Central government—additional material

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7.11 Freedom of Information Act

One of the main themes of Chapter 7 is the accountability of government to Parliament. In addition, the government can be directly accountable to the public through the Freedom of Information Act 2000. This section outlines the key features of the Act and its impact on government.

7.11.1 Introduction

The Freedom of Information Act 2000 grants individuals the right to access information held by public authorities.[1] By comparison with other countries, the UK was relatively slow to grant this right. The traditional view was that because government is accountable through its ministers to Parliament, providing information directly to the public 'would undermine the authority and position of Parliament'.[2] However, the lack of public access to information was said to foster a culture of secrecy that pervaded Whitehall. The Freedom of Information Act 2000 was designed to change this mentality by creating a culture of transparency and open government. This was to enable members of the public, opposition politicians, and the media to hold the government to account more easily.

For information to be released, someone needs to make a request (frequently known as a FOI request). This must be in writing,[3] paying any required fee.[4] The public body receiving the request must respond within twenty working days.[5] The public authority may also refuse to release the information if the costs of collating and releasing the information are too great. Currently, the limits are £600 for a government department and £450 for other public bodies.[6]

7.11.2 The meaning of 'information'

The central concept to the scheme is information. The following case considers what is meant by the word 'information' for the purposes of the 2000 Act.

Case in depth: *Independent Parliamentary Standards Authority v Information Commissioner* [2015] EWCA Civ 388; [2015] 1 WLR 2879

The Independent Parliamentary Standards Authority (IPSA) is responsible for administering the system of MPs expenses. A journalist submitted a freedom of information request for the original receipts used to support the expenses claims of three MPs. IPSA confirmed that it held the information and released some details from the claims, for example amount spent, the name of the supplier and their contact details. However, IPSA did not publish copies of the original receipts and removed details of the suppliers' logos. The journalist wanted actual copies of the receipts. The

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[1] Freedom of Information Act 2000 (hereafter FOIA 2000), s 1.
[2] Patrick Birkinshaw, 'Regulating Information' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (7th edn, OUP 2011) 366.
[3] FOIA 2000, s 8. [4] Ibid s 9. [5] Ibid s 10. [6] Ibid s 11.

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argument was whether information as provided for in section 1 means simply the substantive information, or whether it has a broader meaning to include how information is presented.

The Court of Appeal agreed with the journalist, finding that 'information' was the central concept of the Act and that to further the aims and policy of the Act, the word 'information' should be construed as broadly as possible. This meant that logos, letterheads, and how the information was presented can fall within the definition of section 1.

7.11.3 Public authorities

The Act applies to 'public authorities'. There is no single definition of public authorities, instead the Act applies to those public authorities listed in Schedule 1 of the Act. There are over 400 bodies listed. Some are specifically named, whereas others are listed by category, for example government departments and universities. This means that the Act applies to many more bodies than it may initially appear.[7]

Some bodies are subject to the Act, but with some exceptions. For example, both the House of Commons and the House of Lords are subject to the Act, but are not required to release information regarding the residential address of a member, the travel arrangements, information relating to expenditure on security or information held by the Intelligence and Security Committee.[8]

The inclusion of the BBC has caused some interesting problems. The BBC is listed in Schedule 1 as a public authority but only 'in respect of information held for purposes other than those of journalism, art or literature'.[9] In *BBC v Sugar (No 2)*,[10] a journalist sought the release of a report on the quality of the BBC's news journalism. The Supreme Court held that if information had several purposes, including journalism, the BBC was not required to disclose the information.

7.11.4 Exemptions

There is a list of exemptions which greatly restrict the scope of the general right to access information. There are two categories of exemptions. Some exemptions are absolute, meaning that the information does not need to be disclosed, whereas other exemptions only apply when the public interest against disclosure outweighs publishing the information.

The absolute exceptions are as follows. If the information requested is reasonably available elsewhere,[11] held by bodies dealing with security matters,[12] or relates to court records,[13] then it does not need to be released. A constitutionally important absolute exception is if the disclosure would infringe on parliamentary privilege.[14] The following types of information are also absolutely exempt:

- personal information protected by the Data Protection Act 1998;[15]
- information provided in confidence;[16] and
- if disclosing the information requested is prohibited by law or would breach an EU obligation.[17]

Finally, since the Constitutional Reform and Governance Act 2010, communication between the Monarch, and the first two in the line of succession to the throne (ie the Prince of Wales and the Duke of Cambridge) has become absolutely exempt, instead of being only exempt when disclosure is not in the public interest.[18]

[7] Anthony Bradley, Keith Ewing, and Christopher Knight, *Constitutional and Administrative Law* (16th edn, Pearson 2014) 294.
[8] FOIA 2000, Sch 1, paras 2–3. [9] Ibid Part VI. [10] *Sugar v BBC (No 2)* [2012] UKSC 4.
[11] FOIA 2000, s 21. [12] Ibid s 23. [13] Ibid s 32.
[14] This is discussed in more detail in the additional online material which accompanies Chapter 8.
[15] FOIA 2000, s 40. [16] Ibid s 41. [17] Ibid s 44.
[18] Constitutional Reform and Governance Act 2010, Sch 7, para 3, inserting new provisions into the FOIA 2000, s 37(1).

If the information is not subject to the absolute exemption, disclosure can be refused only if it is in the public interest. This is when disclosure of the information would prejudice:

- the economic or financial interests of the UK;[19]
- national security;[20]
- the defence of the country;[21]
- international relations;[22]
- relations between the UK Government and the devolved institutions,[23] and criminal investigations[24] or law enforcement.[25]

In constitutional terms, the most interesting exception is that relating to the formulation or development of government policy or ministerial communications.[26] The Act is clear, that 'ministerial communications' includes 'proceedings of the Cabinet or of any committee of the Cabinet'.[27] This ensures that the confidentiality of Cabinet meetings is maintained.

Public interest

As seen earlier, the effect of the exceptions depends on balancing the public interest in favour of disclosure against some other factor of the public interest which points against disclosure. Should a public authority refuse to release the requested information, the individual requesting the information must use any complaints procedure provided by the public authority. If they remain dissatisfied, they can appeal to the Information Commissioner, who can reconsider the decision of the public authority.

The Information Commissioner can choose to uphold the original decision of the public authority. The individual making the request can appeal against this decision to the First-tier (Information Rights) Tribunal. Should the Information Commissioner overturn the original decision of the public authority, they can appeal to the Upper Tribunal. From there, either party can make further appeals on points of law, which can be heard by the Court of Appeal and ultimately the Supreme Court.

Disputes over the public interest have been a cause of litigation which has reached the courts. This can be seen in the long-winded dispute involving letters written by Prince Charles, and various government departments, referred to as the 'Black Spider Memos' (see 3.5.2).

Case in depth: *Evans v Information Commissioner* [2012] UKAT 313 (AAC)

A journalist sought disclosure of letters written by Prince Charles to government ministers. At the time the letters were written, communication between the heir to the throne and the government was not absolutely excluded from disclosure, but only if disclosure was against the public interest. As stated above, such communication is now absolutely exempt.[28] The government departments all refused to disclose the letters. The journalist challenged the decision before the Information Commissioner who upheld the decision of the government departments. The journalist appealed to the Upper Tribunal.

Overturning the decision of the Information Commissioner, the Upper Tribunal found that on balance, the public interest required the release of the letters. Factors in favour of release included the fact that the letters were deemed to be 'advocacy correspondence' and went further than was necessary for Prince Charles to prepare for 'kingship'. This meant that the letters fell outside the scope of any 'education convention', and did not attract any special constitutional status.[29] In addition, release of the letters would add to the debate about the extent and nature of the interaction between the government and the royal family.[30] These outweighed factors against disclosure including the possibility that release would have a 'chilling effect' on the frankness of communications between Prince Charles and the government. Indeed, should the letters contain anything politically controversial, it would still be in the public interest to release the letters.[31]

[19] FOIA 2000, s 29. [20] Ibid s 24. [21] Ibid s 26. [22] Ibid s 27. [23] Ibid s 28.
[24] Ibid s 30. [25] Ibid s 31. [26] Ibid s 35. [27] Ibid s 35(5).
[28] Ibid s 1(3)(ea) and s 37(1). [29] [2012] UKAT 313 (AAC) [105–6].
[30] Ibid [142]. [31] Ibid [187].

7.11.5 The ministerial veto

The government departments could have appealed against the decision of the Upper Tribunal to the Court of Appeal. Instead, the Attorney-General on behalf of the government decided to veto the publication of the letters under section 53 of the Act. This section applies if two circumstances are met. First, that the decision notice has been served on the government department requiring the release of information and the notice orders the release of information which is prima facie exempt subject to release being in the public interest. The minister has twenty working days within which they can issue a 'certificate', which effectively overturns the decision of the Information Commissioner, and the information is no longer required to be released.

This veto clearly compromises the right to freedom of information and potentially allows the government to veto the release of information that it may find embarrassing. To date, the veto has been exercised three times. First, following a request for Cabinet minutes regarding the Iraq War, and then again in response to a request for the minutes of a Cabinet committee on devolution. However, the most controversial use of the veto has been in relation to the 'Black Spider Memos'. Once the Attorney-General issued the veto, the journalist then sought a judicial review of this decision. After losing in both the High Court and Court of Appeal he appealed to the Supreme Court. While the case raised important issues regarding the rule of law and parliamentary sovereignty,[32] the key aspect of the decision for present purposes is the discussion about the scope of section 53.

Case in depth: *R (Evans) v Attorney-General* [2015] UKSC 21

Following the Upper Tribunal's decision, the Attorney-General issued a notice under section 53 on the basis that he had reasonable grounds for believing that non-disclosure of the letters would not be unlawful. As required by section 53(3), the Attorney-General gave written reasons for issuing the notice.

On the face of the section, it appears that the government could issue a veto (referred to in the section as a 'certificate') if they have reasonable grounds for believing that non-disclosure would not be unlawful. In this case, the government's belief was that the disclosure of the letters may undermine Prince Charles' political neutrality and call into question his ability to serve as the King when the time comes. Essentially, the Attorney-General disagreed with the balance struck by the Upper Tribunal when considering the public interest considerations for and against disclosure.

The Supreme Court found that the use of the veto was invalid. Lord Neuberger (with Lords Kerr and Reed agreeing) considered that the veto could only be used in one of the following two instances. First, if after receiving a decision of the Upper Tribunal facts or matters come to light which mean that there is a material change in circumstances, between the date of the judgment and the twenty-day period in which section 53 can be used. Alternatively, the veto could be used if the decision of the Upper Tribunal contained serious flaws, but because of the limitations on further appeals on the basis of fact, the Upper Tribunal's decision could not be appealed.

As Lord Neuberger himself admitted, this would mean that the veto could only apply on very limited circumstances and these did not apply in this case.

Lord Mance (with Lady Hale agreeing), gave a broader judgment, finding that the Attorney-General issued the veto because he disagreed with the Upper Tribunal's balancing of the public interest. However, the reasons for issuing the notice did not address the reasoning of the Upper Tribunal. This led Lord Mance to conclude that the 'disagreement with the Upper Tribunal's detailed findings and conclusions reflected in the certificate has not therefore been justified on reasonable grounds'.[33] This indicated that Lord Mance is more willing to consider the use of section 53 than Lord Neuberger, but it still needed to be supported by reasoning that explains why the Upper Tribunal's decision is disagreed with. In short, as the Attorney-General's notice failed to engage with the reasoning of the Upper Tribunal, it was not a justifiable use of section 53.

[32] The issues regarding the rule of law are discussed in 3.5.2.

[33] [2015] UKSC 21, [145].

In a dissenting judgment, Lords Hughes and Wilson found that the Attorney-General's use of section 53 was within the scope of the section and that the effect of Lord Neuberger's judgement was such that section 53 would almost never be used, which runs contrary to the wording of the statute.[34] In particular, Neuberger considered that vetoing a decision reached by a judicial body raised concerns for the rule of law, which requires that decisions of the courts must be binding on the parties. The rule of law especially requires that the executive should not veto a decision merely because it disagrees with it. However, Lords Hughes and Wilson consider that this was exactly what was intended by Parliament, when enacting section 53, as subsection 4 of the section indicated that Parliament had considered the relationship between the courts and the veto.

As CJS Knight outlines, effectively the court was split three ways:[35] Lord Neuberger's extremely restrictive view, Lord Mance's broader view, with the courts able to subject to exercise of the veto, but it was not lawful in this case, and the dissent which accepted the use of the veto. Reaching a clear ratio from this is difficult, however as Knight states, there is 'a majority for retaining a real scope for the section 53 veto, and there is a majority for subjecting any reliance on reasonable grounds to be subjected to an intensive standard of scrutiny'.[36] It may take further decisions to establish the true scope of section 53.

7.11.6 Review

The Freedom of Information Act was introduced as part of Tony Blair's programme of constitutional reform, which included devolution and the Human Rights Act. The aim was to increase the transparency of politics and government, as before the Act, the government only being subject to a Code of Practice on Access to Information. The Freedom of Information Act was the first time that individuals had a 'right' to access information held by the government.

Counterpoint:

Although initial proposals went far further, the eventual Act was described a disappointment by some. Yet Blair himself has admitted that he regrets introducing the Act as he felt that still it went too far. He states in his autobiography:

> Freedom of Information. Three harmless words. I look at those words as I write them, and feel like shaking my head till it drops off my shoulders. You idiot. You naive, foolish, irresponsible nincompoop …
>
> The truth is that the FOI Act isn't used, for the most part, by 'the people'. It's used by journalists … as a weapon.[37]

His concern is that Freedom of Information has limited the ability to debate issues within government: 'Without the confidentiality, people are inhibited and the consideration of options is limited in a way that isn't conducive to good decision making … people watch what they put in writing and talk without committing to paper. It's a thoroughly bad way of analysing complex issues'.[38]

These concerns, also expressed by others, led to the creation of the Independent Commission on Freedom of Information to review the Act, ten years after it came into force.[39] It concluded that the Act 'is generally working well' and has helped change the 'culture of the public sector' by increasing transparency and openness.[40] Further, they concluded that the Act did not require any radical amendments or that the 'right of access should be restricted'.[41] Despite initial concerns, it is clear that freedom of information is now here to stay.

[34] Ibid [177].
[35] Christopher Knight, 'The Rule of Law, Parliamentary Sovereignty and the Ministerial Veto' (2015) 131 LQR 547.
[36] Ibid 551.
[37] Tony Blair, *A Journey* (Hutchinson, 2010) 517.
[38] Ibid.
[39] Independent Commission on Freedom of Information, *Report* (Cabinet Office, 2016), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504139/Independent_Freedom_of_Information_Commission_Report.pdf.
[40] Ibid 3.
[41] Ibid.