

Note of meeting between Lord Burns and Lord Wilson of Dinton

Wednesday 11th November 2015, 1pm, House of Lords

1. Lord Burns opened the meeting and explained that he was keen to draw from Lord Wilson's experience as a former Cabinet Secretary in relation to the questions posed in the call for evidence paper.
2. The following key points were made:
 - a. Lord Wilson became Cabinet Secretary shortly after the White Paper [*Your Right to Know*](#) was published. He recalled that it had proposed a wide statutory right to information from nearly all public bodies (and privatised utilities, private bodies carrying out public functions, and public services performed under contract). There had been considerable discussion thereafter about the need to exempt certain categories of information. He feared that the way in which the Act had been interpreted had in a number of cases defeated the intention behind these exemptions with unfortunate consequences within government.
 - b. Lord Wilson was of the view that most information in government was not sensitive and could be released, subject to the cost of doing so. There was however a small percentage which it was essential to protect for a period of time in the interests of good government. This protection was important so that collective responsibility was not undermined; so that Ministers, civil servants and special advisers had a safe deliberative space for policy making; and so that relations between Ministers and civil servants could be maintained. He commended witness statements which Sir Paul Britton had provided to various tribunals, which he believed explained these matters very well, and promised to provide the relevant extract (attached). It was essential to have an environment in which officials could give advice freely and frankly while preserving their ability to serve future Governments. It was also essential to protect national security. He thought the best approach might be provide for the general availability of information subject to strong exemptions to secure the important objectives which he had described. Each case should be considered on its merits: cases where information had been released because it did not do damage should not be used as precedents for the release of information in cases where it was damaging.
 - c. Lord Wilson said he believed that the FOI Act was often a burden on universities. He was not clear why institutions such as colleges which were not directly funded by public funds should be subject to the FOI Act.
 - d. Lord Burns invited Lord Wilson to submit written evidence.

Secretariat

November 2015

EXTRACT FROM WITNESS STATEMENT BY SIR PAUL BRITTON IN
INFORMATION TRIBUNAL CASE EA/2010/0027

I think that there are countervailing considerations which outweigh the factors in favour of disclosure in the circumstances of this case. I will address three of those considerations:

- a) The importance of protecting collective responsibility
- b) Ensuring a 'safe space for policy-making' for Ministers, Special Advisors and civil servants
- c) Maintaining relations between Ministers and civil servants

.....

(a) The importance of protecting collective responsibility

17. Although Ministers are individually accountable to Parliament for decisions that are made by them (and on their behalf) within their Departments, the Government as a whole acts collectively. The principle that all members of the Cabinet must be taken to have collective responsibility to Parliament and to the public for the policy of the Government as a whole forms the bedrock of the power of Cabinet decisions to bind the Government (such decisions being binding as a matter of convention, not law), and the basis for the Government's authority to govern. The fact that any Minister requires the collective consent of other Ministers to speak on behalf of Government is an essential safeguard of the legitimacy of governmental decisions.
18. Collective responsibility applies equally to decisions made by Cabinet itself, by a Cabinet Committee or other Ministerial Group, or by an individual Minister. It follows that particular Ministers (especially Junior Ministers) may often be "responsible" for decisions that they took no part in making. This means that they must vote with the Government, speak in defence of the policy if the Prime Minister insists, and cannot afterwards reject criticism either in or outside Parliament on the ground that they did not agree with the decision. It also follows that Ministers must not commit the Government while an issue is still under consideration, or has yet to be considered. A Minister who cannot accept the constraints of collective responsibility must resign from the Government.
19. Collective responsibility means that Ministers have to discuss and agree their positions on issues. The views of Ministers on particular subjects will frequently differ, as do the priorities that stem from their departmental responsibilities and the advice from their officials. Government has to arrive at a "joined-up view". There are, as there need to be, processes to ensure that conflicting considerations can be reconciled. These include discussion in Cabinet or a Cabinet Committee and correspondence between Ministers. Other preliminary discussions, including discussions between Ministers, officials and

Special Advisors, help support the collective decision making process because a Minister must be sure that any new policies or major modifications of existing policies command the support of his colleagues. Ministers collectively must also be able to make an input into the formulation of policy which they will be expected to defend.

20. Major issues of policy, including those which are of critical importance to the public, are subject to collective responsibility. The Government's energy policy and policy on new nuclear power generation is one such example. Key departments which would have had a strong interest in this policy at the time of the request were the Department for Environment, Food and Rural Affairs (DEFRA) (environmental impact), the Department of Trade and Industry (DTI) (energy security), the Department for Communities and Local Government (DCLG) (planning and social impact), the Foreign and Commonwealth Office (FCO) (international energy safety and security), HM Treasury (HMT) (finance), Scotland and Wales Offices (relationships with Devolved Administrations). The Department for Transport (DFT) and the Department of Health (DH) –may also have had an interest in particular aspects. For Ministers involved in collective decision-making on this policy area, it would be important for them to be able to articulate where proposals on energy policy might conflict with their departmental policy objectives, and to discuss with colleagues how to manage and resolve those conflicts. Ministers in Committee have to be able to consider the decision with the broadest view on its impact or effect, without prejudicing the final decision. If they were unable to rely on this process being confidential, the quality of the decision-making is likely to be compromised. These papers reveal various disagreements between Ministers as the then Government formulated its energy policy, and at the time of the second request its policy was still not settled.
21. The principle that all Ministers must be collectively responsible to Parliament and to the public for the policy of the Government is a long standing and vital constitutional principle. If collective deliberations – be that records of discussions, papers discussed or correspondence between members of the Government – were to be released to the public, that would make it much more difficult to debate and defend the collective Government position, which is their constitutional obligation even if in private they argued for a different view.
22. These concerns are particularly acute where release of this sort of information is contemplated close in time to a collective decision being taken and especially where aspects of policy remain live ...
 - (b) *Ensuring a 'safe space for policy-making' for Ministers, Special Advisors and civil servants*
23. The prime rationale for the confidentiality of policy discussions is the need to ensure that Ministers and officials can discuss policy formation with frankness and candour. The importance of doing so is

of particular concern where ministerial discussions are concerned, because there is an obvious link between the maintenance of confidentiality and the principle of collective responsibility upon which Cabinet government is based. If such discussions were likely to become public, Ministers, Special Advisors and civil servants would be less likely to record their views on paper, which is detrimental to good administration.

24. If Ministers believed that their policy discussions, whether in Cabinet, with colleagues, or with officials, would be revealed publicly, the nature of those discussions would be very different. Ministers would inevitably be more guarded about what they said, less willing openly to debate difficult policy options, and less trusting of their colleagues: all matters which tend to undermine good administration. Policy discussion would be watered down. As a result, the quality of decision-making would be impaired.
25. Similarly, officials are expected to give private, honest, informed advice before Ministers make policy decisions. They are expected to present Ministers with a full and accurate picture, even when it takes an inconvenient form. If officials no longer felt able to give frank advice on policy, because of fear of disclosure, policy-making would be damaged. On the one hand, difficult or extreme options might never be put forward by civil servants; on the other, policy would not be properly scrutinised. Effective policy formation requires policies to be rigorously tested, with a view to uncovering any potential weaknesses or drawbacks. Even a policy that is ultimately adopted needs to be adopted with a full understanding of its problems or difficulties. Frank and open discussion of those problems or difficulties would be much less likely to take place if those involved operated on the basis that their considerations could be made public. If policy advice and deliberation were disclosed frequently or as a matter of course, their nature would change and they would become more guarded and as a result less useful.
26. The importance of maintaining confidentiality for policy discussions involving Ministers or officials has been recognised consistently by informed commentators since the early days of Cabinet Government, and has been connected directly with the frank and candid discussion of policy. The central importance of confidentiality for the frank and open exchange of views has underpinned every administration over the last century, regardless of party allegiance. Such recognition comes not only from Ministers or officials within government, but also from third parties outside government looking independently and objectively at the justification for confidentiality of policy discussions (for example, the Radcliffe Committee on Ministerial Memoirs, and the Franks Committee of 1972 on reform of Britain's official secrecy laws).
27. A further classic statement of the principle was made in 1967 during the course of Parliamentary debate by Lord Bridges, a former Cabinet Secretary. The civil servant, he stated:

“...has to analyse the position and set out all the courses, and not cover up any uncomfortable facts. That is a job which has to be done fearlessly and frankly, and if it is going to be done as it ought to be done, the people concerned must have confidence that their advice will not be disclosed prematurely. That, of course, is the basis of the confidential relationship between civil servants and Ministers, and likewise between Ministers and the Cabinet.”

(HOL Deb 5s, 1666, 11 May 1967)

28. The Prime Minister has even more need for a safe space to consider policy options than other Ministers as his decisions are likely to be particularly sensitive and to involve the resolution of issues on which individual Ministers may disagree. If officials or advisers felt that this advice may be published, it may become less useful for Ministers, and instead this type of advice will start to be given orally [,on occasion at least]. Oral advice is often less effective and carries more risk because it is often difficult to convey the complexity or subtlety of an issue as well as can be done on paper. It is also less accountable because it leaves no audit trail. This principle has been recognised by the Information Commissioner in another recent Decision Notice.¹ It applies with particular force where relevant policy is still in the process of being formulated or developed at the time that disclosures are contemplated, as was the case here.

(c) Relations between Ministers and civil servants

29. A further danger in the disclosure of policy advice is that it would tend to prejudice relations between Ministers and officials, thus harming the process of government. There are two separate but linked points of relevance here: firstly that discussions should remain confidential, as to do otherwise could reveal that particular civil servants in particular positions were responsible for the formulation of policy; and secondly that relations between Ministers and officials could become strained, and the impartiality of the civil service could be undermined, because Ministers and the public could no longer see civil servants as politically neutral.
30. An essential feature of the civil service is its political neutrality. Civil servants are expected to serve all governments with equal loyalty, whatever their political leanings; and there are correspondingly strict rules restricting civil servants' involvement in party politics. [Sir Paul then quoted the relevant passages from the Civil Service Code and the Code OF Conduct for Special Advisers as they stood at the time.].....
34. Confidentiality for policy advice is central to the political neutrality of the civil service, partly because without it Ministers would be unable to place trust in officials who have served under previous administrations. At present, confidentiality is safeguarded by the

¹ FS50088745, 29 July 2008

established convention that Ministers of a current Administration may not generally see documents of a former Administration of a different political party. If that position were to change, and if in fact officials' policy advice to Ministers were routinely to be in the public arena, the requirement for officials to be seen as impartial would be compromised. The formation of policy is inevitably a highly politicised task, involving the clash of competing ideologies. The disclosure of advice from officials, either attributed or identifiable, would risk public association of those individuals with particular policies, especially those which are highly controversial such as those covered by some of these papers. The possible association of individual officials with certain views could lead to them being so closely identified with contentious policies that when a new Administration took office their advice would not be viewed as impartial or dispassionate. Ministers would view them as too closely wedded to the policies of the previous Administration. Through no fault of their own, those officials would not be able to retain the confidence of the incoming government.