BINGHAM CENTRE FOR THE RULE OF LAW

RESPONSE OF THE BINGHAM CENTRE FOR THE RULE OF LAW TO THE INDEPENDENT COMMISSION ON FREEDOM OF INFORMATION CALL FOR EVIDENCE

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Introduction

1. The Bingham Centre for the Rule of Law welcomes this opportunity to respond to the consultation by the Independent Commission on Freedom of Information concerning the Cabinet veto, the practical operation of the Freedom of Information Act 2000 in respect of the deliberative space afforded to public authorities, and the balance between transparency and the burden of the Act on public authorities more generally. However, the Bingham Centre is disappointed that the Commission's Call for Evidence does not seek views on extension of the FOI framework to further enhance openness, transparency and accountability. The Centre's response is authored by Dr Eric Metcalfe, who is a fellow of the Bingham Centre and a co-author of the fifth edition of *Blackstone's Guide to the Freedom of Information Act 2000*.[1]

About the Bingham Centre

2. The Bingham Centre for the Rule of Law was launched in December 2010 and is devoted to the study and promotion of the rule of law worldwide. Its focus is on understanding and promoting the rule of law; considering the challenges it faces; providing an intellectual framework within which it can operate; and fashioning the practical tools to support it. The Centre is named after Lord Bingham of Cornhill KG, the pre-eminent judge of his generation and a passionate advocate of the rule of law. It is part of the British Institute of International and Comparative Law, a registered charity based in London.

3. The Bingham Centre has a particular interest and expertise in the law relating to Freedom of Information. In his book, *The Rule of Law*,[2] Lord Bingham stressed the need for transparency as a central aspect of the rule of law. First, the law itself must be accessible to the public at large and, so far as possible, intelligible, clear and predictable;[3] secondly, ministers and public officials at all levels must exercise the powers conferred on them in good faith, fairly, and for the purpose for which the powers were conferred;[4] and thirdly, the law must afford adequate protection for fundamental human rights, including the freedom "to receive and impart information and ideas without interference by public authority".[5] As Lord Bingham held in his leading judgment in *R v Shayler*:[6]

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[1] Oxford University Press, 2013.
[2] Penguin Books, 2011.
[3] *The Rule of Law*, pp37-47.
[4] Ibid, pp60-65.
[5] Ibid, p78. See also e.g. the decision of the European Court of Human Rights in *Társaság a Szabadságjogokért v Hungary (App no. 37374/05) (14 April 2009)* in which it noted that the Court had "recently advanced towards a broader interpretation of the notion of "freedom to receive information" … and thereby towards the recognition of a right of access to information" (para 35).
[6] [2003] AC 247 at para 21.

> Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated. Sometimes, inevitably, those involved in the conduct of government, as in any other walk of life, are guilty of error, incompetence, misbehaviour, dereliction of duty, even dishonesty and malpractice. Those concerned may very strongly wish that the facts relating to such matters are not made public. Publicity may reflect discredit on them or their predecessors. It may embarrass the authorities. It may impede the process of administration. Experience however shows, in this country and elsewhere, that publicity is a powerful disinfectant. Where abuses are exposed, they can be remedied. Even where abuses have already been remedied, the public may be entitled to know that they occurred. The role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one. But the press cannot expose that of which it is denied knowledge.

4. The Bingham Centre has also had practical experience of the operation of the Freedom of Information Act. Among the Centre's current projects is a review of the law governing the use of intercept material as evidence and on 19 September 2014 the Information Tribunal upheld the Centre's appeal under the Freedom of Information Act 2000 against the Home Office's refusal to disclose legal advice on this issue.[7]

About the Freedom of Information Act

5. The Bingham Centre notes that the Commission's inquiry comes just three years after the House of Commons Justice Select Committee reported the conclusions of its post-legislative scrutiny of the Freedom of Information Act.[8] In particular, the Committee found that the Act:

   (i) was "a significant enhancement of our democracy" that has "improved openness, transparency and accountability";[9] and

   (ii) had not had a harmful effect on the ability to conduct business in the public service, but that the additional burdens were "outweighed by the benefits".[10]

6. Aside from identifying a need to put time limits for the handling of requests on a statutory footing, and proposing the introduction of a research exemption along the same lines as s

[7] *Bingham Centre for the Rule of Law v Information Commissioner* [2014] UKFTT 2014/0097 (GRC). On 3 June 2015, the Upper Tribunal remitted the case to be re-heard by a differently constituted First-Tier Tribunal and the hearing is scheduled for 27 November 2015.
[8] *Post-legislative scrutiny of the Freedom of Information Act 2000* (HC 96, 26 July 2012).
[9] Ibid, paras 53 and 241, and para 7 of the conclusion.
[10] Ibid, para 241.

27(2) of the Scottish Freedom of Information Act, the Committee saw "no pressing need for legislative change to an Act which is serving the nation well".[11]

7. Although there have been several developments over the past three years - not least the judgment of the Supreme Court in *R(Evans) v Attorney General*[12] concerning the operation of the so-called veto under section 53 of the Act - the Bingham Centre does not consider that there has been any shift in the underlying conditions that supported the Committee's conclusions in 2012. In the Centre's view, the Act remains a significant enhancement to our democracy and we do not see that any pressing need has arisen for changes to the Act.

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

8. In our view, the exemptions contained in sections 35 (formulation of government policy, etc) and 36 (prejudice to effective conduct of public affairs) of the Act already provide significant protection for the internal deliberations of public bodies and we see no basis for either altering or extending these protections any further. Specifically, no information may be disclosed under the Act where a public authority (or, on appeal, the Information Tribunal) considers that:

    a. the requested information either 'relates to' one of the grounds set out in section 35(1) or its disclosure, in the reasonable opinion of a qualified person, either would or would be likely to prejudice or inhibit one of the interests set out in section 36(2); and

    b. in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)).

9. Moreover, Sir Alan Beith MP, then Chairman of the Justice Select Committee, said at the time of the Committee's 2012 report on post-legislative scrutiny of the Act: "The Act was never intended to prevent, limit, or stop the recording of policy discussions in Cabinet or at the highest levels of Government, and we believe that its existing provisions, properly used, are sufficient to maintain the 'safe space' for such discussions. These provisions need to be more widely understood within the public service. They include, where appropriate, the use of the ministerial veto".[13]

[11] Ibid, para 243.
[12] [2015] UKSC 21.
[13] See http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news/foi-report/

10. The Commission invites submissions on "how long after a decision does such information remain sensitive". In our view, however, it is not necessarily the case that information is "sensitive" simply because it relates to the internal deliberations of a public body. Indeed, the premise of the question (that information necessarily remains sensitive for some certain, unspecified period) appears to disregard the carefully-wrought scheme of exemptions under sections 35 and 36 of the Act.

11. First, the exemption under section 35 is classed-based: information is therefore *prima facie* exempt if it "relates to" one of the grounds identified. The exemption under section 36, by contrast, is prejudice-based: it requires the reasonable opinion of a qualified person that the disclosure of the information in question would (or would be likely to) cause prejudice to one of the identified interests. Secondly, the Act does not prescribe or indicate any particular period over which the information in question may be exempt under sections 35 or 36. It is, of course, correct that both the Information Commissioner's guidance and the case law of the Information Tribunal identifies the passage of time as one factor that may bear on the existence of prejudice under section 36(2) as well as the balance of the public interest under section 2(2)(b).[14] It would, however, be both unhelpful and inappropriate in our view to seek to lay down any prescribed period under which information relating to internal deliberations either cannot be disclosed under the Act or its disclosure made more difficult.

12. The Centre considers that there is no evidence that the existing scheme fails to strike the correct balance between the competing public interests in this area, and that the imposition of a prescribed period would only damage the considerable flexibility accorded to public authorities and the Information Tribunal under the existing exemptions. Again, we do not see any basis for either altering or extending the protections that currently apply under sections 35 and 36.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

13. Cabinet discussions (including those of the Welsh Cabinet and the Northern Ireland Executive) are already protected under the head of 'ministerial communications' set out at section 35(1)(b), as well as the exemptions under sections 62 and 63 where minutes of those discussions have been transferred to the Public Records Office. The principles governing the disclosure of Cabinet minutes were extensively addressed by the Information Tribunal in its decisions in *Cabinet Office and Lamb v Information Commissioner* (the minutes of the Cabinet's discussion of the Iraq War)[15] and *Cabinet Office v Information Commissioner* (the

[14] See Information Commissioner's Office guidance on "Government Policy (Section 35)", "Prejudice to the effective conduct of public affairs (section 36)" and "Section 36: Record of the qualified person's opinion".
[15] EA/2008/0024 and EA/2008/0029, 27 January 2009.

minutes of the Cabinet's discussion of Westland plc).[16] In the latter case, the Tribunal summarised these principles as follows:[17]

- By reason of the convention of collective responsibility, Cabinet minutes are always information of great sensitivity, which will usually outlive the particular administration, often by many years.

- The general interest in maintaining the exemption in respect of them is therefore always substantial. Disclosure within thirty years will very rarely be ordered and then only in circumstances where it involves no apparent threat to the cohesive working of Cabinet government, whether now or in the future.

- Such circumstances may include the passage of time, whereby the ministers involved have left the public stage and they and their present and future successors know that such disclosure will not embarrass them during the critical phase of an active political career.

- Publication of memoirs and ministerial statements describing the meeting(s) concerned may weaken the case for withholding the information, especially where versions conflict, either factually (which is not the case here) or in their interpretation of what took place.

- The fact that the issues discussed in Cabinet have no continuing significance may weaken to a slight degree the interest in maintaining the exemption but the importance of the convention is not dependent upon the nature of the issue which provoked debate.

- There is always a significant public interest in reading the impartial record of what was transacted in Cabinet, no matter what other accounts of it have reached the public domain. Where the usual interest in maintaining confidentiality has been significantly weakened, that interest may justify disclosure.

- The public interest in disclosure will be strengthened where the Cabinet meeting had a particular political or historical significance, for example the discussion of the invasion of Iraq at the meeting under consideration in *Cabinet Office v Information Commissioner (Lamb))*.

Applying those principles to the Westland minutes, the Tribunal found that some nineteen years had passed between the date of the Cabinet's discussion and the request made under the Act, such that no "member of that Cabinet could justifiably feel traduced by the

[16] EA/2010/0031, 13 September 2010.
[17] Ibid, para 48.

publication of those minutes in 2005".[18] Overall, it concluded that "balancing the interests for and against disclosure we have no doubt that this is one of the few cases in which the maintenance of the exemption is not shown to outweigh the public interest in disclosure, mainly due to the weakening of the requirement of confidentiality on the particular facts of this case but also to the specific positive factors favouring disclosure that we have noted".[19]

14. It is clear from its case law that the Information Tribunal accords considerable constitutional importance to the principle of collective Cabinet responsibility and the confidentiality of its discussions but that it remains open under the Act for minutes to be disclosed where the balance of the public interest favours such disclosure. In *Cabinet Office v Information Commissioner*, the Tribunal took pains to stress that "this Decision does not mean that the public interest will commonly require the disclosure of Cabinet minutes. We foresee that disclosure will be a rare event and that the interest in maintaining the exemption will be particularly strong where the meeting was held in the recent past".[20] In the Centre's view, the principles identified by the Tribunal in relation to this exercise are entirely sound.

15. As indicated previously, moreover, the Centre does not consider that there is any merit in seeking to specify any particular period in which such material must remain confidential. In our view, this would unnecessarily constrain public bodies and the Tribunal from disclosing material where they considered that it was in the public interest to do so.

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

16. The Act does not provide specific protection for information which involves the candid assessment of risks. Nor, in the Centre's view, is it necessary to provide such protection. This is because risk assessments - whether candid or otherwise - are not, in themselves, an inherently sensitive category of governmental information. Indeed, in the Centre's view, if a public official has produced such an assessment for some governmental purpose, the default position should be that it should ordinarily be disclosed to the public unless there is some compelling reason why it should not be. In our view, it would be a mistake for the Commission to proceed on the apparent misapprehension that risk assessments are somehow inherently confidential or sensitive.

17. If, however, a candid assessment of risks falls within one of the existing exemptions, such as one of the grounds under section 35(1) or its disclosure would, or would be likely to, cause prejudice to the effective conduct of public affairs under section 36(2), then the Centre agrees that such assessments may be lawfully withheld, assuming that the balance of the public interest under section 2(2)(b) of the Act does not favour their disclosure notwithstanding the engagement of the exemption.

[18] Ibid, paras 51-52.
[19] Ibid, para 58.
[20] Ibid, para 59.

18. As before, we do not consider that there is any merit in seeking to identify how long a risk assessment may remain sensitive. This, in our view, must remain something to be assessed according to the facts of each particular case and it would be damaging to the sensitivity and flexibility of that assessment to seek to introduce some particular statutory time limit or minimum period.

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

19. In its Call for Evidence, the Commission states that it is "clear that its terms of reference require it to look carefully at the implications for the Act of the uncertainty around the Cabinet veto".[21] The Centre notes, however, that the Commission's terms of reference do not refer in terms to the so-called veto under section 53 of the Act nor to any such uncertainty concerning the operation of that section.[22]

20. Indeed, the Centre strongly doubts that there could be any lingering uncertainty concerning the operation of section 53 in the wake of comprehensive judgments on that issue delivered by the Upper Tribunal,[23] the Divisional Court (presided over by the Lord Chief Justice),[24] the Court of Appeal (presided over by the Master of the Rolls)[25] and, most recently, a panel of no less than seven Supreme Court justices, presided over by both the President and the Deputy President.[26] As the President himself noted:[27]

> 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.

21. As he went on to explain:[28]

> where, as here, a court has conducted a full open hearing into the question of whether, in the light of certain facts and competing arguments, the public interest favours disclosure of certain information and has concluded for reasons given in a judgment that it does, section 53 cannot be invoked effectively to overrule that judgment merely

[21] Call for Evidence, at p4.
[22] See terms of reference here: https://www.gov.uk/government/speeches/freedom-of-information-new-commission
[23] [2013] UKUT 075 (AAC).
[24] [2013] EWHC 1960 (Admin).
[25] [2014] EWCA Civ 253.
[26] [2015] UKSC 21.
[27] Ibid, para 51.
[28] Ibid, para 59.

because a member of the executive, considering the same facts and arguments, takes a different view.

22. In respect of the veto contained in section 53, the Bingham Centre agrees with the President of the Supreme Court (Lord Neuberger) in *Evans* that, "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".[29] Moreover, it is "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".[30] Like Lord Neuberger, we take the view that, where a court or tribunal has reached a final decision on the question of the balance of the public interest under section 2(2)(b), the executive should abide by that decision.[31]

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

23. In the Centre's view, although there have been increasing problems with delays by public authorities in responding to requests under the Act, the existing system of enforcement and appeals appears to remain broadly effective.[32] We are aware that there has been some discussion of allowing greater use of charges by public bodies for requests under the Act, and that there has already been consultation on the possible introduction of fees for appeals to the Information Tribunal.[33] In our view, the introduction of either measure would be a seriously retrograde step. The Act already provides for public authorities to set fees for dealing with requests under section 9 and the Centre has not seen any evidence to suggest that public authorities have found these provisions inadequate. In addition, any increase in fees for requests under the Act could particularly affect those with good reason to make a series of requests, for example to all local authorities in order to see the national picture. More generally, we are concerned that the introduction of fees for appeals to the Information Tribunal is likely to inhibit the effective operation of the Act and access to justice more broadly.

24. Further fees for requests or appeals would also, in our view, lead to an unwelcome divergence between the treatment of requests under the Act, on the one hand, and that of requests under the Environmental Information Regulations 2004 ('EIR'), on the other hand. As the Commission is undoubtedly aware, the definition of 'environmental information' under the EIR is extremely broad. The potential scope for requesting information under the EIR is not widely appreciated by the public at large. Moreover, as an EU measure, its

[29] Ibid, para 52.
[30] Ibid.
[31] To the extent, however, that section 53 provides for such a veto, the judgment of the majority of the Supreme Court in *Evans* sets clear restrictions on how that veto may be exercised.
[32] See e.g. Information Commissioner's Office, "Ministry of Justice monitored over unacceptable delays to Freedom of Information Responses", 11 September 2015.
[33] Ministry of Justice, "Court and Tribunal Fees: Consultation on further fees proposals" (August 2015).

requirements are not open to amendment in the same manner that the Act may be. Any introduction of restrictions on requests or appeals under the Act with the aim of reducing the burden on public authorities is, therefore, likely to backfire, resulting instead in members of the public seeking information under the EIR wherever possible.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FoI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

25. For the reasons already set out above, the Bingham Centre does not agree that any further controls are required in order to reduce the burden of the Act on public authorities. As the House of Commons Justice Select Committee found only three years ago: "we do not believe that there has been any general harmful effect at all on the ability to conduct business in the public service, and in our view the additional burdens are outweighed by the benefits";[34] and "FOI has costs, but it also creates savings which accrue from the disclosure of inappropriate use of public funds or, more importantly, fear of such disclosure".[35]

26. As to the question whether controls should be targeted at "the kinds of requests which impose a disproportionate burden", the Centre notes that section 12 of the Act already entitles public authorities to refuse requests where the cost of compliance would exceed the limits prescribed by the Secretary of State (currently £600 for central government and £450 for all other public authorities). We do not consider those limits to be particularly onerous. Moreover, public authorities may also refuse to comply with requests that are "vexatious" under section 14; "vexatious" being defined by the Upper Tribunal as denoting a "manifestly unjustified, inappropriate or improper use of a formal procedure".[36] Again, the Centre considers that these existing controls are more than sufficient to ameliorate any burdens imposed on public authorities under the Act.

27. Indeed, the Commons Justice Select Committee concluded in its report that "evidence from our witnesses suggests that reducing the cost of freedom of information can be achieved if the way public authorities deal with requests is well-thought through. This requires leadership and focus by senior members of public organisations. Complaints about the cost of freedom of information will ring hollow when made by public authorities which have failed to invest the time and effort needed to create an efficient freedom of information scheme".[37]

28. Lastly, the Bingham Centre notes recent comments made by the former Lord Chancellor, Chris Grayling MP, in which he claimed that the Act "is, on occasion, misused by those who

[34] *Post-legislative scrutiny of the Freedom of Information Act 2000* (HC 96, 26 July 2012) at para 241.
[35] Ibid at para 53.
[36] *Information Commissioner v Devon County Council and Dransfield* [2012] UKUT 440 (AAC) per Upper Tribunal Judge Wikeley at para 27.
[37] *Post-legislative scrutiny of the Freedom of Information Act 2000* (HC 96, 26 July 2012) at para 90.

use it as, effectively, a research tool to generate stories for the media, and that is not acceptable".[38] The Centre is concerned that the former Lord Chancellor's remarks appear to reflect a profound misunderstanding as to the principles governing the Act. In the first instance, it is clear that any distinction between "the media" and "the public" in relation to requests under the Act is simply untenable for, as the Information Tribunal emphasised in 2007, the Act is:[39]

> applicant and motive blind. A disclosure under FOIA, is a disclosure to the public [ie the world at large]. In dealing with a Freedom of Information request there is no provision for the public authority to look at from whom the application has come, the merits of the application or the purpose for which it is to be used.

29. Secondly and in any event, the Centre notes that the media play an essential role in the free exchange of information and ideas in our society in general, and in informing the public about the activities of government in particular. That function would be hopelessly impaired if the Act sought to pursue a specious distinction between 'the media' and the public at large. As Lord Bingham held in *Shayler:* "The role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one. But the press cannot expose that of which it is denied knowledge".[40]

[38] See Commons Hansard 29 October 2015 at Column 522. See also e.g. BBC News, "Journalists misuse Freedom of Information Act, says Chris Grayling", 29 October 2015.
[39] *S v Information Commissioner and the General Register Office*, EA/2006/0030, 9 May 2007, at para 80.
[40] See n6 above at para 21.