

Planning Aid meeting, Thursday 30th September

Summary of main points:

The Minister confirmed that he did not propose to make further cuts in addition to the first 20% identified, but that Planning Aid should not have exclusive access to the remainder of the funding.

It was discussed how the remaining money could be allocated given that the amounts would be tiny if distributed evenly across the country to individual neighbourhoods. **The Minister asked for a paper on how neighbourhood plans could be financed** before making any decisions on how the money would be distributed, and that the Planning Aid budget should form part of this. He also said that [redacted] **should ask Planning Aid to come up with suggestions for a programme of how the available funding could be allocated.**

[redacted] explained he is visiting Dorset DC on Friday, the Minister agreed that it would be a good idea to float ideas off them on how to use the money available this financial year (£3.6m).

It was agreed that [redacted] **would provide the Minister with a copy of the Headingly neighbourhood plan document** to get a conceptual idea of what they could look like.

Many thanks

[redacted]

[redacted]
Assistant Private Secretary to The Rt Hon Greg Clark MP
Minister for Decentralisation
DCLG
[redacted]

CLG staff. For Box times **click here**

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Appendix 4. Steiner schools

Reference: First Tier Tribunal (Information Rights) Case No. EA/2014/0017

Notes. The decision notice on this case, dated 24 June 2014 confirmed that 'the Commissioner requires the Department to take the following steps to ensure compliance with the legislation:

(i) Disclose those extracts of the submission dated 3 August 2010 which fall within the scope of the request, namely, paragraphs 4(ii); 10-15 and Annex A; and

(ii) Disclose the submission dated 23 September 2010 in its entirety save for the third; fourth and fifth sentences of paragraph 16 which are properly withheld under section 42(1).

Both pieces of information are included in this document.

Part (i) extracts from 03 Aug 2010 submission, including Annex A to that submission.

Recommendation

4. That Ministers:

(ii) agree that officials should respond in writing to all Steiner proposals received as attached at Annex A, setting out the policy questions their pedagogical approach raises (as described in paras 10 to 15) and offering a meeting to discuss them;

Suitability of Steiner proposals

10. The Steiner Waldorf Schools Fellowship claims that Steiner education is part of state funded mainstream provision in most European countries. Its only state funded presence in this country is the Hereford Steiner Academy, which opened in September 2008. It has a Funding Agreement which states it is to manage and deve lop a school offering a broad curriculum in accordance with the ethos and teachings of Rudolph Steiner.

11. As an Academy, however, it is subject to Section 5 Ofsted inspections as applied to all maintained schools, and the current inspection framework is antithetical to the Steiner ethos/pedagogical approach in the following areas:

- *Literacy in Early Years Foundation Stage (EYFS) and Key Stage 1 (KS1)* differ from both the National Curriculum and the inspection framework. In the Steiner Kindergarten (4-6 yrs of age) the focus is on physical growth and movement, imaginative child generated play, imitation and "eurythmetical"[1] activities. Formal learning follows in the age 7-12 age group. It was agreed by Ministers in the previous government that the Academy would not have to conduct National Curriculum Tests at KS1, but would do so at KS2. However, the inspection framework is predicated on more formal learning - especially writing in EYFS and KS1, and in the Ofsted monitoring visit this was a difficulty. The Steiner Academy has since asked for dis-application of the EYFS.
- *KS2 Tests*. The school did meet the requirement of making the appropriate arrangements for KS2 tests last summer, but all parents refused to allow their children to take them and requested alternative education. When Her Majesty's Inspectorate of Education (HMIE) visited last November the Academy had no data on attainment at KS2 and HMIE judged from lesson observations that they were not making sufficient progress at this key stage (see Annex B for full report).
- *Teaching and learning*. The Steiner Waldorf Schools Fellowship argues that children need time to reflect on what teachers teach and that gains in learning are not immediately apparent but emerge later. Therefore any process which judges learning as the immediate outcome from teaching in a lesson is inappropriate. This is in clear opposition to the Section 5 inspection

[1] A Steiner website defines eurhythmy as "a dance-like art form in which music or speech are expressed in bodily movement; specific movements correspond to particular notes or sounds."

framework.

12. Officials have been meeting with Ofsted to try and resolve these issues as the Academy is due a Section 5 inspection next year, (before the framework is changed from September 2011). It is likely to be judged inadequate as its provision does not meet the framework requirements. The outcomes at age 16 are however above national standards. We are continuing to work with Ofsted on agreeing a way forward. The independent school inspection framework is based on compliance with the regulatory standards which all independent schools must meet as a condition of their registration with the Department. Inspections against the framework are conducted either by Ofsted, or by a body approved by the Secretary of State. Independent Steiner schools are inspected by the School Inspection Service (SIS) which has been approved to inspect these schools and those affiliated to Focus Learning Trust (the educational arm of the Exclusive Brethren). Ofsted has to date been unwilling to support applications for any school exemption from Section 5 inspections, because of the precedent that would establish.

13. In addition to concerns around the Steiner pedagogical approach, there is also a handling/presentation risk given the racist and anti-Semitic nature of some of Rudolph Steiner's writings. The Steiner Waldorf Schools Fellowship website clearly and prominently states on its homepage:

"The SWSF is opposed to all forms of discrimination against any person or group of people on the grounds of race, gender, faith, disability, age and sexual orientation and is committed to promoting equality of opportunity and reflecting the diversity of the children, staff and parents served by Steiner schools. We also reject any racism stated or implied in any of Rudolf Steiner's speeches and writings (dating from the mid-1880s to his death in 1925)."

14. Similarly, the website states "The Steiner Waldorf Schools Fellowship acknowledges Rudolf Steiner as the founding inspiration of modern day Steiner schools, but does not promote Anthroposophy or endorse every aspect of it." Anthroposophy is a spiritual philosophy founded by Rudolf Steiner, which postulates the existence of an objective, intellectually comprehensible spiritual world accessible to direct experience through "inner development". In its investigations of the spiritual world, anthroposophy aims to attain the precision of natural science's investigations of the physical world. Regardless of the Fellowship's public stance on anthroposophy, any perceived endorsement by the Department of such a philosophy may attract unfavourable media attention. Officials are also in receipt of correspondence from concerned parents who had placed their children in Steiner schools, citing teaching staff's affirmation of anthroposophy, a fatalistic approach to illiteracy in some children, and a refusal to respond to complaints about allegedly racist conduct by staff.

15. Due to the concerns outlined in paragraphs 11 and 12, we recommend that officials send the letter attached in draft form as Annex A, confirming that we would need to resolve these issues are in order to progress any Free School proposals from the Steiner Waldorf Schools Fellowship.

DRAFT LETTER TO STEINER FREE SCHOOL APPLICANTS

Dear

Thank you again for submitting your proposal to establish a Free School.

Steiner proposals raise some policy questions for the Department, particularly around the approach to early years education, tests at Key Stage 2 and compatibility with the Ofsted framework.

We would welcome the opportunity to explore these questions with you and ask therefore that you contact me at the above number below to arrange a meeting at a mutually convenient time.

Yours sincerely,

Relevant Deputy Director

Part (ii) Submission dated 23 September 2010

PS/SECRETARY OF STATE

From: [redacted]

Tel: [redacted]

Date: 23 September 2010

Copy: PS/Gibb
PS/Hill
Permanent Secretary
PS/Advisers
Peter Houten
David Jeffrey
Penny Jones
[redacted]
Lesley Longstone
[redacted]
Mela Watts
And others at end

STEINER SCHOOLS – HANDLING PRESENTATIONAL RISKS

Issue

1. To note the key points contained in parental complaints to officials about Steiner schools, the accompanying presentational risks of approving Steiner Free School proposals, and a corresponding handling plan.

Recommendation

2. That the Secretary of State notes:

(a) the complaints summarised in this submission and the media risks arising from them; and

(b) the proposed lines to take in paragraph 20.

Summary

3. Officials have received a number of complaints from aggrieved parents making allegations about the impact of the Steiner philosophy in some schools.

Some of these allegations are very serious, including racist abuse by other pupils which the school allegedly failed to act upon despite repeated complaints, and the use of racial epithets by teachers. The parents have provided officials with large amounts of material to substantiate their allegations and have repeatedly asked for reassurances that Ministers will not fund or support Steiner schools. We are not sure of the extent of the anti-Steiner movement (that is referred to in the materials provided) or how widespread the dissatisfaction from parents is. Our experience of the Steiner Academy in Hereford does not reflect these concerns. However, in the event of a Steiner Free School being approved, there may be some associated handling risks. This submission briefly summarises the material the parents have supplied, set in the context of our knowledge of Steiner independent schools and the Steiner Academy, and sets out a high level handling plan including lines to take in the event of a successful Steiner proposal for a Free School.

Timing

4. Routine.

Background

5. Officials in Academies Group have worked closely with members of the Steiner Fellowship over several years, in the establishment and running of the Steiner Academy in Hereford. Steiner representatives have been willing to compromise on various aspects of their beliefs in order to sign the Academy funding agreement, including, for example, appointing a principal and providing for the pupils to sit the Key Stage 2 tests. Officials in Free Schools Group met a large group of Steiner representatives this week to explain the process of applying to become a Free School. Five Steiner schools have already applied, and several more are considering it.

6. As the Secretary of State is aware though, the Department has received concerns from two parents surrounding the treatment of their mixed-race child at a Steiner school, including racist abuse by other pupils which the school allegedly failed to act upon despite repeated complaints, and the use of racial epithets by teachers. Officials met the parents who provided a large amount of material on the anthroposophical basis of Steiner pedagogy and its apparently racist nature, and a critique of the Steiner approach to literacy and numeracy, bullying and transparency to parents.

7. We cannot reliably establish the extent of the anti-Steiner movement, and have only seen materials provided by dissatisfied parents. Officials have received several emails since the meeting, from the two parents and others, asking for assurances that the Secretary of State has seen the materials they provided and what decisions have been made on funding any Steiner Free Schools. Given their interest and the fact they have met officials from the Department, it seems likely that they will contact the media if a Steiner Free School is announced.

8. This submission summarises the materials received, and suggests lines to take in response to criticism if a Steiner Free School is approved.

<u>Summary of materials</u>

Influence and racist nature of anthroposophy

9. According to the materials provided, Steiner education is said to be founded on spiritual rather than educational principles and concepts. The materials indicate

that the curriculum is structured around the spiritual philosophy of Rudolf Steiner, called anthroposophy (spiritual science), which includes the belief in the reincarnation of the spirit through the races, from Black to Aryan. There is a job description for a classroom teacher for a Steiner school in Norwich which states that candidates must have a 'genuine commitment to anthroposophy and Steiner education'. To become a Steiner teacher you undertake a 'certificate in anthroposophical studies' which includes 'evolution of human consciousness', 'occult science', and 'towards the consciousness soul'.

10. Racist elements of Steiner's writings were highlighted in the material, including statements such as "blond hair actually bestows intelligence. In the case of fair people, less nourishment is driven into the eyes and hair; it remains instead in the brain and endows it with intelligence".

Approach to literacy and numeracy

8. A concern raised by the two parents and in various items of official correspondence, is the Steiner approach to not teaching basic literacy and numeracy until children have their adult teeth, and that parents are strongly encouraged to withdraw their children from sitting SATs.

9. With the Steiner Academy, we agreed when negotiating their funding agreement that they would be exempt from Key Stage 1 tests but that they would participate in tests at Key Stage 2, so Ofsted could assess pupil performance. Last year, the Academy pupils did not sit the tests (the Academy provided the exam papers and rooms for pupils to sit the exams but parents chose not to allow their pupils to sit the tests).

Approach to bullying

10. A recurring theme in the material provided is that bullying is not tackled within Steiner schools. One parent complains that they witnessed a physical attack on their son where a teacher failed to intervene, and subsequently justified this approach by claiming the children were 'working out their karma'. A teacher training document entitled *How should bullying be handled?* asks "can a child's karma or destiny be that of a victim or bully? It is a child's destiny to seek certain experiences to build his or her self-esteem and inner self. Should a potentially abusive situation be stopped, and if so, at what point?" It goes on to state "there are normal levels of aggressive behaviour particularly as children are exploring the cruel aspects of their nature. Every school provides the opportunity for some bullying to take place, as children test each other out and work out their roles in the classroom and playground relationships."

11. In addition to the material provided by parents, the Department's Independent Schools team is aware of serious complaints of staff bullying pupils in 8 of the existing 25 registered independent Steiner schools. In several of the cases of bullying complaints, there is also a concern about the way the school has handled the allegations, failing to investigate accusations of bullying and physical abuse by teachers in some cases.

12. Stephen Williams MP wrote to Nick Gibb in June about the difficulties his constituent's son has experienced at Bristol Steiner School. His constituent has said that his son has been bullied, which has not been addressed by the school, and that the school management structure is inadequate to deal with these issues and to respond to complaints from parents. The Department asked the Schools Inspection

Service to conduct an unannounced inspection to look at supervision levels and procedures to deal with bullying, which will take place this term.

13. In four Steiner schools, the Department has received complaints about physical abuse from teachers towards pupils, including spitting in a pupil's face, making sexual innuendos and throwing a rounders bat at a pupil. At one school, a teacher was allowed to continue teaching for two days after a pupil reported that they had made inappropriate suggestions to them. The pupils were encouraged to visit the teacher at his home to deliver flowers and gifts and parents were asked if their sons and daughters could contribute towards a leaving gift. The school did refer the teacher to the local authority and he was arrested following an admission of guilt. The local authority is concerned about the way the school handled the situation and the Schools Inspection Service will inspect the school this autumn to look at safeguarding procedures. At another school, Ofsted found management worryingly unsatisfactory and a failure to deal with physical abuse by teachers and child protection issues.

14. Free Schools are required to follow existing legislation which requires head teachers to take measures aimed at preventing all forms of bullying. In addition, the independent schools standards require independent schools to have regard to Departmental guidance on tackling bullying. While that guidance does not require schools to use particular strategies, the approach reportedly used by Steiner schools would not accord with the overall approach indicated in our guidance. We would need to assure ourselves, in discussion with the Steiner fellowship, that a Steiner Free School will have sufficient anti-bullying policies in place. Bullying has not been an issue at the Steiner Academy.

Lack of transparency

15. A common accusation from correspondents is that the movement is not transparent – not only about the influence of anthroposophy and its in principle opposition to SATs, but also about what takes place in the classroom. Officials are in receipt of Steiner teacher training materials that imply a highly secretive approach to what takes place in class, stating teachers should **"**…never allow anyone access to lesson notes or records' and 'anything indicating what the class may have learnt, or covered in Morning Lesson should be 'lost' before you leave the school."

<u>Responding to the concerns</u>

16. Despite the concerns with Steiner schools summarised above, it is important to state that when deciding whether to approve a Free School proposal, the Secretary of State will judge each case on its merits. Taking the same approach with Steiner would mean that we do not use the material provided by the parents about specific cases in particular schools as the basis for our approach to all Steiner schools. We should discuss any concerns with the Steiner Fellowship and give them an opportunity to address them.

17. We have no evidence that any of the allegations and approaches outlined above are found in the Hereford Steiner Academy, which received a monitoring visit from Ofsted last year.

Presentation

18. If the Secretary of State funds Steiner Free Schools, it is likely that the parent groups will seek media attention and will provide the media with the material

which they claim indicates the racist motives of Steiner education. The Department has also received several pieces of correspondence asking for reassurance that Steiner schools will not be state funded.

19. Officials will work with press office to produce a reactive media and communications handling plan based on the lines to take below. It will be important to stress that a state-funded Steiner Academy already exists (Steiner Academy Hereford), that each Free School proposal will be carefully screened for extremist values and that the Steiner Waldorf Schools Fellowship has publicly distanced itself from any racism stated or implied in the writings of Rudolf Steiner.

Lines to take

20. In the event that Ministers do approve Steiner Free School proposals, we suggest the following key lines to take in response to any public or media criticism:

- As has been made clear repeatedly, the Secretary of State would not countenance approving any proposals that endorse racism or run counter to the UK's democratic values; the Steiner Waldorf Schools Fellowship has clearly and publicly distanced itself from any racism stated or implied in the writings of Rudolf Steiner;
- The Steiner Waldorf Fellowship has also publicly affirmed that it does not promote anthroposophy or endorse every aspect of it;
- It would be neither fair nor logical to assess proposals for new Steiner schools on the basis of complaints or allegations from parents in other Steiner schools – just as each Catholic or Jewish school is different, so is each Steiner school. Each Free School proposal is assessed on its merits;
- Providing all parents with the choice currently only available to those with the ability to pay is at the heart of the Free School policy – enabling access to alternative pedagogies such as Steiner and Montessori that many parents currently pay for is an example of that expansion of choice;
- As Academies, all Free Schools will of course be accountable to both the Secretary of State and Ofsted, and any complaints regarding the conduct of staff or content of teaching will be taken very seriously.

21. Officials will also need to respond to the parents and other correspondents who have complained to the Department and asked for assurances that Steiner schools will not receive state funding. This will take very careful handling. We propose to respond using the lines set out above, emphasising first that the Secretary of State assesses each proposal individually and on its own merits, and that he would never consider approving a proposal where he had any concern about what was being taught or the suitability of the proposers. We will also highlight the importance of choice for parents, and the requirement on Free Schools to make clear in their information to parents what their ethos and philosophy consists of.

Finance

22. There are no financial implications associated with the recommendations set out in this submission.

Internal Clearance

23. [redacted] [redacted] Mela Watts

Copy list continued: [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]

AM(MWG)(05)1 **COPY NO**
21 September 2005

CABINET

MINISTERIAL WORKING GROUP ON ASYLUM AND MIGRATION

_____

FREE MOVEMENT OF WORKERS FROM NEW EU MEMBER STATES

Note by the Secretaries

Summary

1. This paper invites Ministers to consider whether to retain the Worker Registration Scheme (WRS) for (up to) another three years, or close it down at the end of April 2006. The paper sets out the implications and risks of such a decision on the UK's social assistance system (as well as child benefit and child tax credit)[1], the Government's wider managed migration policy, future waves of enlargement and public and media relations.

Recommendation

2. Ministers are invited to consider whether to retain the WRS for (up to) another three years from 30 April 2006.

[1] References to social assistance in this paper include local authority housing and homelessness assistance.

Background

Legal Context

3. The WRS was established in May 2004 and applies to nationals from eight of the new EU Member States ('the new Member States')[2] who wish to work in the UK.

4. The Accession Treaty allowed existing Member States to derogate from the usual position under European Community law, which gives EEA workers and work-seekers a right to reside in other Member States (i.e. the right to move freely, to live and take up employment or look for work). The derogation applies for an initial period of two years (i.e. until April 2006) and could be extended for a further three years. By 1 May 2009, all restrictions on the free movement of workers are to be lifted unless there is a serious disturbance to the labour market, in which case restrictions may be continued for a further two years.

5. The Accession Treaty did not provide for any derogation from EU regulations governing EEA nationals' rights to social assistance or social security in other Member States. Prior to 1 May 2004, individuals could generally qualify for income-related benefits, housing and homelessness assistance, if they were 'habitually resident' in the UK, normally after a couple of months' residence; or, in the case of child benefit and the child tax credit, ordinarily resident.

6. **Annex A** explains the effects of the derogation and the benefits, housing and tax credit regulations in more detail.

Government decision

7. In 2002 the Government announced, with cross-party support, that it intended to open the UK labour market fully to citizens of the new Member States. By early 2004, however, it became clear that most other existing Member States (significantly, Germany, Spain, France, Austria and Italy) intended to apply restrictions. At the same time, the Government came under significant public pressure to review its decision, stimulated by concerns (particularly in the tabloid media) about large 'floods' of people migrating to the UK, claiming benefits and threatening the jobs of domestic workers.

8. The Government announced in February 2004 that it would put in place transitional arrangements to monitor the numbers of people from the new Member States working in the UK and to restrict access to social assistance by work-seekers from those States.

Current arrangements

9. The *Accession (Immigration and Worker Registration) Regulations 2004* have two main effects:

(a) Firstly, they require most workers from the new Member States to register with the WRS in order to work legally in the UK (first applications cost £70). Until they have worked for authorised employers for 12 months continuously[3], they do not have full rights of free movement and are not eligible for out-of-work benefits and local authority housing if they become unemployed;

[2] Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia
[3] I.e. with no more than 30 days' interruption in any 12 month period

(b) Secondly, nationals from the new Member States do not have a right to reside in the UK as work seekers. This means that while they are seeking work they only have a right to reside as an economically inactive person, and this right is conditional on them having sufficient resources to avoid becoming a burden on the UK social assistance system. Amendments to income-related benefits, child benefit, child tax credit and housing regulations effectively restricted access to these forms of support by economically inactive EEA nationals, by requiring claimants to demonstrate that they had a right to reside in the UK. Without the WRS and the associated regulations, access to income-related benefits by unregistered workers and work-seekers from the new Member States could not also be controlled in the same way. Further detail is provided at **Annex A**. The European Commission have shown concern that these arrangements may be in contravention of EU legislation on equal treatment of workers. Although the risk of infraction has decreased, it still remains a possibility.

Consideration

10. The Government now needs to decide whether to:

- **Close the Worker Registration Scheme** and provide nationals from the new Member States with full free movement rights. This would mean the UK could no longer restrict access to social assistance, child benefit and child tax credit beyond the limits currently in place for citizens of the EU15. In other words, it would become impossible to restrict access to benefits and local authority housing by workers from the new Member States if they ceased to work within the first 12 months or by work-seekers (once they had become habitually resident – which generally takes only a couple of months – or ordinarily resident in the case of child benefit and child tax credit); or

- **Maintain the current arrangements** for (up to) another three years, with periodic reviews, as necessary.

Process and Timing

11. The UK is required to inform the European Commission **in March 2006** whether it intends to continue its transitional arrangements beyond 30 April 2006. Closure of the WRS would require affirmative regulations to repeal the *Accession (Immigration and Worker Registration) Regulations 2004.* The regulations would need to be laid **no later than February 2006**. No legislative or operational changes would be required to retain the Worker Registration Scheme.

12. Bulgaria and Romania are due to accede to the European Union on 1 January 2007 (although this may be delayed until January 2008). Government will need to decide whether to open its labour market to Bulgaria and Romania. This is covered in paper AM(MWG)(05)2. The arrangements for the eight new Member States need not be affected by decisions relating to the Bulgaria and Romania accession. A decision to close the WRS for the eight new Member States would not prevent it being re-established for Bulgaria and Romania, however, it could make Bulgaria and Romania a hotter media issue during the passage of the EU Accessions Bill.

Experience since EU Enlargement

13. In general the UK's arrangements have proven very effective in limiting the number of people attempting to claim social assistance, whilst providing employers

with a large pool of labour to ease recruitment difficulties and skills shortages, particularly in the agriculture and hospitality and catering sectors.

14. The evidence shows that although the number of workers registering for employment has been higher than expected (with 232,000 applicants between May 2004 and June 2005), overall the impact on the UK labour market has been modest but broadly positive, with an increase in output and total employment. There is anecdotal evidence that some workers are returning home after brief periods of employment in the UK. Net migration is estimated to be in the region of 60,000 in the first eight months since enlargement[4], which is not far from early UCL estimates of 70,000 annual net migration from the new Member States. Proportionately, there has been significantly more migration to Ireland than the UK[5]. The WRS appears to have reduced the number of people working illegally[6] and limited opportunities for exploitation of migrant workers.

15. Claims for social assistance, child benefit and child tax credit have been low. According to the quarterly monitoring reports published by the Home Office, for example, between May 2004 and June 2005 there were 12,222 applications for child benefit (of which 41% were approved) and 3444 applications for child tax credits (of which 52% were approved). Fewer than 1,700 applications for Income Support and Jobseeker's Allowance were processed and of these just over 50 met the 'right to reside' test. The same is true of housing and homelessness assistance. For example, between May 2004 and March 2005 there were 43 lettings by local

[4] Estimate from a DWP study: "The impact of FMOW from central and eastern Europe on the UK labour market: early evidence", based on data from the Labour Force Survey.

[5] A report by the European Citizen Action Service found that Ireland has received over 85,000 workers from the 10 new EU countries in the period from May 2004 to June 2005. Calculated on a per capita basis, Ireland received six times as many migrant workers as the UK during the same period. This is probably a result of the Irish policy to introduce a presumption of only issuing work permits to third country nationals where employers can prove no EEA worker is able to fill the post.

[6] Up to 30% of people applying for registration may have already been in the UK before 1 May 2004. The DWP study also identified reduction in illegal workers as a key outcome of the UK's policy

authorities of long term social housing to people from the new Member States: this represents just 0.03% of the average number of lettings to all new tenants over a typical 11 month period.

Arguments for Closing the Worker Registration Scheme

16. There are four main arguments for closing the WRS and providing full, free access to the UK labour market.

(a) Arguably, **the WRS has served its purpose**: analysis of the WRS data has demonstrated that the UK labour market has successfully absorbed the new workers. Allowing for some seasonal variation, levels of applications per quarter have been stable since the inception of the scheme. At this stage it is unlikely that this trend will change, other than for levels of applications to decline. The vast majority of workers from the new Member States are young, single, in full-time employment, and not claiming benefits. As time goes by the relevance and usefulness of the WRS data (both analytically and presentationally) is diminishing because workers are not required to inform the WRS when they leave employment. Moreover, the commitment to publish quarterly monitoring reports gives the media a regular opportunity to compare the high numbers of registrations with original 'guesstimates' that net migration from the new Member States would be between 5,000 and 13,000 migrants a year.

(b) The **Home Office has incurred costs of around £3.55 million**[7] in unrecovered application fees to run the WRS during 2004-05 and 2005-06**.** However, from 1 October 2005, when the new application fee comes into effect, the WRS will be fully self-financing. There is a risk that the WRS may increase costs in other

parts of IND, if more people from the new Member States apply for EEA residence permits, which must be considered free of charge. Nationals of the new Member States will be required to show a Residence Permit when they are no longer subject to the WRS (after 12 months' continuous employment) in order to prove their status to employers. However, early data does not show any evidence of an increase in demand, but Home Office will continue to monitor volumes.

(c) **the WRS creates additional bureaucracy and costs for employers**. Removing the registration requirement would result in some administrative savings for employers, would support the Government's wider objectives to reduce regulatory burdens, and may help ease the handling of the introduction of new civil penalties legislation, currently before Parliament[8]. However, only around 7%[9] of UK employers employ workers from the new Member States, so the regulatory savings are unlikely to be significant. The registration fee is also a significant sum for individuals to pay.

(d) There has been some **lobbying amongst employers** for closure of the WRS, particularly the agriculture, food processing and hospitality sectors (where most workers are located). However, the employer lobby has been contained and managed effectively within the Illegal Working Stakeholder Group, chaired by the Minister of State for Immigration, Nationality and Citizenship.

<u>Arguments for retaining the WRS</u>

[7] Excluding start-up costs
[8] NOP survey for Manpower, of 2,100 employers, conducted in February 2005

17. On the other hand, a decision to close the WRS would have significant handling and cost implications. These are set out below.

(a) Whilst it is extremely difficult to assess how many people have been prevented from coming to the UK or from seeking social assistance as a result of the transitional arrangements, there is a clear risk that closing the WRS could **create a 'pull factor',** attracting more migrants from the new Member States to the UK, some of whom might arrive without a job or with limited resources. DWP estimate that the current arrangements may have saved around £5 million a year in payment of income-related benefits.

(b) Closing the WRS would almost certainly mean **more people from the new Member States would be eligible to claim income-related benefits, child benefit and child tax credit**. If the numbers who have claimed Jobseeker's Allowance in the first year were to rise from just one to two thousand, the cost in payment of income-related benefits could be in the order of £7 million.

(c) Closing the WRS could also mean an increase in the number of people eligible for local authority housing and, possibly, owed a duty to secure accommodation under the homelessness legislation. This could put **greater pressure on local authority housing supply**, particularly in London and the South East, in some cases at the expense of UK nationals.

(d) In addition to creating a fresh 'pull factor' abroad and possibly undermining previous messages that people should only come to the UK to work, not to claim benefits and housing, the change in policy is likely to be **perceived domestically as a loosening of the Government's grip on migration and benefit shopping**. This would contrast unhelpfully with other Government

policy to tighten management of the migration system (as set out in the Five Year Strategy for Immigration and Asylum). At the same time, public and media opinion remains largely resistant to rational arguments for migration, and the media climate is arguably more hostile to migration now than in early 2004. There is an additional risk that this debate could also be skewed by the Bulgaria and Romania question (see paper AM(MWG)(05)(2)).

(e) There is **no evidence that other Member States intend to change their policies,** despite pressure from the Commission and lobbying by the new Member States. By closing the WRS, the UK would be going out on a limb, reigniting the media debate to no obvious (domestic public) advantage; workers would still be able to come to the UK and work, but would now have a stronger claim to social assistance while they were not working. There is a risk the Government could be accused of making the UK a more attractive destination to less economically desirable migrants.

(f) There is also **an argument for consistency and fairness**. If the WRS is closed, then those who have complied with the registration requirement so far will be in no better a position than those who have failed to do so. The intention was that only those who complied would become eligible for full workers' rights after 12 months of working legally. But closing the WRS would mean that those who had not registered would also become immediately eligible for full workers' rights. This could have implications for the effectiveness of any WRS policy for Bulgaria and Romania on their accession to the EU. It could become difficult to convince Romanian and Bulgarian workers of the need to register (and pay for the application) if they expected the measures to be withdrawn after two years.

Conclusion

18. A decision to close the WRS would have advantages in reducing bureaucracy for (some) employers and allowing Home Office resource to be diverted to other priorities. However, it would also require the Government to relax controls on access to social assistance and to defend a change in the status quo - a status quo which is generally accepted, and in some cases welcomed. Since EU enlargement, Government has consistently promoted the success of the UK's transitional arrangements.

Cabinet Office

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Annex A

RESIDENCE TESTS FOR INCOME-RELATED BENEFITS AND LOCAL AUTHORITY HOUSING

Like UK and third-country nationals, EEA nationals (subject to certain exceptions[10]) must be **habitually resident** in the UK, Channel Islands, Isle of Man or Republic of Ireland – i.e. the Common Travel Area - to qualify for income-related benefits[11] and local authority housing[12].

A new stage was added to the habitual residence test from 1 May 2004. Amending regulations[13] introduced a requirement for claimants to have a **right to reside** in the Common Travel Area before they could be considered habitually resident. Though introduced at the same time as the Worker Registration Scheme (WRS), the new "right-to-reside" test is quite separate: the relevant regulations were not made under the Accession Treaty derogation and apply to all claimants.

Implications for nationals of pre-2004 Member States[14]

EEA nationals may derive their right to reside in the UK from various provisions in EC law. For instance, at present[15]:

[10] EEA workers, the self-employed and subject to conditions retired workers and self-employed persons; refugees; people who have been granted exceptional leave to enter or remain in the UK; people who have been deported, expelled or otherwise removed by compulsion of law from another country to the UK; and people who have left Montserrat since November 1995 because of volcanic eruption there

[11] Income Support, income-based Jobseeker's Allowance, Pension Credit, Housing Benefit and Council Tax Benefit

[12] The allocation of council housing via a waiting list and homelessness assistance

[13] *Social Security (Habitual Residence) Amendment Regulations 2004*

[14] and nationals of Cyprus and Malta, who acquired full rights of free movement from 1 May 2004

a. **workers** have the right to reside in another Member State - such as the UK - by virtue of Article 39 EC, Regulation 1612/68 and Directive 68/360;

b. **retired workers** have, subject to conditions, the right to remain in the territory of a Member State after having been employed in that State, by virtue of Regulation 1251/70;

c. the **self-employed** who have the right under Article 43 EC to establish themselves and to provide services in another Member State have the right to reside in that State by virtue of Directive 73/148;

d. **work-seekers** have the right to move freely within the EU to search for work and to reside for at least six months and thereafter for as long as they are continuing to seek work and have a genuine chance of being engaged, by virtue of Article 39 EC and Regulation 1612/68 (as interpreted in Case C-292/89 *Antonissen*); and

e. the **economically inactive** – such as students, pensioners who have not exercised the right of free movement to undertake economic activity, and others such as lone parents and those unable to work because of ill health – have the right to reside anywhere in the EU by virtue of Article 18 EC and Directives 93/96, 90/365 and 90/364. This

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[15] A new "rights of residence" Directive (Directive 2004/38) must be transposed by 30 April 2006 and will replace much of the EC legislation mentioned below, though in many respects the effects of the provisions will remain the same.

right is subject to the proviso that they have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State during their period of residence (as well as having comprehensive sickness insurance cover in that State).

Although there are legal challenges in a number of cases currently before tribunals and the courts, the effect of the new "right-to-reside" test is to deny access to income-related benefits and local authority housing by **economically inactive** EEA nationals, including lone parents and pensioners. To have a right to reside in the UK, they must have sufficient resources to avoid becoming an unreasonable burden on the social assistance system during their period of residence. If they apply for income-related benefits, their ability to satisfy that condition is put in doubt. As long as they have not acquired a right to reside, they will not qualify for income-related benefits and local authority housing.

Implications for nationals of the new Member States[16]

In the case of eight of the new Member States[17], the Accession Treaty allows derogation from Articles 1 to 6 of Regulation 1612/68, which give rights in relation to free movement of **workers** and **work-seekers**. The derogation lasts in the first instance for two years following the date of accession, i.e. until 30 April 2006. During the first two years following the date of accession and possibly longer[18], the present

[16] other than nationals of Cyprus and Malta

[17] i.e. the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia

[18] Subject to certain conditions, Member States may continue to apply these measures for a further three years – until 2009 – and exceptionally until 2011, if there are serious disturbances or threats to the country's labour market. Otherwise, free movement rights will apply from 1 May 2006.

Member States apply national measures under which they can either restrict or allow entry to their labour markets for nationals of the eight relevant states.

The national measures introduced by the UK were the *Accession (Immigration and Worker Registration) Regulations 2004.*

Workers from the new Member States derive their right to reside in the UK from these domestic regulations rather than the EC measures listed at (a) above. They have a right to reside while they are registered under the Workers Registration Scheme and working for authorised employers in accordance with the regulations[19]. Once they have worked in this way for 12 months (with no more than 30 days' interruption), they acquire the same rights of free movement as other EEA workers and may have access to out-of-work benefits and local authority housing if they become unemployed.

The domestic regulations provide that nationals from the new Member States are not entitled to reside in the UK as **work-seekers** (under the EC measures listed at (d) above) but only as self-sufficient people (i.e. under the EC measures listed at (e) above). This means that, in order to have a right to reside in the UK, they must - like economically inactive EEA nationals - have sufficient resources to avoid becoming an unreasonable burden on the social assistance system during their period of residence. If they apply for income-related benefits, their ability to satisfy that condition is put in doubt. As long as they have not acquired a right to reside, they will not qualify for income-related benefits. Under current housing regulations EEA nationals whose only right to reside derives from their status as economically

[19] Certain other categories of workers – e.g. those who had already worked lawfully in the UK for 12 months by 1 May 2004 – have the right to reside too.

inactive persons are ineligible for local authority housing or homelessness assistance (whether or not they are self sufficient).

RESIDENCE TESTS FOR CHILD BENEFIT AND CHILD TAX CREDIT

General Position

To claim the child and working tax credits and child benefit, a person (irrespective of nationality) must be both present and ordinarily resident in the UK. A person is present in the UK if he or she is physically present here throughout the period of the award, although temporary absences of up to eight or, in some cases, twelve weeks may be disregarded. The term "ordinarily resident" is not defined in tax credit or child benefit legislation but its established meaning is that a person is ordinarily resident if:

- he or she normally resides in the UK (apart from temporary or occasional absences); and
- residence here has been adopted voluntarily and for settled purposes as part of the regular order of their life for the time being.

Ordinary residence is different from the "habitual residence" test applicable for access to income-related social security benefits and housing and homelessness assistance. The period of time spent in the UK may in certain circumstances be taken into account (together with other factors) when deciding whether a person is habitually resident. However, the ordinary residence test for tax credits and child benefit does not require a claimant to have already been living in the UK prior to the date of claim. The ordinary residence test thus allows people to claim tax credits and child benefit even if they have only just arrived in the UK, provided they can demonstrate to HM Revenue and Customs that they genuinely intend to make this country their settled home.

As part of a package of measures across Government to tighten the residence tests generally for access to benefits , tax credits and housing support, the tax credit and child benefit regulations were amended in April 2004. For new claims made on or after 1 May 2004 (up to 30 April 2006), access to the child tax credit and child benefit is restricted to those people with a "right to reside" in the UK.

Position for nationals of the new Member States (other than Cyprus and Malta)

For nationals from the new Member States (other than Cyprus and Malta), the introduction of the right to reside generally means that only those who are registered workers or are exempt from registration (such as the self-employed) or who have worked in the UK lawfully and uninterruptedly for twelve months or more are able to claim child benefit and the child tax credit.

Workers from these new Member States can also claim the working tax credit on the same basis as other EEA workers. This is because the working tax credit falls within Article 7(2) of the EC Regulation 1612/68 and is thus outside the scope of the derogation from the Treaty of Accession. As a work incentive, the working tax credit is only paid to people in remunerative work.

Nationals from these new Member States who are **work-seekers** or **economically inactive**, as well as economically inactive individuals from other EEA Member States, are not entitled to claim child benefit or the child tax credit unless they have sufficient resources not to be an unreasonable burden on the UK's social assistance system.

Annex B

UK's experience since EU enlargement: Summary of Evidence

- the **number of workers** applying for registration was higher than expected[20]. Between May 2004 and June 2005 there were 232,000 applicants to the Worker Registration Scheme. There is some evidence of seasonality, with applications peaking in summer 2004 and spring/summer 2005, and anecdotal evidence of workers, particularly in the agricultural sector, returning home after short periods I the UK;

- **net migration** to the UK from the new Member States is estimated to be around 60,000 for the first 8 months of the WRS[21]. Proportionately, there has been significantly more migration to Ireland than the UK[22];

- a recent study by DWP[23] concluded that overall **the labour market impact** of enlargement has been modest but broadly positive. Output and total employment have increased, with minimal impact on the UK workers, although there is evidence of some possible downward pressure on wages in the agricultural sector.

[20] Note: the Worker Registration Scheme only provides a cumulative figure for the number of people who have applied to register for work – it does not reflect how many workers may be returning home. There is some anecdotal evidence that some workers from the new MS come to the UK to undertake seasonal work and return home after a few weeks or months;

[21] Estimate from a DWP study: "The impact of FMOW from central and eastern Europe on the UK labour market: early evidence", based on data from the Labour Force Survey.

[22] A report by the European Citizen Action Service found that Ireland has received over 85,000 workers from the 10 new EU countries in the period from May 2004 to June 2005. Calculated on a per capita basis, Ireland received six times as many migrant workers as the UK during the same period. This is probably a result of the Irish policy to introduce a presumption of only issuing work permits to third country nationals where employers can prove no EEA worker is able to fill the post.

[23] "The impact of FMOW from central and eastern Europe on the UK labour market: early evidence"

- Up to 30% of people applying for registration may have already been in the UK before 1 May 2004. We can reasonably assume that a proportion of these were here **illegally** before enlargement, and that the arrangements have had a 'regularising effect'. This is reinforced by findings from the DWP study;

- Workers from the new Member States are going where the work is, helping to **fill the gaps in our labour market**, particularly in administration, business and management, hospitality and catering, agriculture, manufacturing and food, fish and meat processing.

- In many cases nationals from the new Member States are **supporting the provision of public services** in communities across the UK. Between July 2004 and June 2005, over 3000 nationals from the new Member States registered as bus, lorry and coach drivers and almost 5500 as care workers. There were 560 teachers, researchers and classroom assistants; 290 dental practitioners (including hygienists and dental nurses); and over 300 GPs, hospital doctors, nurses and specialists.

- Just under a fifth of registered workers were based in London. However, workers are **based all over the UK** particularly Anglia and the Midlands with 16% and 11% of the total respectively.

- 97% of workers were **working full time**, and over 99% of applications for National Insurance numbers made by nationals from the new Member States between May 2004 and June 2005 were for employment purposes.

- The vast majority of workers are **young and single**, 82% of workers were aged between 18 and 34. 95% of registered workers had no dependants living with them in the UK, and only 2% had dependants under the age of 17 with them.

- The numbers applying for tax-funded income-related benefits, child benefit, tax credits and housing support was **very low**. Fewer than 1700 applications for Income Support and Jobseeker's Allowance were processed between May 2004 and June 1005, and of these applications just over 50 were allowed to proceed for further consideration.