

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's Evidence to the Government
Commission on Freedom of Information**

November 2015

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at
<http://www.liberty-human-rights.org.uk/policy/>

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1. In July 2012, the House of Commons Justice Committee released its report on the post-legislative scrutiny of the Freedom of Information Act 2000 (FOIA).¹ Liberty gave evidence to the Committee, urging that the transparency created by the Act not be diminished by further legislative change.²
2. The FOIA remains a vital tool in vindicating human rights. Our submission to the Justice Committee identified important legal cases in which requests under the Act had been made. Requests under the Act have revealed, for example, critical evidence relating to the use of stop and search powers, detention without suspicion at the UK's borders, and the powers given to police under the 'Prevent' program. The information obtained suggested that the powers are used in ways that breach human rights and discrimination law, supporting Liberty's case work for individual victims and providing transparency for the public in general.
3. Liberty continues to make use of the Act in our work. For example, following the death of Jimmy Mubenga during his attempted removal from the UK by staff of the private contractor, G4S, Liberty made a number of requests under the Act to the Home Office as to their policy in this area. The requests revealed that the Home Office operates a system of formal sanctions against the private contractors who are hired to enforce removals, which can be applied when there is a perceived failure to meet a performance standard. A failure to meet a performance standard can include a failure to provide an escorting service (i.e. a successful take-off and removal from the UK). This appeared to us to build in to the process a financial incentive to ensure that removal take place at all costs, even when it might no longer be safe to remove, such as where detainee is panicking and/or resisting physically. Non-removal would therefore appear to result in a formal sanction. The Home Office claimed that "simple" failure to remove would not necessarily lead to a formal sanction but refused to issue more specific details of the performance standards imposed. It claimed that doing would "identify any areas of performance to which an individual service provider has failed to deliver the required contractual standard and the costs associated with each deduction" and prejudice the commercial interests of the Home Office and its private contractors.

¹Justice Committee Report: Post legislative scrutiny of the Freedom of Information Act, July 2012, accessible here: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news/foi-report/>.

²Liberty's submission to the Justice Select Committee's Inquiry: Post legislative scrutiny of the Freedom of Information Act, February 2012, accessible here: https://www.liberty-human-rights.org.uk/sites/default/files/Liberty%27s%20submission%20-%20Justice%20Committee%27s%20scrutiny%20of%20the%20FOIA%20%28Feb%202012%29_0.pdf.

4. It is Liberty's view that the questions posed by the Commission's Terms of Reference have been fully answered by the findings of the Justice Committee in 2012. As the Chairman, Sir Alan Beith MP, stated, the Act "has been a success and we do not wish to diminish its intended scope, or its effectiveness". Instead, they simply "need to be more widely understood within the public service."
5. The Committee considered the Act's effectiveness, its strengths and weaknesses, and whether it is operating in the manner intended. In so doing, it took oral evidence from 37 witnesses, over 7 evidence sessions, and 140 pieces of written evidence.³ This plainly included substantial evidence as to the questions asked by the Commission in its terms of reference. Questions of protection for internal deliberations of public bodies and the Cabinet, disclosure of risk assessments, the exercise of the veto, the enforcement and appeal system, and the burden imposed were satisfactorily covered by the evidence heard and fully evaluated by the Committee in its report.
6. It summarised its chief conclusions as follows:
 - i. "The Freedom of Information Act has been a significant enhancement of our democracy. Overall our witnesses agreed the Act was working well."
 - ii. "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."
 - iii. "...the cost to public authorities must be weighed against the greater accountability the right to access information brings. In addition, there is evidence of both direct cost savings, where a freedom of information request has revealed erroneous public spending, and an indirect impact whereby public authorities know that they will be exposed to scrutiny as a result of the Act and use resources accordingly."
 - iv. "We acknowledge the irritation experienced by public authorities which receive frivolous or trivial requests but, since these can normally be dealt with quickly at minimal cost, we do not recommend any change in the law in this area."

³ JC report, p. 5.

- v. “We believe that civil servants and others in public authorities should be aware of the significance of [sections 35, 36, and the Ministerial veto] and the protection they afford.”⁴
7. Nothing has changed since the publication of the Committee’s report which should materially alter or undermine its findings. As identified by the Commission’s Call for Evidence, the Committee did not have before it the Supreme Court’s judgment in *R (Evans) v Attorney General*.⁵⁶ However, for reasons we set out below, this represents an insufficient change in the policy and legal landscape to justify an additional inquiry into the operation of the Act.
8. The Supreme Court’s judgment provides significant clarification as to the use of the veto which, in any event, has been used extremely rarely. In any event, the promulgation of the judgment concerns only the deployment of the veto. Whilst its decision as to the scope of the veto plainly did not take place in a legal and political vacuum, it is clear that questions relating to the Act’s appeals and enforcement regime, and the financial burdens imposed by the volume of requests made, are wholly unrelated to the issues raised by the Supreme Court.

The Commission

9. Civil Society has raised serious concerns as to the impartiality and neutrality of the Commission. One member, Lord Howard, has been the subject of requests under the Act as to his expenses claims during his time as a Member of Parliament.⁷ He was also the subject of a number of requests relating to events whilst he was Secretary of State for the Home Department, such as the 1995 sacking of the Governor of Parkhurst Prison after high-profile prisoner escapes, in which the former Minister faced considerable public scrutiny.⁸
10. The Commission also includes Jack Straw, a former government Minister at the centre of a number of high-profile requests under the Act in respect of which he exercised his power of ministerial veto, including a refusal to disclose Cabinet

⁴ JC report, pp. 3-4.

⁵ [2015] UKSC 21.

⁶ Independent Commission on Freedom of Information, 9 October 2015, accessible here: <https://www.gov.uk/government/consultations/independent-commission-on-freedom-of-information-call-for-evidence>.

⁷ *The Telegraph*, ‘MPs’ expenses: Michael Howard’s £17,000 claims for gardening’, 1 June 2009, accessible here: <http://www.telegraph.co.uk/news/newstoppers/mps-expenses/5418996/MPs-expenses-Michael-Howards-17000-claims-for-gardening.html>.

⁸ *The Times*, ‘Tories cry foul on Howard secrecy files’, 26 June 2005, accessible here: http://www.thesundaytimes.co.uk/sto/news/uk_news/article138955.ece.

minutes relating to the legal advice given prior to the prosecution the war in Iraq, along with Cabinet minutes relating to the Devolution Sub-Committee.⁹ It is especially significant that the Iraq war veto related to Mr Straw's time as Foreign Secretary, prompting queries as to precisely what was withheld.¹⁰

11. In addition, Mr Straw has multiply commented on record that the Act's scope and depth should be curtailed. During his evidence to the Justice Committee, Mr Straw was asked by a member of the Committee as to whether the comments made Tony Blair in his autobiography indicated that they had "parted company" as to the Act's intended effects. These included claims by Mr Blair that the Act is "utterly undermining of sensible government" and that he "quake[s] at the imbecility of it".¹¹ Mr Straw stated, "We did not part company on it. Anyway, it was his idea; it has to be. I have an alibi." Asked by the Committee as to whether he would have "killed" the legislation "at birth", had he been able, Mr Straw responded, "I do not know the answer."¹² More of his comments to the Committee are included in an Annex to this evidence.

12. Mr Straw has also made comments which display serious misconceptions as to the law relating to requests under the Act and its operation. For instance, he stated in evidence before the Justice Committee, that exemptions to disclosure under section 35 "can only apply while policy was in the process of development but not at any time thereafter", something which, in his view, is "crazy and not remotely what was intended".¹³ There is nothing in the Act that precludes the application of the exemption to material after the completion of the policy development process, provided it falls within the kinds of information listed in section 35(1), such as information relating to the development of public policy. As the leading Tribunal case on this issue stated, the reasons for refusing disclosure will be far higher where the request is made during the development of the policy.¹⁴ Whether the request is made at such a time is a matter of fact to be determined, naturally affecting the balance of interests for and against disclosure. As it stated, "We do not imply by that that any

⁹ See, for example, *BBC News*, 'Straw vetoes Iraq minutes release', 25 February 2009, accessible here: http://news.bbc.co.uk/1/hi/uk_politics/7907991.stm.

¹⁰ See, for example, *The Guardian*, 'Straw vetoes publication of cabinet Iraq war minutes', 24 February 2009, accessible here: <http://www.theguardian.com/politics/2009/feb/24/iraq-freedom-of-information>.

¹¹ Blair, A., *A Journey*, Hutchinson, 2010.

¹² Q339, JC report.

¹³ Q343, JC report.

¹⁴ *The Department for Education and Skills v Information Commissioner and The Evening Standard* EA/2006/0006, accessible here: <http://www.informationtribunal.gov.uk/DBFiles/Decision/i70/DFES.pdf>.

public interest in maintaining the exemption disappears the moment that a minister rises to his or her feet in the House. We repeat – each case must be decided in light of all the circumstances.”¹⁵

13. Concerns have also been raised as to the lack of transparency in the Commission’s own activities. During its first official briefing, journalists were reportedly requested not to disclose the identities of attendees nor attribute what was said.¹⁶ In addition, the original version of Commission’s consultation document proposed that evidence would be quoted anonymously.¹⁷ The Committee Chair’ replied to queries from campaigners by removing the relevant passage, and providing for the quotation of anonymous evidence where “it is appropriate in the circumstances to grant it.”¹⁸
14. The use of anonymous evidence is in itself an extraordinary recourse for any committee to take. It is justifiable only in limited circumstances: for example in 2013 the Home Affairs Select Committee rightly took evidence in private from three women who were tricked into long term relationships by undercover police, in order to protect their anonymity.¹⁹ No basis has been suggested for the Commission to make provision for anonymous evidence on the basis of the likely material to be received. Even less clear is why such provision was made *in the abstract*. Such an approach is all the more extraordinary for a Committee tasked with the assessment of government transparency, accountability, and public access to information.

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?

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?

¹⁵ See *DFES* decision, paragraph 75(iv) and (v).

¹⁶ *The Guardian*, ‘Freedom of information commission not very free with its information’, 9 October 2015, accessible here: <http://www.theguardian.com/politics/2015/oct/09/freedom-of-information-commission-not-very-free-with-its-information>.

¹⁷ See the letter of The Campaign for Freedom of Information to Lord Burn, Committee Chair, 27 October 2015, accessible here: <https://www.cfoi.org.uk/wp-content/uploads/2015/10/Lord-Burns-letter.pdf>.

¹⁸ See the letter of Lord Burns to The Campaign for Freedom of Information, 27 October 2015, accessible here: <https://www.cfoi.org.uk/wp-content/uploads/2015/10/Burns-reply.pdf>.

¹⁹ Undercover Policing: Interim Report, Home Affairs Select Committee, 26th February 2013, accessible here: <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/837/837.pdf>.

15. It is Liberty's view that there is no basis for increasing protections already available to public bodies and Ministers provided by sections 35 and 36 and the power of veto under section 53.
16. Section 35 already exempts all information held by a Government department relating to the formulation of Government policy, ministerial communications, advice by Law Officers, or the operations of any Ministerial private office. This potentially excludes a vast amount of information of use not only to members of the public but also to Parliamentarians making determinations about proposed legislation. Moreover, the 'prejudice' test of section 36 remains easy to meet for those seeking to withhold information. Liberty has previously recommended that a stronger, 'substantial harm' test should be imposed.²⁰
17. The Commission's Call for Evidence quotes the words of the Justice Committee on the need for the provision of "full, frank advice", the ability to "discuss and test proposed policies in a comprehensive and honest way", and the "accurate and sufficiently full" recording of their discussions and decisions.²¹ However, the document does not quote the conclusions of the Committee on this very issue.
18. In particular, the Committee was "unable to conclude, with any certainty, that a chilling effect has resulted from the FOI Act". In light of the clear public policy and democratic objectives of the Act, and the continued availability of the Ministerial veto, the Committee concluded that no significant change to the system could be recommended.²²
19. In so concluding it took into account anecdotal Ministerial concerns as to an alleged 'chilling effect' of the Act on the objectives identified above. However, the Committee took seriously the findings of UCL's Constitution Unit – which it called "the most important research-based source of evidence on FOI"²³ – that any such effect has been "negligible to marginal."²⁴
20. Nothing in the policy landscape has changed to justify departure from the findings of the Justice Committee on this issue. UCL's Constitution Unit found that, whilst there

²⁰ See Liberty's Committee stage briefing on the Protection of Freedoms Bill in the House of Lords (January 2012), accessible here: <https://www.liberty-human-rights.org.uk/sites/default/files/liberty-s-committee-stage-briefing-supplementary-prot-of-freedoms-bill-hol-j.pdf>.

²¹ Independent Commission on Freedom of Information, Call for Evidence, p. 6, citing JC report, p. 54.

²² JC report, p. 75.

²³ JC report, p. 69.

²⁴ Hazell, R., Worthy, B., and Glover, M., *The impact of the Freedom of Information Act on Central Government in the UK, Does FOI Work?*, London, 2010.

had been some altered behaviour of officials in certain high profile-cases, “there has been no negative impact of FOI on the quality of advice”, no impact on the way departments work together, and whilst there was some nervousness at the outset those interviewed by the Unit seemed untroubled.²⁵

21. As the Committee found, the Commissioner and Tribunal have repeatedly upheld the need for a ‘safe space’ whilst naturally testing its boundaries.²⁶ In Liberty’s view it is the vital constitutional role of the independent court system to determine the meaning of legislation. Where the extent of Ministerial ‘safe space’ remains not fully clear, it is for the courts to decide by sections 35 and 36 of the Act.
22. Instead, the Committee found that greater Ministerial direction and leadership is needed as to the safeguards under the Act. Officials should “state explicitly that the Act already provides a safe space, and that the Government is prepared to use the ministerial veto to protect that space if necessary.”²⁷
23. The Justice Committee’s clear finding was that “the Act has contributed to a culture of greater openness across public authorities, *particularly at central Government level which was previously highly secretive*” (emphasis added).²⁸ The Justice Committee recognised that refusals to fulfil requests under the Act may simply protect “politically embarrassing” information leading merely to “bad publicity” to the body concerned.²⁹
24. Suspicion will be inevitably deepened where Government Ministers are seen to be employing exceptions under the Act to hide mere embarrassment, rather than protecting anything approaching ‘internal deliberative space’. The Act has revealed a wide range of very serious cases of government and Parliamentary wrongdoing, such as the MPs’ expenses scandal,³⁰ allegations as to Sir Cyril Smith’s pressuring of police to avoid investigating claims against him of child sexual abuse,³¹ over a

²⁵ *The impact of the Freedom of Information Act on Central Government in the UK, Does FOI Work?*.

²⁶ JC report, p. 63.

²⁷ JC report, p. 74.

²⁸ JC report, p. 11.

²⁹ JC report, p. 54.

³⁰ See, for example, *The Independent*, ‘MPs’ expenses scandal: the timeline’, 23 October 2011, accessible here: <http://www.independent.co.uk/news/uk/politics/mps-expenses-scandal-the-timeline-1888349.html>.

³¹ *Manchester Evening News*, ‘Revealed: Sir Cyril Smith’s “bullying” of sex abuse probe police’, 14 March 2013, accessible here: <http://www.manchestereveningnews.co.uk/news/greater-manchester-news/revealed-sir-cyril-smiths-bullying-1744842>.

thousand care-home residents dying as a result of neglect,³² the summary incineration of over 15,000 aborted fetuses,³³ and the use of police tasers on more than 400 children in 2013.³⁴

25. Providing additional exceptions to the release of information under the Act will deepen worries as to the unaccountability of government which the Act was designed to address. It is likely that imposing further carve-outs to the requirements of the Act for Ministers will increase public mistrust of Government and undermine Government's stated objectives to be truly responsible and responsive to those governed. This is particularly important in light of public worries over other avenues of Executive accountability for matters of major public interest. The longstanding delay over the release of the report of the Chilcot Inquiry on the Iraq War is a case in point.³⁵

26. The same is true of what appears to be frivolous reliance on exemptions from disclosure, such as that in evidence before the Upper Tribunal *The Cabinet Office v The Information Commissioner*.³⁶ The requestor sought information as to the number of times the Reducing Regulation Committee had met since its establishment over a two-year period. This was opposed by the Cabinet Office by way of section 35(1)(a) and (b), claiming that disclosure of the information would generate the "pollutant" of "exposing the committee (and the Cabinet/Committee structure) to external accountability".

27. Taking into account the need for a "safe space" in which deliberation and decision-making can take place, the Information Commissioner and the First-tier Tribunal had ordered disclosure. The Upper Tribunal unanimously refused the Cabinet Office's appeal. In addition to heavily criticising the Cabinet Office's witnesses and the testimony they offered, the Tribunal accepted the Information Commissioner's finding that the likelihood of disclosure causing the damage claimed was "very remote", it

³² *The Telegraph*, 'More than a thousand care home residents die thirsty', 1 December 2013, accessible here: <http://www.telegraph.co.uk/news/health/news/10487305/More-than-a-thousand-care-home-residents-die-thirsty.html>.

³³ *The Telegraph*, 'Aborted babies incinerated to heat UK hospitals', 24 March 2014, accessible here: <http://www.telegraph.co.uk/news/health/news/10717566/Aborted-babies-incinerated-to-heat-UK-hospitals.html>.

³⁴ *BBC News*, 'Tasers drawn on 400 children in 2013', 25 February 2015, accessible here: <http://www.bbc.co.uk/news/uk-31608320>.

³⁵ *The Guardian*, 'Chilcot report delays blamed on "vested interests"', 29 August 2015, accessible here: <http://www.theguardian.com/uk-news/2015/aug/29/chilcot-iraq-war-report-delays-vested-interests>.

³⁶ EA/2013/0119 (remitted), accessible here: http://www.informationtribunal.gov.uk/DBFiles/Decision/i1666/EA-2013-0119_12-11-2015.pdf.

instead providing public information which supplemented that already available forming its proper context.

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

28. As to the publication of risk registers, it is Liberty's view that there is no case for the introduction of additional safeguards. As the Justice Committee found, there is insufficient evidence to suggest that any change needs to be made. There remain sufficient safeguards in the Act against the publication of risk assessment where they cause prejudice and the Ministerial veto remains as a final block on their release.
29. Moreover, the evidence, as it stands, points in the opposite direction. For example, the Information Commissioner, in his report on the use of the veto by Andrew Lansley to suppress the NHS transitional risk register, disagreed with the Government's finding that disclosure would affect the "frankness and candour" of future risk registers, finding no evidence of a chilling effect resulting from publication.³⁷ He also found that insufficient reasons had been provided for thinking that the circumstances were sufficiently exceptional to justify the veto, nor was the certificate sufficiently reasoned.

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?

30. In *Evans*, the Guardian journalist Rob Evans made a request under the Act for the disclosure of communications passing between the Prince of Wales and various Ministers. Their departments refused disclosure, arguing that the communications were exempt from disclosure under sections 37 (as in force at the time),³⁸ 40, and

³⁷ See Information Commissioner's Report to Parliament, Freedom of Information Act 2000: Ministerial veto on disclosure of the Department of Health's Transition Risk Register, HC 77, Session 2012–13, paragraphs 7.5–7.9, and 7.15–7.19, accessible here: <https://ico.org.uk/media/about-the-ico/documents/1042385/ico-report-to-parliament-doh-transition-risk-register-hc77.pdf>.

³⁸ This provided for a qualified exemption for any information relating to communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or the conferring by the Crown of any honour or dignity. Sections 1 and 37 have subsequently been amended to provide for an absolute exemption (it formerly being qualified) for any information relating to communications with the Sovereign, his or her heirs, all other members of the Royal Family or Household, or the conferring by the Crown of any honour or dignity.

41³⁹ of the Act, and their refusals were upheld by the Information Commissioner (although he later resiled from his decision). The Upper Tribunal ruled, in a judgment described by the Court of Appeal as “a most impressive piece of work”, that certain communications must be disclosed. None of the departments sought to appeal the decision. Instead, the Attorney General vetoed the Tribunal’s decision by issuing a certificate by way of section 53.⁴⁰

31. Mr Evans challenged this on the basis of both constitutional principle and European Union Directive 2003/4/EC,⁴¹ which requires access to environmental information. The Court of Appeal found that the veto had been unlawfully made,⁴² and the Supreme Court agreed. As the majority found, the Attorney General’s veto did not meet the section 53 test: in the circumstances, his decision merely disagreed with the carefully-reached findings of the Tribunal, failing to demonstrate the requisite justification for departing from them. As to EU law, Article 6 of the Directive requires decisions of judicial bodies as to the provision of environmental information to be final and binding and therefore was found to provide “no room” for a blanket veto by a member of the executive.⁴³
32. Liberty does not believe that the Supreme Court’s decision justifies a reassessment of the Act’s safeguards against disclosure, particularly those provided by sections 35 and 36. Rather, its judgment significantly clarifies and crystallises the position since the Act’s inception.
33. The Government’s own guidance on the use of the veto states that it “should only be used in exceptional circumstances and only following a collective decision of the Cabinet.”⁴⁴ Moreover, it provides that the Government “will not routinely use the power under section 53 simply because it considers the public interest in withholding the information outweighs that in disclosure.”

³⁹ These provide for absolute exemptions in case of information which is ‘personal information’ for the purposes of the Data Protection Act 1998 and the disclosure of which would constitute an actionable breach of confidence, respectively.

⁴⁰ This provides for the Attorney General and others (as designated ‘accountable persons’) to override a decision or enforcement notice by service of a certificate no later than 12 days after the receipt of the notice stating that he or she has “on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure” to fulfil the disclosure duties under the Act.

⁴¹ Accessible here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>.

⁴² See [2014] EWCA Civ 254.

⁴³ *Evans*, paragraph 103.

⁴⁴ See Statement of HMG policy: Use of the executive override under the Freedom of Information Act 2000 as it relates to information falling within the scope of Section 35(1), undated, accessible here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/276160/statement-hmg-policy-veto.pdf/.

34. As a result, the veto has been used extremely sparingly. As recounted by the Justice Committee, it had been used on only 6 occasions other than *Evans*:

“...in February 2009, when Jack Straw, as Lord Chancellor, vetoed the disclosure of Cabinet minutes and records relating to meetings held in March 2003, concerning the Attorney-General’s legal advice about military action against Iraq; in December 2009, when Jack Straw vetoed disclosure of minutes of the Cabinet Sub-Committee on Devolution, Scotland, Wales and the Regions; in February 2012, when the Attorney General, Dominic Grieve, vetoed the disclosure of minutes of the same Sub-Committee; and in May 2012, when the Health Secretary, Andrew Lansley, vetoed disclosure of the NHS transitional risk register.”⁴⁵

35. A further veto was issued in July 2012 blocking the release of cabinet minutes relating to military action in Iraq, and another was issued in January 2014 in respect of documents relating to the planned HS2 rail line.⁴⁶

36. As Jack Straw stated during the passage of the Act,

“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.”⁴⁷

37. It is of note that in his reports on both uses of the veto in 2009 in respect of the Iraq war and devolution minutes, the Information Commissioner doubted the rationale provided by the Government, stating that disclosure of the Cabinet minutes in question would not be likely to significantly undermine the convention of collective Cabinet responsibility.^{48,49} He also found that the maintenance of the convention only

⁴⁵ JC report, p. 63.

⁴⁶ See House of Commons Liberty, FoI and Ministerial vetoes, 19 March 2014, accessible here: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05007>.

⁴⁷ Hansard, 4 April 2000, columns 918-23.

⁴⁸ See Information Commissioner’s Report to Parliament, Freedom of Information Act 2000: ministerial veto on disclosure of Cabinet minutes concerning military action against Iraq, HC 622, Session 2008–09, paragraph 4.4, accessible here: <https://ico.org.uk/media/about-the-ico/documents/1042382/ico-report-on-iraq-minutes-ministerial-veto.pdf>.

⁴⁹ See Information Commissioner’s report to Parliament, Freedom of Information Act 2000: ministerial veto on disclosure of the minutes of the Cabinet Sub-Committee on Devolution for Scotland, Wales and the Regions, HC 218, Session 2009–10, paragraph 4.7, accessible here <https://ico.org.uk/media/about-the-ico/documents/1042387/ic-report-to-parliament-hc21.pdf>.

justified the refusal to disclose only part of what was covered by 2012 devolution minutes.⁵⁰

38. It was therefore clear before the litigation in *Evans* that the exercise of the Ministerial veto would have to be exercised compatibly with both constitutional principle and EU law. The Justice Committee itself heard evidence on the relationship between EU law, including the Environmental Directive and its likely adverse impact on blanket exemptions to disclosure under the Act, such as that relating to the BBC.⁵¹ It also heard evidence as to the impact of the Aarhus Convention, which the Directive implements, the two having been in effect for over a decade prior to the Supreme Court's judgment.⁵²⁵³

39. The Supreme Court also relied on cases decided prior to the passage of the Act of which Parliament could be presumed to be aware as it made provision for the Ministerial veto.⁵⁴ They held that executive decisions to override judicial and even quasi-judicial bodies could be quashed where the government had failed to demonstrate sufficient justification for doing so, including where a Minister had a statutory veto power, or its equivalent, as in *Evans*.

40. The issues of constitutional principle were also clear and compelling. As Lord Neuberger stated,

“...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

⁵⁰ See Information Commissioner's report to Parliament, Freedom of Information Act 2000: the Attorney General's veto on disclosure of the minutes of the Cabinet Sub-Committee on Devolution for Scotland, Wales and the Regions, HC 1860, Session 2010–12, paragraphs 4.10–4.12, accessible here: <https://ico.org.uk/media/about-the-ico/documents/1042383/ico-report-attorney-general-veto-cabinet-sub-committee-minutes-devolution.pdf>.

⁵¹ Ev w180, JC report.

⁵² The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998, commonly known as the Aarhus Convention, accessible here: <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

⁵³ Ev w3-6 and w180, JC report, volume II.

⁵⁴ *Evans*, paragraphs 60-65 and 88.

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.”⁵⁵

41. He described these principles as “scarcely a recent development” and called the Government’s suggestions to the contrary “remarkable”.⁵⁶ He also relied on the longstanding principle that Parliament cannot legislate to abrogate fundamental rights and the rule of law in the absence of clear statutory language, something plainly absent in the case of section 53.⁵⁷
42. Most fundamentally, nothing in *Evans* removes the power of veto. In essence, it remains a power to override the decision of a court in circumstances far wider than available appeal rights. Plainly, the veto remains available, for example, where the Tribunal’s decision is manifestly wrong, or the Attorney General seeks to rely on evidence – such as risk assessments – relevant to the original decision but arising after any appeal. This could include evidence not considered or even excluded by the Tribunal or higher courts. The veto’s power to challenge a judicial decision is far wider than that available by way of appeal to a higher court, which is only permitted in respect of points of law.
43. The extent to which the Attorney General or others may veto the decision of a Tribunal will depend on the facts of the case, including the specific decision made and the manner in which it was reached.⁵⁸ Lord Mance took this to include cases of disagreement between the Attorney General and the Tribunal as to “the relative weight to be attributed to competing interests”, or where the accountable person provides the “clearest possible justification” for departing from the court’s decision.⁵⁹ Overall, the particular facts of *Evans* were decisive: the Attorney General took a decision in disagreement with the Tribunal without doing what was necessary to make the clearest possible justification for the use of the veto. Mere redetermination or re-evaluation, as against a carefully-considered judicial decision, whose reasoning the certificate did not adequately or at all address, was insufficient to meet the section 53 test.⁶⁰

⁵⁵ *Evans*, paragraph 52.

⁵⁶ *Evans*, paragraphs 53-55.

⁵⁷ *Evans*, paragraphs 56-58.

⁵⁸ *Evans*, paragraphs 66-69.

⁵⁹ *Evans*, paragraphs 130 and 145.

⁶⁰ See also *Evans*, paragraphs 137-145.

44. *Evans* was a case in which the Government's reasons for issuing the certificate were widely questioned in public, were found wholly inadequate by the Supreme Court, and at their highest amount to a disagreement with the findings of a carefully reasoned judicial body.
45. In light of this, and the fact that the use of the veto remains rare, Liberty does not expect that the Supreme Court's judgment will have a significant effect on the Government's powers under section 53 in future. There is no justification for further changes to render the making of a veto easier. Nothing has displaced the Committee's finding that the Ministerial veto is "a necessary backstop to protect highly sensitive material."⁶¹

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

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?

46. It is Liberty's view that nothing has arisen since the publication of the Justice Committee's report which justifies further inquiry into the operation of the Act, quite apart from the issues of sections 35, 36, and the Ministerial veto and in particular in relation to its appeals and enforcement system and the financial cost it imposes. It is Liberty's view that the costs of the Act are amply justified by its clear benefits to transparency, accountability, and democracy. However, the evidence points to two important facts. First, the direct costs it imposes are not significant. Secondly, its direct costs are likely more than offset by the savings made in funds recouped after revelations of government inefficiency or financial and other malpractice.
47. The Constitution Unit of University College London has estimated that the cost to government of fulfilling its obligations under the Act was around £31.6 million in 2010.⁶² It is clear that these costs are steadily decreasing. UCL's research has demonstrated that both cost and the number of hours are decreasing: costs down from £36.6 million in 2009 and the average hours per request have been cut by

⁶¹ JC report, p. 68.

⁶² Constitution Unit, UCL, 'The Cost of Freedom of Information', December 2010, accessible here: <https://www.ucl.ac.uk/constitution-unit/research/foi/countries/cost-of-foi.pdf>.

almost two thirds since 2007. Savings are made, it would appear, as public authorities become more experienced in fielding inquiries from the public and develop systems and practices to deal with them efficiently and effectively.

48. The evidence cited by the Commission in its Call for Evidence provides further support. Even on the assumption that the number of initial requests significantly increases costs – which is highly debatable in light of UCL’s research – numbers of initial requests, internal review requests, and ICO appeals are down since 2013.,

49. As the Justice Committee heard, these costs will continue to decrease with “positive leadership combined with good systems, staff and organisation”.⁶³ As the Committee found,

“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.”⁶⁴

50. It is also important to contextualise the costs of maintaining a transparent and accountable government within its budget as a whole. For example, a recent request under the Act revealed the cost to government of its press, communications, and marketing activities over the course of the year 2014/15.⁶⁵ The burden imposed was found to total £150.7 million, almost five times more expensive than that of meeting its obligations to the public under the Act.

51. The Justice Committee heard evidence as to the savings made by revelations ranging from systemic inefficiencies to serious mismanagement of public funds. The Act generates savings accruing “from the disclosure of inappropriate use of funds or, more importantly, fear of such disclosure.”⁶⁶ The cost savings to be made by public scrutiny of inefficiencies or inflation of public sector remuneration, including further expenses irregularities by public officials of serious concern.⁶⁷

52. The Justice Committee also heard evidence on a number of methods by which the burden on public authorities could be reduced, including the creation of publication schemes and disclosure logs. As it found, this would enable them to answer requests

⁶³ Ev 169, JC report.

⁶⁴ JC report, p. 38.

⁶⁵ *Foiman*, ‘FOI costs, sure – but nowhere near as much as PR’, 9 October 2015, accessible here: <http://www.foiman.com/archives/2072>.

⁶⁶ JC report, p. 24.

⁶⁷ See, for example, *The Daily Mail*, ‘EXCLUSIVE: How much do bosses at YOUR council earn?’, 8 November 2015, accessible here: <http://www.dailymail.co.uk/news/article-3309596/The-shocking-scale-fat-cat-pay-public-sector-exposed-today-major-Daily-Mail-investigation.html>.

more proactively and efficiently, in parallel to the traditional means by which it meets its obligations under the Act.⁶⁸

53. There are real dangers to introducing fees for requests under the Act. The experience of Ireland serves as an instructive example. After introducing fees of 10 euros per request, 25 euros for an internal review, and 50 euros for an appeal in 2003, the number of requests made dropped by around 50%. The Irish Information Commissioner found that fees were “a major obstacle” to freedom of information.⁶⁹ The Justice Committee concluded that it would be impossible to devise a fee sufficiently high to recoup the costs of the Act whilst not also inappropriately quashing requests under it.⁷⁰
54. International cost comparisons are highly instructive. In fulfilling each request under the Act, on average, the UK was found at the Act’s inception to spend around the same as the US, approximately half as much as Canada, more than half as much as Australia, and over £100 less than Ireland. This was despite each of the comparator countries having operated their freedom of information regimes for significantly longer and, in the case of Ireland, after supposedly cost-saving measures.⁷¹ Moreover, in light of the above, the cost of fulfilling individual requests by UK authorities is likely to have substantially decreased since the Act’s beginnings.
55. As to alleged vexatious requests, the Act already has substantial safeguards. Section 14 which permits public authorities to ignore them, and the Commissioner has provided guidance to assist public authorities in dealing such cases.⁷²
56. As to alleged frivolous requests, it is common sense that, where they are not serial and therefore vexatious, they can be dealt with quickly and summarily. Where they are serial and vexatious, they can be safely ignored under section 14. As a Ministry of Justice representative stated to the Justice Committee, the issue of frivolous requests “is pretty minor in the grand scheme of things.”⁷³ As Committee itself found, such requests “are a very small problem” which “can usually be dealt with relatively easily, making it hard to justify a change in the law.”⁷⁴

⁶⁸ JC report, pp.15-6.

⁶⁹ See *BBC News*, ‘Ireland reviews FOI fee which cut request level in half’, 31 May 2012, accessible here: <http://www.bbc.co.uk/news/uk-politics-18282530>.

⁷⁰ JC report, p. 36.

⁷¹ ‘The Cost of Freedom of Information’.

⁷² ICO, Dealing with vexatious requests, undated, accessible here: <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>.

⁷³ Q463, JC report.

⁷⁴ JC report, p. 52.

57. The Act performs a clear money-saving role, alongside what the Justice Committee described as the “incalculable” benefits “such as greater openness and accountability as well as a better informed citizenry”.⁷⁵

Sam Hawke

⁷⁵ JC report, p. 23.

ANNEX – Jack Straw’s comments to the Justice Committee

In giving evidence to the Justice Committee during its post-legislative scrutiny of the Freedom of Information Act, Mr Straw made the following comments:

- i. “[T]he view I take is that it is not a particularly well-constructed Act intellectually or jurisprudentially.”⁷⁶
- ii. “FOI was not thought about with any seriousness.”⁷⁷
- iii. “There are plenty of things that I would do differently if I were the Minister in charge of this Bill now, one of which is not to have allowed the Act to run retrospectively.”⁷⁸
- iv. “If you seek to undermine collective responsibility, which is essentially what the tribunal and the enthusiasts for FOI have been doing, then you will start to undermine Government. Far from discouraging leaking and poor record keeping, you will encourage it. I deplore it anyway, but you will get more of it.”⁷⁹
- v. “On freedom of information more than almost any other area of public policy, it is almost impossible to have a proper balanced conversation with the press, because, regardless of their political persuasions, they have one interest and the Government have another. You can get individual journalists to accept that there needs to be better balance, but they are interested in stories.”⁸⁰
- vi. “[I]n my view there is a very significant problem with sections 35 and 36. That is solvable, but there has to be a will to solve it.”⁸¹
- vii. “[I]n my view section 36 is too loose in its wording”.⁸²
- viii. “My view is that we need a class exemption, full stop, that exempts information if it relates to the formulation or development of Government policy, ministerial communications and so on. However, we also need a class exemption in respect of matters covering section 36—the maintenance of

⁷⁶ Q342, JC report.

⁷⁷ Q334, JC report.

⁷⁸ Q332, JC report.

⁷⁹ Q345, JC report.

⁸⁰ Q347, JC report.

⁸¹ Q342, JC report.

⁸² Q343, JC report.

conventional collective responsibility of the Crown and the provision of free and frank advice.”⁸³

- ix. Sections 35 and 36 have “led to a reluctance to commit the process of decisions to records, so in one sense it has made it more difficult to secure accountability rather than less.”⁸⁴ They are “unsatisfactory” and produce “consequences that tend towards less openness rather than more.”⁸⁵
- x. “There has to be a space in which decision makers can think thoughts without the risk of disclosure, and not only of disclosure at the time, but of disclosure afterwards. Let me say this: I am very struck that this right to protect private space for decision making is one that many in the media, including the BBC, seek to deny Government, but are very jealous about guarding for themselves, as witness the recent BBC case before the Supreme Court.”⁸⁶
- xi. “We 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.”⁸⁷
- xii. “I happen to think that the legal advice of an Attorney-General, like any other legal advice, should be the subject of legal professional privilege.”⁸⁸
- xiii. “I do not think [private secretaries’ notebooks] should [be disclosed] at all. I am absolutely clear about that.”⁸⁹
- xiv. “The drafting of section 12 on cost limits is poor, and it does not include the actual costs. That needs to be changed. There is provision in the Act for charging a small fee for applications, and, although I fully intended to have a fee, I was surprised when, subsequent to my period, it was dropped.”⁹⁰
- xv. “The costs are huge”.⁹¹
- xvi. “My intention was to use section 13, I think it is, but I am speaking from memory, to charge a small charge parallel to that for data protection requests.

⁸³ Q344, JC report.

⁸⁴ Q327, JC report.

⁸⁵ Q329, JC report.

⁸⁶ Q331, JC report.

⁸⁷ Q343, JC report.

⁸⁸ Q353, JC report.

⁸⁹ Q331, JC report.

⁹⁰ Q355, JC report.

⁹¹ Q360, JC report.

It would be about £10. It would not stop important requests, but it would act as a check. I would also tighten up very significantly section 12, which, referring to an earlier answer, relates to the excessive costs provision. As the MOJ memorandum says, it is too narrowly constrained.”⁹²

- xvii. “The real curiosity is that the identity of the requester is kept from Ministers. For the life of me, I do not understand that, and that needs to be changed too.”⁹³
- xviii. [In respect of the early proposals leading to the Act] “[m]y contribution was to ensure that there was a substantial carve-out for Home Office matters...I got protection for the Home Office. There was a huge carve-out, and the rest was all open.”⁹⁴

⁹² Q363, JC report.

⁹³ Q358, JC report.

⁹⁴ Q334, JC report.