MAURICE FRANKEL
Director, Campaign for Freedom of Information

Freedom of Information: requiring decisions to be taken in the public interest

[Edited transcript of lecture delivered on 16 March 2011[1]]

I am delighted and honoured to be asked to give this talk. Not only because the Allen Lane Foundation's generosity towards the Campaign for Freedom of Information has been so important to us but also because it is rare to have the opportunity to meet so many of its trustees.

We have been working on freedom of information since 1984 when the Campaign was set up. To be honest for much of that time I doubted that we would get a Freedom of Information Act. When it began to look as if we might, I doubted that we'd get an effective one. I thought we might get one that was there on paper but that was never used and which certainly never gave anybody any important information. I'm delighted that my pessimism has been proved wrong. I think what we have is a piece of legislation that is entirely respectable internationally by comparison with the better freedom of information laws around the world - and central to that is the Act's public interest test.

I thought I would explain how that test works and go through some of the cases which illustrate where it has had a positive outcome and those where it has not. I often tend to focus on cases where the public interest test has worked for the requester and not those cases where it hasn't. So there is a risk of an unconscious bias, making the test sound more effective than a lot of people find it to be. So I'm going to try and give examples of it operating in both ways.

Under the UK's FOI Act the right of access is available for any person regardless of whether they are a British citizen or even living in this country. A series of exemptions permit public authorities to withhold information. But for the majority of exemptions there is also a public interest test which provides the possibility that information may have to be disclosed in the public interest, even though it is exempt. What this means - and it is not a feature of all freedom of Information laws - is that the process is not a one way process of simply looking at whether a disclosure would be harmful and then refusing the information, discussion over. What authorities have to do is also look at the benefits to the public of disclosing the exempt information. They have to weigh the benefits against the harm - that is what is so interesting and potentially powerful about it.

---

[1] I am grateful to Emma Prest for transcribing the lecture

Before I plunge into the exemptions, what you need to know is that there are two types of exemptions. There are exemptions which apply when disclosure would be likely to *prejudice* a particular interest such as commercial interests, law enforcement, defence or international relations. In those cases the public interest test comes into play after it has been shown that that interest is likely to be prejudiced. So you may have a situation in which there is a likelihood of harm to defence or international relations, but it is still possible, if the public interest factors work out right, for the information to be disclosed.

Then there are a group of exemptions which don't have a harm test, but where the *whole class* of information is exempt. A wide range of information, regardless of whether it is actually harmful, falls within the exemption and the only prospect of disclosure is under the public interest test. So here the test plays a far more important part.

About two thirds of the UK Act's exemptions are subject to the public interest test. By comparison, the American Freedom of Information Act has a public interest test for one exemption only and that's the privacy exemption – one area where the public interest test *doesn't* apply in the UK.

The other interesting thing about the public interest test is that information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure. In other words, to withhold the information the authority has to show that the public interest in withholding is *greater* than the public interest in disclosing. It is not the requester's job to show the public interest in disclosing overrides the harm that would be caused by releasing information. That's a subtle, but important point.

The authority initially decides whether or not to release the information based on whether an exemption applies and where it considers the balance of public interest to lie. If the requester complains, it will go to the Information Commissioner. There is a further right of appeal to what was the Information Tribunal but is now the First Tier Tribunal (Information Rights) and then to the Upper Tribunal and beyond that to the Court of Appeal and Supreme Court. We have even had one case go beyond that to the European Court of Justice[2]. So the whole pantheon of the legal system may become involved.

[2] This involves an issue under the Environmental Information Regulations, which runs alongside the Freedom of Information Act and provides a right to environmental information. The regulations implement a European Directive and the final arbiter of disputes about the directive is the European Court of Justice. The case is: Office of Communications v Information Commissioner [2011] EUECJ C-71/10 (28 July 2011)

There are two other things you need to know at this point. The first is that the Act is meant to be ‘applicant blind’. It takes no account in most cases of who is asking for the information and what the applicant intends to do with it. The test is not can you disclose this information to *this person*. The test is can you make it *public*. The identity of the requester is irrelevant to the substantive issue of whether it can be made public.

The second thing is that the public interest test applies to the particular information that has been asked for and not to the type or class of information. You sometimes find authorities saying ‘it's our policy not to disclose this’, a response which conflicts with the whole approach of the Act. You have to look at the circumstances of each case.

One of the growth areas from day one of freedom of information has been speeding. If you have been done for speeding, unless you are someone who has a fast car and likes to do 90 mph when you've really got no leg to stand on, what you naturally believe is that you didn't see the sign. It's a 40 mph area and the buggers changed it to 30, but they put up a very very little sign behind a lamp-post. People are always convinced this has happened, and if this happens to you, you will be convinced. So lots of people have been making requests - how many people have been caught by this particular speed camera? You would think that is a straightforward piece of information to get hold of. Actually it's not. The reason it's not is because most speed cameras are not on all the time. They are switched off for long periods, so many of the speed cameras you pass are in effect dummy cameras. They are there to frighten you into slowing down. They are not actually taking your picture or your number plate’s. But you’re not meant to know which ones are the dummies because once you know you'll ignore them and you'll speed.

The police have developed a very sophisticated argument, backed up by research, that people who want to know the number of convictions at that particular camera site are asking for information which, if disclosed, is ultimately liable to lead to people breaking the law by speeding past the inert cameras. This is likely to prejudice law enforcement, which is one of the FOI exemptions. It is also likely to endanger health and safety, another exemption, because if you are speeding you are more likely to have an accident.

In one case a motorist had argued that signs were not visible at a particular junction in the early morning on a sunny day, because the sun would be in the driver’s face and the car’s sun visor would be down and obscure the signs. He made an FOI request for the number of convictions resulting from that camera, together with the date and time of each offence, hoping to prove this correlation between sunny mornings and speeding convictions. He didn’t get the information because it would

have shown when the camera was switched off and the balance of public interest was held to favour concealing that information.[3] Most similar requests have also been refused.

But another case involved a pair of speed cameras monitoring a hill where the speed limit changed from 30 to 40 mph, catching drivers who accelerate too early as they go up, particularly if they overtake another vehicle struggling with the gradient. Many people believed that these cameras had been placed there deliberately to raise money. The local newspaper, having seen how earlier speed camera decisions were going, said: we are not going to ask about a single specific camera. What we want is the combined prosecutions from the *two* cameras, the one at the bottom of the hill and the one at the top, over a whole year. This was a cleverly designed request intended to prevent the police from arguing the answers would show how much of the time these cameras are switched off. First, because you wouldn't know which of the two cameras had been involved. Second, because it covered a long period of time, so you couldn't have told over which periods one or other of the cameras might have been switched off. The police nevertheless refused the request and the Information Commissioner upheld their decision. But the Tribunal reversed the decision. It said the way this request had been phrased would not reveal any pattern of enforcement. But it added that, even if it was wrong about this, the public interest in contributing to the debate about the fairness of the camera sitings was greater than the public interest in maintaining the exemption in the particular circumstances of this case, which involved a lesser risk of harm.[4]

The next quirk of the system is how do you tell what is in the public interest and who determines the public interest. There is a lovely passage in the decision that I have just been referring to where the Tribunal says: "It is quite conceivable that a matter of great public interest may be identified by no one other than an astute requester of information and, conversely, that a number of individuals may become voluble on a topic of little genuine relevant [sic] to the public as a whole."[5]

The reference to an 'astute requester' always reminds me of a case under the non-statutory code of practice that preceded the Freedom of Information Act.[6] I once succeeded in using this to persuade the Ministry of Defence to hand over the manual used by its historical section to decide whether 30-year-old documents could be placed in The National Archives or whether they should be withheld from the public for longer periods. They did eventually cough this up, and when I looked at this it

[3] Information Tribunal, EA/2005/0025, Paul Hemsley & Information Commissioner & Chief Constable of Northamptonshire.
[4] Information Tribunal, EA/2006/0071, Bucks Free Press & Information Commissioner.
[5] EA/2006/0071, paragraph 21.
[6] The Code of Practice on Access to Government Information, introduced by John Major's government in 1994.

was absolutely full of wonderful things which might trigger extended closure of the records. It said to look out for things like unconstitutional action by members of the Royal Family or plans to invade countries with which we were not at war.[7] I had visions of the MOD planning to go in and nab Paris one day when the French were not looking.

When I got hold of this, I went to three or four journalists that I knew well, and I said look this is the material and here are the things I have found. I hope you can use it. One of them was the late Tony Bevins who was the political editor of The Independent. He promised me he was going to write about it. I got up the next morning and bought The Independent but I couldn't find anything at all about it. Finally, I went through it story by story looking for Tony Bevins' byline and I found a story by him entitled 'Ulster kept in dark by Whitehall secrecy'.[8] Lo and behold this was the story I had given him, except my little examples were relegated to the last few paragraphs. What he had discovered himself from this document was that it included a glossary of the MOD's classification terms. This showed that the previous category "UK Eyes Only", the conventional classification for keeping things away from foreign governments and restricting them to UK officials, had been replaced by two new classifications, one of which applied to the Home Civil Service *excluding* the Northern Ireland Civil Service and the Royal Ulster Constabulary and one which included them. He realised from this that Whitehall had lost confidence in the ability of the Northern Ireland Civil Service and RUC to protect confidential material, presumably from disclosure to extremist organisations. So that was the story for Bevins. Now I had looked at this document and simply not noticed the significance of this. Nor had any of the other journalists. It was only Tony Bevins who had spotted it.

This brought home to me what a difficult thing this public interest business can be because it must be equally difficult sometimes for the Commissioner and Tribunal to spot the significance of something on a subject of which they are not themselves the masters. And generally they won't be the masters of the subject matter of the request. Often the Tribunal will say: the requester has suggested that there is some hanky panky going on here and the public is being deceived. But we have looked at the documents and we can say that that's not the case. There is always a nagging doubt, could anybody other than a person who is the master of the subject actually recognise from the material that something is going awry?

There are two other things I want to tell you before I jump into the cases. The first is that to withhold information on public interest grounds, the public authority's arguments have to relate to the exemption it is citing. Suppose it is the exemption for prejudice to commercial interests. It can't throw in arguments about, say, law

[7] Ministry of Defence, Instructions for Record Reviewers, March 1992.
[8] The Independent, 11 September 1996

enforcement. It has got to focus on the particular exemption, but the requester doesn't. The public interest in disclosure doesn't have to be linked, it can be to do with general public interest in transparency and accountability and this sort of thing.

The second point is that these discussions always look back to the situation at the time the request was made or at least finally refused by the public authority, not what the public interest is at the time the matter goes to the Commissioner or Tribunal. Sometimes by the time you get to the Tribunal decision things have moved on, so that a decision which was secret at the time of the request has now been announced. Or a conflict which was building up is now over, or a contract which was being negotiated has now been signed. The factors that made the issue sensitive at the time no longer apply. The Commissioner and Tribunal nevertheless consider the situation at the time it was before the authority, not as it is now. That can seem a slightly artificial situation, but it is very relevant to understanding how these decisions go.

Now I'm going to just jump into some of these cases and give you a flavour of how they go. The classic public interest situation is where there has been wrongdoing. When there has been wrongdoing, particularly by a public authority itself, it is going to be very difficult for an authority to persuade the Commissioner or Tribunal that they should keep its wrongdoing confidential. The first example is a request by The Guardian newspaper soon after the FOI Act came into force for the police file on Jeremy Thorpe. He was the former Liberal Party leader prosecuted and acquitted of conspiracy to murder in 1979 who thereafter left public life. The police force refused the request. The Commissioner upheld the refusal, primarily under an exemption for information relating to investigations which could lead or could have led to criminal charges.[9] It went to the Tribunal. The Tribunal found little public interest in disclosure, observing that it could see the public interest in re-examining a possibly unjustified conviction, but felt there would rarely be an equivalent public interest in examining an acquittal. It accepted that there was a public interest in withholding what witnesses had said to the police in case the prospect of disclosure under FOI made witnesses in future cases less willing to come forward. Overall it found that the public interest balance favoured withholding.

But, significantly, it added: *"we should have regarded any inference of a lack of vigour or proper vigilance in this investigation…as a decisive argument in favour of disclosure, even thirty years on and even faced by police concerns over the effect on future potential witnesses. If there were evidence to support a suspicion that a prominent public figure had been shown improper favour, there would be an overwhelming interest in telling the public. There was none*."[10]

---

[9] Section 30(1) of the Freedom of Information Act 2000

[10] Information Tribunal, EA/2006/0017, Guardian Newspapers Ltd & Information Commissioner & Chief Constable of Avon and Somerset Police.

That is a classic principle from the law of confidence, which is where the public interest concept comes from. A wrongdoer cannot invoke the law's protection to prevent his wrongdoing being exposed.

One area where you rarely get any information is information that is likely to harm international relations. If you want to know about Tony Blair's dealings with George Bush, the chances of getting it have always been very very slender and as far as I can tell they are still slender[11]. If you want to know about the UK's dealings with Iran the chances are also very slender. The relevant exemption in part protects information whose disclosure would prejudice the UK's relations with another state or international organisation and communications received in confidence from such bodies.[12]

There have been a number of requests about arms deals with Saudi Arabia including the very expensive Al Yamamah deal. One of these cases went to the Tribunal which found that maintaining good relations with Saudi Arabia was in the UK's national interest, that the Saudi's expected these documents to remain confidential and the consequence of disclosing them would be to cause substantial prejudice to our relations with them.

However, the Tribunal accepted that the documents also showed that British officials had been involved in arranging for commissions - bribes - to be paid, not to themselves but to members of the Saudi Royal Family, for vast sums of money, to ensure the deal went through, although such payments had been outlawed under Saudi legislation. The Tribunal said the public interest favoured disclosure where the documents referred to the role of British officials in facilitating the payment of bribes even though there would be real harm to our international relations with Saudi Arabia. That information was to be disclosed and it has been disclosed.[13]

Actually under the FOI Act there is the potential of a ministerial veto, overruling decisions of the Commissioner or Tribunal which are taken on public interest grounds.[14] The government cannot veto a decision by them that an exemption does not apply, for example, that disclosure would not harm defence. But if the Commissioner says: there would be harm to defence but it's in the public interest to disclose, then the decision could be vetoed. The veto is attached to the public interest

---

[11] Since this talk was given, the Information Commissioner has ruled that a note of a telephone conversation between Tony Blair and George Bush should be disclosed in part, so that Mr Blair's contribution to the conversation is disclosed but President Bush's – and any other confidential US information – is not. The Foreign & Commonwealth Office has appealed against the decision. Decision Notice FS50341647.

[12] Freedom of Information Act 2000, sections 27(1) and (2)

[13] Information Tribunal, EA/2007/0071, EA/2007/007 and EA/2007/0079, Gilby & Information Commissioner & Foreign and Commonwealth Office.

[14] Freedom of Information Act 2000, section 53

test. Interestingly, the veto was not used on that occasion. It has been used quite sparingly so far.

The next international relations case involves the so-called 'ghost ships', the four defunct, decrepit US navy ships which the Americans didn't want to dismantle because they were full of toxic materials. They arranged for them to come over here to be dismantled: as a result any environmental hazard would be experienced in the UK not the US. These ships set sail in 2003 in the belief that they had the necessary authorisations to be dismantled in Hartlepool. Once they were half way across the Atlantic it turned out that they did not have the proper authorisations. A debate followed about whether they should be sent back to the States or allowed to come here.

Friends of the Earth applied for any communications between the Foreign & Commonwealth Office and the US State Department about this. The Information Commissioner accepted that there might be some slight harm to UK – US relations, but felt that this did not outweigh the greater public interest in knowing whether the exchanges supported or contradicted the findings of two official reports into the episode. The Foreign Office appealed against this decision to the Tribunal.

The Tribunal concluded that the potential harm to the UK's relations with the US was greater than the Commissioner had recognised and that the public interest in disclosure was less. In particular it found that the UK-US exchanges took place *after* the key decisions had been taken and so played no meaningful part in them. They wouldn't inform public debate. They might add to the sum of human knowledge but without furthering the public interest. So it reversed the Commissioner and upheld the Foreign Office.[15]

So although the *issue* was of great public interest, the *particular information* in this case was not. You've got to be able to show that the information will further public debate and accountability or whatever. It is not enough to say the *issue* is controversial and of great public importance.

I'm correcting my tendency to only give good news cases.

The next case involves methods used to restrain violent or unruly young people, some of them children, at what were called Young Offenders Centres, now called Secure Training Centres. The Youth Justice Board has a manual which deals with the circumstances in which these 'distraction techniques' can be used. They actually involve the deliberate infliction of pain on a young person as a way of bringing them

[15] Information Tribunal, EA/2006/0065, Foreign and Commonwealth Office & Information Commissioner & Friends of the Earth.

under control. The Board argued that revealing these techniques in detail would mean that the young offenders would swot up on the manual and then be immune to the techniques.[16] It also said it would expose the prison staff to risk of danger to their own health and safety because the techniques they would use could be countered by the evil geniuses they were detaining who would know how to counter them.[17] The Commissioner found that both exemptions were made out, but then went on to the public interest. He said these techniques have been linked to deaths in these institutions. There has not been adequate scrutiny. They have been used 169 times in one year. The public interest favours disclosure.[18] And the manual has been disclosed.

To read you an extract from it: "*use an inverted knuckle in the trainee's sternum and drive inward and upward…Continue to carry out alternate elbow strikes to the young person's ribs until a release is achieved...Drive straight fingers into the young person's face and then quickly drive straightened fingers of the same hand downward into the young person's groin area".*[19]

So these are very violent techniques and they go on to talk about the risk of temporary or permanent blindness caused by rupture of the eyeball or a detached retina. If we didn't have a public interest test the harm would have been made out in this case. There would be no way of getting access to this kind of information. The balance has worked out correctly in favour of disclosing the information.

Another exemption applies to information whose disclosure would be a breach of confidence at common law.[20] But the common law of confidence has its own public interest test, which is very similar to the FOI Act's. This might apply where, for example, someone wants to see the report into a doctor whose standard of clinical practice has been investigated but the report includes evidence from staff who had been promised confidentiality or if the authors of the report had themselves been guaranteed it. The exemption for breach of confidence would come into play, particularly if the names would be revealed or they could be deduced from the context. In such cases it has often been held that the public interest in disclosure does not justify breaching confidentiality.[21]

---

[16] This would trigger the exemption for prejudice to the maintenance of security and good order in prisons found in section 31(1)(f) of the Freedom of Information Act

[17] This exemption is found in section 38(1) of the Act.

[18] Information Commissioner, Decision Notice FS50173181.

[19] Quoted in The Observer, 18 July 2010, "Revealed: Brutal Guide to Punishing Jailed Youths".

[20] Section 41 of the Freedom of Information Act 2000.

[21] See for example Information Commissioner Decision Notice FS50111838, Royal Wolverhampton Hospitals NHS Trust. In such cases the Act's exemption for personal data, in section 40, would also be likely to apply. However, in one case, the Tribunal found that s.41 did not apply to such an investigation because there was no evidence that staff had been told that interviews were in confidence and no evidence that in the past it had consistently protected similar information from disclosure. EA/2011/0055, Johnston & Information Commissioner.

But there are cases where the public interest in disclosure has been found strong enough to require the disclosure of information which is confidential at law. One case involved a database showing whether university premises – classrooms, student accommodation and so on - were fit for their purpose. The Guardian newspaper applied for access to this information. The Higher Education Funding Council said sorry, you can't have it, the universities have been expressly promised that their data would be kept confidential and it would be a breach of confidence for us to disclose it. The Tribunal accepted that this and that the other tests needed to stand up this exemption had been met: the information was not in the public domain and disclosure would harm the person or body providing it. In this case, the harm would be done to the reputation of the universities with substandard premises.

But the Tribunal went on to say: there may be a breach of confidence here, but it's not in the public interest to keep potential students, choosing their university, in the dark about the possibly substandard premises they are going to encounter. Disclosure will also inform the public debate about university funding. It's not in the public interest to keep that information secret. So all of that has been disclosed.[22]

Finally, the sensitive area of access to policy information in government. Can we see the discussions that precede the decisions that ministers take and the advice that leads to them? The Act deals with this with a gigantic exemption for any information which 'relates to the formulation or development of government policy'.[23] That covers everything relating to policy making. Not just the advice but factual material. Even the daily press cuttings referring to policy discussions in government might be exempt. However, disclosure is possible on public interest grounds.

This has been tested in an innocuous case where its now clear that no confidential advice was involved. There had been discussions about a funding shortfall in school budgets in the Department for Education two years earlier and there were some minutes of a high-level meeting. When these were finally disclosed it was clear that they were fairly uninformative. Choice quotes included *"Local Authorities had not consciously sought to divert funds and the public debate was unfortunate"* and *"It was crucial to balance our response and maintain our room to manoeuvre for both this and next year."*

The public interest test is the only basis on which any disclosure under this exemption can take place. In its decision the Tribunal laid out some general principles. It stressed that the timing was crucial. Releasing policy options while they were being discussed was unlikely to be in the public interest, it said. "*Ministers and*

[22] Information Tribunal, EA/2009/0036, Higher Education Funding Council for England and Wales & Information Commissioner & Guardian News and Media Ltd.
[23] Freedom of Information Act 2000, section 35(1)(a)

officials are entitled to time and space…to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy."[24]

This means that if you make your request while the discussions are still taking place you are very unlikely to get the information. But if you make your request some time after the decision has been taken and announced, you're much more likely to have a chance of getting it. Here are just a few examples of how this has worked in practice.

The criminal law on parental chastisement was changed in 2004 to withdraw the defence of reasonable punishment in cases where the parent had injured the child. This is not a slap, this is an injury which leads to a charge of assault causing actual bodily harm. The Crown Prosecution Service had previously said that such a change in the law was not necessary but apparently later changed its mind.

An FOI request was made for the documents which discussed this change of policy. The CPS said the law did change in 2004, but the policy has continued to develop since then. The CPS was saying there was continuing policy development, it never ends. The Tribunal's approach was to say, are officials and ministers protected during the period before the decision is taken? The decision was taken and implemented in 2004. The request was made in 2005. That falls outside the period. Policy formulation was not still continuing. Some monitoring was being done but this was not for policy making purposes. However, the public interest test can still favour withholding based on what's called a "chilling effect", if the Commissioner or Tribunal is persuaded that the consequences of disclosing information of this kind will seriously inhibit officials and ministers in exchanging views or recording them in future. The Tribunal looked at the material, said there were no sharp disagreements between officials or ministers or embarrassing options that would inhibit discussions or undermine collective ministerial responsibility if disclosed. So there was little public interest in withholding the material.

On the other hand, the Tribunal said, the government had said in a report that the law is poorly understood by parents and by organisations in this field, so there would be a positive benefit in promoting better understanding and informed debate. There had also been a lobbyist with privileged access to government involved, in this case the Royal Society for the Prevention of Cruelty to Children, and there is public interest in knowing how it has used its privileged access. The Tribunal found that the balance favoured disclosure, given that policy discussions were over by the time of the request, and ordered disclosure.[25]

---

[24] Information Tribunal, EA/2006/0006, Department for Education and Skills & Information Commissioner & Evening Standard.
[25] Information Tribunal, EA/2009/0077, Crown Prosecution Service & Information Commissioner.

The second example involves the proposed review of drug classification laws. This is of course a ministerial graveyard. Charles Clarke, who was the Home Secretary in 2006, announced the review. He left office and was replaced by John Reid who cancelled the review. Five months later a request was made for the consultation document that was to have been issued. The discussion was over. The request was made after the change in policy had been announced. The Commissioner ruled that the space for private discussion was not needed. He also concluded that the Home Office had offered no persuasive argument to show that disclosure would inhibit future discussions, particularly as the document concentrated on technical issues. He rejected the Home Office argument that the document had not been finally checked and might contain inaccuracies, saying the FOI Act provided a right to the information that was held, accurate or not. Policy on drug classification was of significant public concern and the public interest in understanding how decisions were reached and promoting informed debate meant the balance favoured disclosure.[26]

Some of these decisions come two or three years after the request was made, it has sometimes been even longer, partly because of a backlog that had existed in the Information Commissioner's office, though this has been substantially improved. So we are sometimes getting the background to quite significant decisions of this kind, even if some time after the event.

The next example was a request for minutes of meetings between the Confederation of British Industry and the Department for Trade and Industry, as it then was, to talk about energy policy. Exactly this argument about the effect of disclosure on frankness was made. It went to the Tribunal and the Tribunal said: *"there is a strong public interest in understanding how lobbyists, particularly those given privileged access, are attempting to influence government so that other supporting or counterbalancing views can be put to government to help ministers and civil servants make best policy. Also there is a strong public interest in ensuring that there is not, and it is seen that there is not, any impropriety…This means that there is a public interest in the disclosure of information in relation to such deliberations even at the early stages of policy formulation."*[27]

I know this myself from the work we did with private members bills. In the early days of the Campaign, we were lobbying, eventually successfully, for a law to give patients the right to see their medical files[28]. For several years we were on the outside and the government would sit down with the medical profession and discuss how to

[26] Information Commissioner, Decision Notice FS50198230, The Home Office.
[27] Information Tribunal, EA/2007/0072, Department for Business, Enterprise and Regulatory Reform & Information Commissioner & Friends of the Earth
[28] This was enacted as the Access to Health Records Act 1990, most of which was subsequently incorporated into the Data Protection Act 1998.

thwart us, because the profession was always on the inside track. In campaigning for a right of access we produced many examples of doctors making unjustified comments about patients in their records. A classic example was this: *"I've seen the patient, I've seen his wife, I've seen his two kids and I've seen their pet rabbit and in my opinion the most intelligent of the lot was the rabbit*."[29] This was on somebody's medical records. We compiled all these and published them and that finally persuaded the profession to hand over its sword and surrender. Miraculously at that point we became the privileged party. We went into to see the Department of Health officials and they were talking to us about amendments we needed, and suggesting that we put them down at the very last minute, when it would be too late for the doctors to table counter amendments. It was this principle of privileged access to government which the Tribunal says raises a serious public interest case for disclosure.

We are now on nuclear policy. In 2003, there was a new energy white paper which raised the prospect of going back to building nuclear power stations. It promised the fullest consultation before any such decision was taken. In 2006, the consultation began as part of the policy review. While the review was still underway, Tony Blair gave a talk to the Confederation of British Industry in which he said he'd seen "the first cut of the review" and new nuclear stations were "back on the agenda with a vengeance". Now this was during a consultation exercise. If a consultation exercise is carried out with a closed mind that may be grounds for the courts to overturn the whole process on grounds of unfairness – and that is what happened. The government had to start again with a new consultation paper. Friends of the Earth then made a request for the material seen by Tony Blair. They first made the request two days after he made his speech and they repeated the request soon after the second consultation paper was issued. This was dealt with not under the Freedom of Information Act, but under the Environmental Information Regulations, a parallel similar regime.

The Tribunal found that there was substantial public interest in the government's thinking and policy over nuclear energy and understandable concern and even alarm at what the Prime Minister had said in his speech. But the requests had been made while options were being formulated. The first request was made during the first consultation period, the second request during the second consultation period. The Tribunal held that the briefing to the Prime Minister from the responsible minister was entitled to confidentiality at that time and probably for a substantial time afterwards. The same was true of other material setting out ministers' views. Most of the information would be withheld.[30]

---

[29] Secrets (Newspaper of the Campaign for Freedom of Information), November 1989, www.cfoi.org.uk/pdf/SecretsNewspaperNo18.pdf

[30] First Tier Tribunal, Information Rights, Decision EA/2010/0027, Cabinet Office & Information Commissioner

So I feel I'm making good to my pledge not to give you an over optimistic view of the state of play.

The very final case is the Commissioner's decision that the cabinet minutes at which the decision to go to war with Iraq was taken should be disclosed, which the Tribunal upheld by a 2 to 1 majority.[31] If you read the Tribunal decision they say there is nothing in these minutes that is not already known. They do not suggest that the public would be significantly better informed about the key issues by reading the minutes. What they do say is that the strength of the public interest argument lies *"in understanding the deliberative process recorded in the Minutes"* and not "*from their detailed content"*. They add: *"the value of disclosure lies in the opportunity it provides for the public to make up its own mind on the effectiveness of the decision-making process in context."* Reading between the lines the public interest in disclosure appeared to be that it would confirm that the decision to go to war was taken with minimal discussion by cabinet.[32]

This decision led to the first ever use by ministers of their power of veto, which I mentioned earlier in the talk. As result, the Tribunal's decision in this case was set aside. Since then the veto has been used only on one further occasion, to reverse the Information Commissioner's decision that cabinet committee minutes on devolution should be disclosed. It is fortunate that the veto has so far been used only sparingly, since its capable of striking at the heart of the Act.

I hope these examples not only illustrate how the FOI Act's public interest test works but also the real potential of this important piece of legislation.

---

[31] Information Tribunal, EA/2008/0024 and EA/2008/0029, Cabinet Office & Information Commissioner & Dr Christopher Lamb

[32] This is confirmed by the Tribunal's account of the position adopted by the dissenting Tribunal member who felt that the balance of public interest favoured withholding the information. The Tribunal recorded that "*The minority view sees limited value in releasing the Minutes simply to confirm a possible negative that there may have been little probing or extended discussion of the Attorney's advice in Cabinet on 17th March, and no discussion of the longer minute from the Attorney that had not been circulated."*