Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0030
Information Commissioner's Ref: FS50084358

Heard at Field House, London,
On 17 September 2008

Decision Promulgated
On 21 October 2008

BEFORE

CHAIRMAN

CHRIS RYAN

and

LAY MEMBERS

JACQUELINE BLAKE
ROSALIND TATAM

Between

CABINET OFFICE

Appellant

and

INFORMATION COMMISSIONER

Respondent

Subject matter: - Formulation or development of government policy s.35(1)(a)

Cases: *Department for Education and Skills v Information Commissioner and The Evening Standard* (EA/2006/0006); *Office of Government Commerce v Information Commissioner* [2008] EWHC 774; *Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin).

Representation:

For the Appellant: Gerry Facenna
For the Respondent: Timothy Pitt-Payne

Decision

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 19 February 2008

Information Tribunal **Appeal Number: EA/2008/0030**

SUBSTITUTED DECISION NOTICE

Dated: 17 September 2008

Public authority: **Cabinet Office**

Address of Public authority: **70 Whitehall**

London

SW1A 2AS

Name of Complainant: **R Evans**

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that the Cabinet Office dealt with the Complainant's request in accordance with section 1 of the Freedom of Information Act 2000, save that it should have disclosed statistical information recorded in slides 14 – 19 inclusive of the Report (as defined in the Tribunal's determination).

Action Required

As the statistical information referred to had been disclosed by the time the Appeal from the original Decision Notice was heard on 17 September 2008 no further action is required.

Dated this 21st day of October 2008

Signed

Chris Ryan
Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. In December 2000 Lord Birt, then a part-time, unpaid adviser to the Prime Minister, Tony Blair, prepared a report entitled "Reducing Crime: A new vision for the criminal justice system" ("the Report"). The Report took the form of a series of more than 120 slides divided into two parts. Phase 1 outlined the issues and recorded the evidence base. Phase 2 set out Lord Birt's findings and opinions in a series of short statements accompanied, where appropriate, by supporting evidence and statistics, often in the form of a chart or other graphic presentation. Lord Birt submitted the Report to the Prime Minister under cover of a letter dated 20 December 2000 in which he summarised some of its content. The issue for decision in this Appeal is whether the Report and letter should have been made available under the Freedom of Information Act 2000 ("FOIA") when requested.

The request for information

2. On 26 April 2005 Mr Rob Evans sent an e-mail to the Cabinet Office in the following terms:

> *"In 2000, Lord (John) Birt was appointed to take a long-term strategic look at criminality and social trends, reporting directly to the Prime Minister. I understand that Lord Birt provided advice, research and analysis to the Prime Minister which, according to a parliamentary answer on May 2 2001 (Hansard column 676W), was reflected in the government's strategy document "Criminal Justice: the way ahead") (Cm 5074) which was published on February 26 2001.*
>
> *Under the act, I would like to request complete copies of all the correspondence between Lord (John) Birt and the prime minister regarding the advice, research and analysis provided in this instance by Lord Birt which was reflected in the strategy document Cm 5074."*

3. The Prime Minister's Private Secretary Nikhil Rathi replied to Mr Evans by letter dated 27 May 2005. He confirmed that the Prime Minister's Office held information

relevant to the request but refused to disclose it on the ground that it was covered by the exemption in FOIA section 35(1)(a) and the public interest in maintaining the exemption outweighed the public interest in disclosing it. The relevant part of section 35 is in the following terms:

> *"35. (1) Information held by a government department … is exempt information if it relates to—*
>
> *(a) the formulation or development of government policy …*
>
> *(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—*
>
> *(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy …"*

The exemption is a qualified one, with the result that, as Mr. Rathi implicitly acknowledged, the Cabinet Office was still required to disclose the information unless, (applying the test provided for under FOIA section 2(2)(b)):

> *"in all the circumstances of the case, the public interest in maintaining the exemption outweigh*[ed] *the public interest in disclosing the information."*

4. On 6 June 2005 Mr Evans requested an internal review of that decision. The review was undertaken by Colin Balmer CB, who wrote to Mr Evans on 1 July 2005 informing him (incorrectly as it subsequently transpired) that the only document held by the Cabinet Office was the Report. He explained that the Report had been produced in two phases, as described above, and explained that he had reviewed the public interest considerations and concluded that the material in Phase 1 should be disclosed with the exception of one slide, which set out detail of crime in a particular neighbourhood. However, he maintained the position that Phase 2 of the Report should not be disclosed. He again relied on section 35 FOIA, but added that, to the extent that any part of the Report was not exempt under that provision, section 36 applied. The relevant parts of that section are as follows:

"36. (1) This section applies to—

(a) information which is held by a government department …and is not exempt information by virtue of section 35, and

(b) …

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

(a) would, or would be likely to, prejudice—

(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or

(ii) the work of the Executive Committee of the Northern Ireland Assembly, or

(iii) the work of the executive committee of the National Assembly for Wales,

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

(3) …

(4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

5. Although the Cabinet Office's argument in respect of the interplay between sections 35 and 36 was not entirely clear from Mr Balmer's letter it became clear, as the case developed, that it was as follows:

   a. By the date when the request was made statistical material contained in the Report had fallen outside the scope of section 35 by virtue of sub section (2);

b. Section 36, (which could not apply to the rest of the report because the sections 35 and 36 are mutually exclusive) was capable of applying to such statistical material;

c. The test to be applied in determining whether the statistical material in fact fell within the exemption did not require the intervention of a qualified person (section 36(4)): it was exempt if disclosure would prejudice, or would be likely to prejudice, the effective conduct of public affairs;

d. Information that was found, on the application of that test, to fall within the section 36 exemption should not be disclosed because, applying FOIA section 2(2)(b), the public interest in maintaining the exemption outweighed the public interest in disclosure.

6. The factors which Mr Balmer took into account in deciding that the public interest test was in favour of upholding the earlier refusal to disclose were set out in some detail in his letter. He recorded that the Report had been provided in confidence directly to the Prime Minister and relevant Secretaries of State in order to inform policy development and maintained that there was a strong public interest in Ministers being able to "discuss and debate the pros and cons of particular policy options in private before their final decisions come under public scrutiny". He also stressed that disclosure would significantly inhibit the Government's ability to commission advice and would eradicate the "free space" that those at the highest level of Government should have in order to "use imagination and consider radical policy options, without concern that every detail of their consideration will be publicly disclosed." Finally, Mr Balmer made it clear that the refusal to disclose extended to both factual information (notwithstanding the adjustment to the public interest test in favour of disclosure set out in section 35(4)), as well as statistical material, because its disclosure would have the effect of revealing the policy advice and recommendations set out in the Report.

The complaint to the Information Commissioner

7. On 19 July 2005 Mr Evans lodged a complaint with the Information Commissioner regarding the refusal to disclose. He made it clear at that stage that he did not object to the decision not to disclose the retained slide from Phase 1. The only issue which the Information Commissioner had to consider, therefore, was whether the Cabinet Office had been justified in withholding Phase 2 of the Report.

8. It is a matter for regret that the Information Commissioner's office did not make contact with the Cabinet Office in order to start its investigation until over 6 months later, on 6 February 2006 and that it took him a further two years, with lengthy periods of apparent inactivity, before the investigation was completed.

9. Eventually, on 19 February 2008 the Information Commissioner issued a Decision Notice which required the Cabinet Office to disclose all of the withheld information. Both we and, we suspect, the advocates who appeared before us on this Appeal experienced difficulty in following the reasoning in some sections of the Decision Notice, but we believe that it may fairly be summarised as follows:

    a. The publication, in February 2001, of the White Paper referred to in the original request ("the White Paper") constituted the policy decision emanating from the Report. It followed that from that date statistical information in the Report ceased to fall within the section 35 exemption because it had by then been "*used to provide an informed background to the taking of the* [relevant Government] *decision"* for the purposes of section 35(2).

    b. The section 36 exemption was not engaged in respect of the statistical information. Both the Cabinet Office and the Information Commissioner were proceeding at that stage in the belief that the exemption could only be engaged if in the reasonable opinion of a qualified person the disclosure of the statistical information would give rise to one or more of the detriments set out in the section. It has subsequently been accepted on both sides that the effect of section 36(4) on the facts of this case was to preclude the need for a qualified person's opinion. However, in rejecting the opinion that had been proffered, the Information Commissioner expressed the view that release of the statistical material would not cause any prejudice to the effective conduct

of public affairs because it did not relate to the formulation of government policy and was derived from information which had already entered the public domain. He also relied on the publication of the White Paper some four years before Mr. Evans made his request.

c. The rest of the contents of the Report did fall within the section 35 exemption because it was a document commissioned and presented to the Government in order to inform policy making.

d. The information in the Report should nevertheless be disclosed unless the public interest in maintaining the section 35 exemption outweighed the public interest in disclosure.

e. The public interest factors in favour of maintaining the exemption were:

    i. The requirement that Ministers should be able to receive free and frank advice to inform their policy decisions, and to debate policy options in private before their final decision came under public scrutiny;

    ii. Disclosure would inhibit the commissioning of advice, to the detriment of the policy development process, because it would discourage the Government from commissioning advice on subjects of its choosing and at the time of its choosing;

    iii. Ministers, particularly at the highest levels of Government, needed free space in which to use imagination and consider radical policy options, without concern that every detail of their consideration would be publicly disclosed;

    iv. Independent experts would be reluctant to be frank and candid in their advice in future if they realised that their views, provided on a private basis, would be disclosed;

    v. Factual and statistical information in the Report was so closely linked to policy recommendations that its disclosure would have revealed them and would also have been detrimental to the

deliberative process, which benefited from the ability of advisers to select and use appropriate analytical and factual information when setting out advice and recommendations.

f. The public interest factors in favour of disclosure were:

i. Informing public debate in the area of criminal justice;

ii. Promoting public participation in policy decisions;

iii. Ensuring government accountability on the effectiveness of the criminal justice system at the time when the Report was written;

iv. Increasing transparency.

g. In balancing the public interest factors the Information Commissioner appeared to consider that the weight to be applied to the Government's requirement for frank advice and for time to debate options was reduced by the passage of time between the date when the Report was submitted (December 2000) and the date of the request (April 2005), particularly in view of the publication of the White Paper in February 2001. He did not therefore accept that disclosure would undermine policy development. He also considered the relationship between the Government and Lord Birt, as well as other individuals who might be asked to provide advice, but appeared to conclude that disclosure would not cause detrimental effect. Conversely the Information Commissioner considered that there was a strong public interest in disclosure which would aid understanding and increase accountability on the effectiveness of the criminal justice system, which he believed was a matter of great concern to the public. He also recorded that there was a particular public interest (under FOIA section 35(4)) in disclosure of factual information which had been used to provide an informed background to decision taking. He concluded that the public interest in disclosure outweighed that in withholding the material.

The appeal to the Tribunal

10. The Cabinet Office launched an Appeal against the Decision Notice on 19 March 2008. The basis of the Appeal was that, although the Information Commissioner had correctly decided that the section 35 exemption had been engaged, he had been in error in deciding the public interest test in favour of disclosure under that exemption and also in concluding that the section 36 exemption had not been engaged in respect of the statistical material. The Cabinet Office contended that we should not only find that section 36 did apply, but should decide that the public interest in maintaining that exemption outweighed the public interest in disclosure of the statistical material.

11. The Appeal was heard on 17 September 2008. In the course of preparing for that hearing the Cabinet Office discovered the letter referred to in paragraph 1 above, which accompanied the Prime Minister's copy of the Report ("the Letter"). We were given sight of both the Report and the Letter, on a confidential basis. We were able to see from this that the letter summarised parts of the report, laid stress on certain of its recommendations and provided his personal interpretation of some of the findings. The Appeal proceeded on the agreed basis that the Letter fell within the scope of the original request, that the issues arising under section 35 in respect of the Report applied equally to the Letter, but that no issue arose in relation to it under section 36. The circumstances in which the Letter came to light were explained to us in evidence. It is unsatisfactory that such a vital piece of information should have been overlooked at the time Mr Evans' request was being considered (particularly as the original request had made specific reference to "correspondence"). However, the explanation satisfied us that this was the result of nothing more sinister than a lapse of communication between different parts of the Cabinet Office at the time and that the Letter was disclosed to the Information Commissioner and the Tribunal as soon as it was discovered.

12. On the day before the hearing the Cabinet Office wrote to Mr Evans releasing to him six pages of the Report which had previously been withheld. A covering letter explained that, having reviewed the information in the course of preparing for the hearing, it had concluded that the information in those pages was factual, statistical information about interventions in criminal justice that fell outside the section 35

exemptions engaged by the rest of the Report. There was some debate during the hearing as to whether section 36 had any continuing relevance in the light of that concession. We will return to that issue at the end of this Decision.

13. We received evidence, in the form of Witness Statements, from Paul Britton and Alastair Bridges. Mr Britton is the Head of the Domestic Policy Group in the Cabinet Office and his Witness Statement provided background information about the Report and some facts, but a great deal more opinion and submission, about the perceived risks inherent in disclosure in response to Mr Evans' request. Mr Bridges is the Director of the Strategic Support Directorate within the Home Office. His Witness Statement summarised the Report, drawing particular attention to some of the subjective judgments and broad general observations that it contained, and explained the role that some parts of it played in the development of policy, in particular the preparation of the White Paper. Mr Bridges also provided an explanation of the Home Office's contribution to the process of responding to Mr Evans' request and confirmed its support of the approach adopted by the Cabinet Office. Neither witness had been involved in either the policy development process that led to the White Paper or the handling of Mr Evans' request. As a result their evidence was inevitably rather imprecise on some of the matters relevant to the Appeal.

14. Part of Mr Britton's evidence, and the whole of Mr Bridges' evidence, were provided on the basis that they were to be treated as confidential pending the outcome of the Appeal. However, some parts of the "closed" written evidence ought not to have been categorised as confidential and we repeat here what we said to the parties during the hearing. This was to the effect that the Tribunal's procedures are intended to be conducted in public and materials relied on in support of a party's case on an Appeal should generally be made available to all other parties and the public. The Tribunal makes a concession to public authorities resisting disclosure in sometimes permitting parts of its procedure to be conducted on a confidential basis, typically where a public airing of evidence and/or argument might have the effect of disclosing the very information that is under consideration. The concession should not be abused by parties placing in "closed" Witness Statements or exhibits material whose disclosure would not have that effect.

15. Both Mr Britton and Mr Bridges attended the hearing for cross examination and answered a number of questions put to them by the panel. Later in this Decision we will touch on elements of their evidence which have particular relevance to the issues we have to decide.

The questions for the Tribunal

16. The issues we have to decide are as follows:

    a. At the date of the refusal of Mr Evans' request did the public interest in maintaining the section 35 exemption in respect of the Report (excluding the statistical material) and Letter outweigh the public interest in disclosure?

    b. At the date of the refusal of Mr Evans' request would the disclosure of the statistical material have prejudiced the effective conduct of public affairs, or have been likely so to do, with the result that the section 36 exemption was engaged?

    c. If section 36 was engaged did the public interest in maintaining that exemption in respect of the statistical material outweigh the public interest in disclosure at the date of refusal?

17. Before turning to deal with each of those questions in turn we make two general comments. First, the Cabinet Office criticised a number of the passages in the Decision Notice. As we have mentioned in paragraph 9 above, we experienced difficulty in following some of the Information Commissioner's arguments. However, we remind ourselves that FOIA section 58 gives the Tribunal a wide jurisdiction to decide whether or not the Decision Notice was in accordance with the law and, to the extent that it involved an exercise of discretion by the Information Commissioner, to decide whether the discretion ought to have been exercised differently. It may also review any finding of fact on which the Decision Notice was based, a power that is particularly relevant where, as in this case, evidence was adduced before us that delved deeper into some of the issues at stake than the Information Commissioner might reasonably be expected to have done, given the more limited information that was available to him. Moreover new issues have arisen since the Decision Notice was published (in particular the discovery of the

Letter) and others have disappeared (including the whole issue of the qualified person's opinion under section 36) or have assumed reduced significance. In these circumstances, and in light of the full submissions which we heard from counsel for both parties, we have approached the three questions anew, rather than base our decision on a section by section critique of the Decision Notice. The second general point was that in at least one passage of the evidence filed on behalf of the Cabinet Office comment was made on the perceived damage to the public interest if information of the type contained in the Report or Letter were "routinely published". The effect of the mechanisms for disclosure set out in the FOIA is that disclosure of information ought not to be routine, at least once a claim has been made that it is covered by one or more of the available exemptions. Disclosure will only take place if either no exemption is found to apply, or if the public interest in favour of disclosure at the time when the request for information was refused is equal to or less than the public interest in maintaining the exemption. A decision to order disclosure will depend on the particular facts and circumstances of the case under consideration, including the lapse of time between the date the information came into existence and the date of the request. As we make clear later, the facts of this case are particularly unusual and our decision not to order disclosure should not lead to the disclosure or non-disclosure of other information being regarded in the future as "routine".

Public interest test under section 35 – Factors in favour of maintaining the exemption.

18. The Cabinet Office argued that there were three strong public interest factors in favour of the exemption being maintained. Each had been acknowledged in the Decision Notice but had not been accorded sufficient weight when the Information Commissioner came to perform the balancing exercise required by FOIA section 2(2)(b).

19. The first factor in favour of maintaining the exemption was that disclosure would hamper the freedom of the Prime Minister and other ministers to commission private advice from external experts on terms that the request for advice and the advice itself would be confidential. As we have previously mentioned in paragraph 9 the Information Commissioner acknowledged in his Decision Notice that disclosure could have an effect on the relationship between the Government, on the one hand,

and Lord Birt and others in a similar position, on the other. However, the arguments summarised in the parties' skeleton arguments suggested that there had been a degree of misunderstanding as to the Cabinet Office's case on this. Our understanding, based on counsel's oral submissions, is that ultimately the parties were agreed that the only issue at stake in this part of the Appeal was the general one as to whether a decision to disclose the Report and Letter in July 2005 would have discouraged Ministers from commissioning confidential reports, or advisers from accepting such a commission. Questions affecting Lord Birt's own position or public perception as to the content of the Report and Letter were only relevant to the extent that they might impact that general issue. The difference between the parties on that issue was that the Information Commissioner, while accepting the importance of Ministers having access to frank advice from independent advisers, did not accept that disclosure in the particular circumstances of this case would have a significant damaging effect. The Cabinet Office argued that it would and that this led to a strong public interest in maintaining the exemption

20. In his open Witness Statement Mr Britton expanded on the nature of Lord Birt's role. He explained that Lord Birt had been appointed as a part-time, unpaid adviser to the Prime Minister in 2000 and had been asked by him to undertake a long-term, strategic look at criminality and long-run social trends. The intention had been to apply a fresh perspective to the review, which Mr Britton said in cross examination was more likely to come from an independent adviser with experience outside the civil service than from a permanent career civil service adviser attached to the office of the Prime Minister or a particular department. In the case of the Report Lord Birt had received analytical and other support from the Home Office and the Prime Minister's office but the Report represented his personal views and conclusions, based on the investigations and research which he had undertaken or caused others to undertake. Circulation of the Report was very limited; only five copies were created and it had been prepared on the clear basis that it was to be kept confidential and was not for publication. The Letter was sent solely to the Prime Minister with copies provided to the Cabinet Secretary and the Principal Private Secretary to the Prime Minister.

21. Mr Britton explained that, although individuals are not infrequently appointed to report on a particular issue to Government on the basis that their conclusions would be public, other appointments are made on the basis of a Minister seeking confidential advice on a particular issue. He said that in those cases the assumption that the individual's work would remain confidential was critical to the willingness of individuals to accept such an appointment and that disclosure in this case would discourage future candidates and, in denying Ministers the radical thinking they are capable of introducing, would harm the policy-making process. No specific examples were given as to the willingness or reluctance of individuals to serve in either a public or private capacity in this way. However, in a part of his closed Witness Statement, which we considered did not justify that status, Mr Britton said:

> *"…I can inform the Tribunal that we have sought the views of Lord Birt, who has expressed a concern that in future this type of report will not be possible if it is likely to be released to the public, as people would be unwilling to take part (and, if they did, their proposals would not be written down)"*

This rather second hand form of opinion was not supplemented by any direct opinion that we might rely on from this or any other individual who had given advice to the Government in the past or might do so in the future. It is, moreover, expressed in rather vague terms and is unsupported by reasoning or justification for the reported opinion. We do not feel comfortable in attributing any significant weight to it.

22. A little further on in his Witness Statement (again in a section for which confidentiality was claimed without justification) Mr Britton said:

> *"At the time the official who supported Lord Birt in the Cabinet Office sought to establish whether the then Freedom of Information Bill would protect the work, particularly as the report and recommendations were likely to involve 'the slaughter of a few sacred cows'. (I note that, when the report was written, the Bill proposed that the exemption for the development of Government policy (the current section 35) should be an absolute exemption.) The report was written on the basis that it would ultimately be exempt from disclosure"*

It is not entirely clear from the imprecise language of the final sentence of that extract whether the unnamed official's enquiries led Lord Birt to believe that the Report would not be exposed to any risk of disclosure under future Freedom of Information legislation. However, even if we assume that to have been the case it is likely to have been clear to any individual accepting an advisory role after the FOIA came into force that a risk would exist that, at some stage in the future, the application of the public interest test might lead to disclosure. It seems to us, therefore, that the impact of disclosure in this case will have limited impact on his or her decision to accept an appointment.

23. The corollary of the argument as to the willingness of individuals to accept appointment is that disclosure in this case may discourage Ministers from making such appointments. The Cabinet Office argued, supported again by opinions set out in the Witness Statements of Mr Britton and Mr Bridges, that this would impair the ability of the government to obtain radical input to policy issues from suitably experienced and independent individuals. Counsel for the Information Commissioner, Mr Pitt-Payne, laid stress on the independence and strength of character to be expected from those accepting the role of special adviser and suggested that such a person would not be deterred by fear of his or her advice being subjected to public debate. Both sides of this particular argument are based on supposition; we do not know how potential advisers will react. However, we may surmise that their response is likely to depend on the particular circumstances of cases in which disclosure is seen to have been ordered and the reasonableness of the arguments that supported the decision.

24. The Cabinet Office argued that the public interest in maintaining the exemption was increased by the fact that the public might believe, or be led by the media to believe, that the Report represented government policy. In the course of his evidence during the hearing Mr Britton explained the distinction that he saw in this respect between the Prime Minister and other ministers. He said that advice to a Prime Minister, especially when provided by a special adviser, was more likely to be misunderstood in this way. He also thought that it would frequently be submitted in a format that enabled it to be absorbed at speed by a person with a very large number of important issues under consideration at any one time. It would not

therefore be written in the more measured language, or display the same balance, as material prepared for wider dissemination.

25. The second factor relied on by the Cabinet Office in support of its argument that the exemption should be maintained was that, before reaching a decision on policy, it was important that the Prime Minister and other ministers should be able to consider imaginative or radical options in private - to be free to "think the unthinkable" – without fear that the details of that deliberative process would be disclosed. On this issue Mr Britton's Witness Statement contained the following statement:

> *"…the ability of Ministerial advisers to have wide-ranging ideas about policy issues is an important element of the policy process. …Radical ideas may go on to be dismissed, but a small part of them may go on to be developed into a workable policy proposal, and implemented more widely. Without the radical idea having been considered first, the later policy change might not take place. Being able to have radical ideas, without fear of castigation or mockery, leads to better government. If policy advisers felt that they could not have such wide-ranging ideas (or write them down) in anticipation of an adverse public reaction, the process of government would be damaged."*

And later:

> *"Significant parts of Lord Birt's recommendations were not taken forward either in the February 2001 report* [i.e. the White Paper], *or since. Publishing earlier versions of policy papers from a formative stage would have the effect of undermining the Government's ability to maintain a policy position, both in terms of the collective agreement reached, and the rationale for the policy itself*"

26. The third risk identified by the Cabinet Office was that disclosure would discourage advisers in the future from committing their ideas to writing, or would encourage them to adopt a bland and defensive style of writing if they did so. It was said that this would again make it more difficult for Ministers, including the Prime Minister, to obtain candid advice from external experts in the future. Mr Britton put it in these terms in his Witness Statement:

"I would expect all advice, whether it was to be published or not, to be written in accordance with the facts, but the language used and its intended effect obviously differ depending on the audience. In this case, there is a clear public interest in ensuring that the Prime Minister had the benefit of Lord Birt's analysis of crime. But publishing that analysis would not serve the public interest – because of the way it was expressed this work has the potential to undermine public confidence in elements of the criminal justice system and to increase fear of crime and public perception of risk as it was not written for an external audience. … Language used in internal documents may be much less circumspect or considered – this is a function of the need to communicate at speed and to give emphasis to points made. … Ministers have limited time and it needs to be possible to advise them at speed, with regard to the facts, but without the dilution of messages that might be suitable for a published document"

27. Mr Pitt-Payne, argued that all of the factors relied on by the Cabinet Office in favour of maintaining the exemption were diluted by the passage of time between the date when the Report and Letter were written and the date of Mr Evans' request, particularly in light of the events that occurred during that period. These included the publication of the White Paper in February 2001 and the publication in July 2004 of a major public statement by the Home Office on crime reduction entitled "Confident Communities in a Secure Britain: The Home Office Strategic Plan 2004-2008" ("the Strategic Plan"). There was some cross examination of Mr Britton and Mr Bridges on the extent to which issues raised in the Report continued to be under consideration, for the purposes of policy development, in 2005. It was clear from the evidence of Mr Bridges that, although he believed that the content of the Report continued to inform the thinking of those relatively few people to whom it had been disclosed, it had its most direct impact on the preparation of the White Paper and had reduced in significance by 2004, when the Strategic Plan was published. He thought that by that stage it had become no more than part of the overall environment of which those working in the field would have been aware. Counsel for the Information Commissioner seemed to suggest at one stage that the acceptance by the Cabinet Office that publication of the White Paper constituted the decision on government policy for the purposes of FOIA section 35(2), was

inconsistent with its argument that the public interest in maintaining the exemption continued to have effect after that date. If that was his argument then we think that he overstated the position because the subsection does no more than fix the moment when statistical information ceases to be covered by the exemption; it says nothing about the public interest in maintaining the exemption in respect of other material. We believe that the true status of publication of the White Paper is that it formed one step, albeit a significant one, in the process by which, over a period of time, the public interest in keeping information secret became less significant.

28. At the other end of the spectrum, we do not think that it would be right to say that the policy development process in this area continues for as long as the issue of criminal justice generally remains a matter of concern to public and politicians alike. Mr Facenna, Counsel for the Cabinet Office, laid stress on the fact that the Prime Minister who commissioned the report was still in office at the date when Mr Evans made his request and that Lord Birt was either still acting as adviser at that time or had only just relinquished the role (the evidence on the precise date of his departure was unclear but we think it was ultimately agreed that he was still in post at the date of the request). Ultimately we do not think that the evidence really did more than confirm, as we would have expected, that matters raised in a report of this nature did not disappear from the consciousness of those working in this area immediately the White Paper was published. We have little doubt that such people would have retained some of them, including some of the recommendations that had not been adopted, as part of the general body of information and policy options that contributed to their specialist expertise in the field. The question we have to determine in applying appropriate weight to this aspect of the public interest in maintaining confidentiality, therefore, is how far the admitted decrease in the Report's impact on government thinking had progressed by the date when Mr Evans made his request.

29. The Information Commissioner also argued that the factors in favour of maintaining the exemption had to be viewed in the light of what a differently constituted panel of this Tribunal in *Department for Education and Skills v Information Commissioner and The Evening Standard* (EA/2006/0006) considered to be the guiding principles for determining the public interest balance in a case of this kind. We are not, of

course, obliged to follow other decisions of this Tribunal and, as the first of the *DfES* principles makes clear, every decision is specific to its particular facts and circumstances. The facts of that case concerned a request for disclosure of the minutes of senior departmental committee meetings considering school funding issues. The subject matter was therefore quite different and we have adopted a cautious but open-minded approach to the possible application to this Appeal of those of the *DfES* "principles" on which the Information Commissioner relied and which we regard as having potential relevance to this Appeal. One of these was the dilution over time of the strength of the argument in favour of maintaining confidentiality, which we have already dealt with. Of the remainder the following two seem to us to be particularly relevant:

a. The traditional independence and courage of civil servants as protection against the fear of future publication leading to bland advice or inadequate record-taking. In this case, of course, the advice was given by an independent adviser and not a career civil servant. Mr Pitt-Payne conceded that such an adviser would not therefore be covered by the code of behaviour that binds civil servants and would not have absorbed the civil service ethos during a career in public service. But he argued, on the other hand, that a person would not have reached the stage where he or she might be invited to play the sort of role that Lord Birt did without having independence of mind and a degree of resistance to the sort of public pressure that might result from the publication of the advice given to the Government. He also made the point that, unlike a civil servant, an independent adviser would be unlikely to have any concern about his or her role in a future administration in the light of previously published advice attributed to him or her.

b. The ability of the public, if given an appropriate level of information, to form a fair and balanced view of the role of those giving advice to Ministers. The counter-argument we heard on that point was that publication in this case would in fact lead to unbalanced commentary in the media or opportunistic attack by political opponents.

30. It is fair to say that Mr Britton, in the course of cross examination and re-examination, expressed the view that decisions of the Information Tribunal in cases such as *DfES* had not given sufficient weight to the impact of disclosure on government officials. He considered that the full effect of this had not been felt yet because there had not been sufficient cases decided to date under which particularly sensitive advice had been ordered to be disclosed. However, he considered that, over time, decisions that adopted the same approach would create a change in the way that Whitehall worked. He said that he was aware already of instances when Ministers had expressed concern as to what should be committed to paper and of one instance of a Minister taking legal advice about whether the minutes of a meeting he was attending would be disclosable under the FOIA. We infer, from the context of his remarks, that his concerns applied equally to independent advisers as they did to civil servants. We take seriously the views of a very senior and, in our perception, thoughtful civil servant. However, we must balance his fears about the possible future behaviour of Ministers and civil servants against the words of Mr Justice Stanley Burnton (as he then was) in the case of *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin) in which he said:

> *"It was formerly generally thought that there was a culture of confidentiality, if not secrecy, in the administration of public authorities, and in particular central government. The climate had however been changing in favour of greater transparency, and therefore of disclosure, for some time. It was reflected in the willingness of the Courts to require disclosure of relevant documents for the purposes of litigation, heralded by the decision of the House of Lords in Conway v Rimmer. FOIA introduced a radical change to our law, and the rights of the citizen to be informed about the acts and affairs of public authorities"*

It is not surprising that the radical change to the law to which Burnton J referred should have required a change in the way that civil servants and others advising Ministers are required to conduct themselves. Within that new environment they continue to be required to give frank and robust advice and to maintain an adequate record of it in accordance with Civil Service traditions and their own code of conduct. It seems to us to follow that any argument in favour of maintaining an

exemption that is based on a fear or suspicion that civil servants will change the way they have traditionally conducted themselves suffers from a crucial defect. In order for the argument to have impact it must be established, or assumed, that a civil servant will disregard the traditions and the code of conduct. That failure forms a vital link in the chain of causation between the possibility of disclosure under FOIA and the public interest harm that is asserted. Despite what Mr Britton told us we do not believe that we have sufficient evidence in this case to support a conclusion that civil servants do act in that way or will do so. And if we decline to make any assumption on the point (and we do so decline) the causal chain is broken and the argument loses all impact. We see no reason why a different approach should be taken in respect of independent advisers, who must be bound by similar obligations to those imposed on civil servants. We comment in passing that abandoning the traditional methods of operation might also prove to be unwise in the long term in that a reputation for giving bland advice might ultimately hamper career development and situations may arise where civil servants or ministers will find that the absence of a complete record prevents them from demonstrating that relevant issues had been considered, or appropriate consultation undertaken, before a decision was taken.

Public interest test under section 35 – Factors in favour of disclosure

31. We have already recorded in paragraph 9(f) the public interest factors in favour of disclosure that the Information Commissioner took into account in his Decision Notice. Mr Pitt-Payne distilled into three headings the advantages which he said would have resulted from disclosure at the relevant time. First, he argued that disclosure would have contributed to an informed debate on the criminal justice system, including possible solutions to problems within it. In this respect we note that Lord Birt himself referred to the Report as containing an "audit of the effectiveness of existing crime reduction measures" and we believe that it was capable of playing a significant role in highlighting weaknesses on which those working in the field could have targeted reform. Mr Pitt-Payne's second argument was that disclosure would have increased public understanding of the process by which policy in this field was developed up to the time when the White Paper was published. This goes to the root of the advantages that the FOIA is intended to

promote – an environment in which the government processes are more transparent and responsibility for decision making more easily identified. And it does seem likely that publication of the document that recorded the end result of the special adviser's work in this case would have increased understanding of those processes. The third element of public interest in disclosure on which the Information Commissioner relied was that disclosure would have provided an insight into the role played in the formulation of government policy by experts such as Lord Birt. It might be argued that disclosure would be particularly important in the case of a very senior special adviser having a closer relationship with the Prime Minister than in other cases. Against that it may be said that the nature of the relationship in fact justified a longer period of protection from disclosure. We return to this point later in the Decision.

32. Mr Facenna argued that the impact of these factors was reduced by the fact that they were general and not specific and that they were not in any event capable of bearing sufficient weight to satisfy the section 2(2)(b) test of at least equalling the factors in favour of maintaining the exemption. He argued, in particular, that the format of the Report had the effect of making it less likely that the public would understand it and that the extent to which it would inform public debate was therefore significantly reduced. It is true that the Report does not follow the continuous text style of a traditional report to government but, as explained earlier, took the form of a series of slides. It was suggested in evidence that the slides were used as visual aids for an oral presentation to the Prime Minister. We have studied the slides with some care. Each one was A4 in size and contained a great deal of material, including footnotes. They were very far from the sort of bullet point slides frequently used in public presentations and we did not find difficulty in following the author's logic or in understanding the facts on which he relied or the recommendations he made. The Letter, which accompanied the Report, also highlighted and explained various points in a manner which we found clear and comprehensible.

33. Mr Facenna also argued that one individual's expression of his own "blue sky thinking" would not have any effect on accountability. However, our reading of the

Report and Letter demonstrated that they certainly contained clear statements as to accountability for the state of affairs that the author considered existed in 2000.

34. The Cabinet Office also criticised the Decision Notice for what it characterised as opaque arguments and circular reasoning. However, viewing the case as a whole and not just the particular manner in which the Information Commissioner explained his decision, our inspection of the Report and Letter leads us to conclude that any member of the public reading them would acquire an understanding of the state of the criminal justice system at the relevant time, the policy issues that were identified by Lord Birt and the quality of the research and logic that supported his proposals for addressing those issues. He or she would also gain an understanding of the extent to which those proposals were subsequently adopted in the White Paper, Strategic Review or otherwise. We regard these as important public interest considerations in favour of disclosure, although their impact is reduced by the likelihood that in practice some members of the public would be likely to see the information in dispute only in the form of a summary or commentary in the media, which may be incomplete and possibly distorted

Public interest test under section 35 – the balancing exercise

35. We have set out the text of section 2(2)(b) in paragraph 3 above. It requires us to consider all the circumstances of the case. This means that we should take account of general policy considerations and the indirect impact of our decision on disclosure alongside matters specific to the subject matter of the case – see *Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin). If we then conclude that the factors for and against disclosure are equally balanced we are required to order disclosure; it is only if the public interest in maintaining the exemption "outweighs" the public interest in disclosure that disclosure will be refused – see *OGC v Information Commissioner* [2008] EWHC 737 (Admin) at paragraph 78.

36. In normal circumstances there would be a substantial dilution of the public interest in maintaining confidentiality over analysis and advice given to government five years before a request was made for its disclosure, and in circumstances where government policy on the subject had been published in a white paper four years

before the request. By that stage it would be unlikely to outweigh public interest in factors in favour of disclosure of the kind considered above. However, in this particular case there are a number of features which differentiate it from others and have the effect of delaying the process by which the public interest in maintaining confidentiality would normally dilute over time. Those which we consider to have particular significance are the following:

a. The fact that Lord Birt was commissioned to provide assistance direct to the Prime Minister with a particular brief to introduce radical "blue sky thinking" to policy development across a number of sectors. The Prime Minister at the time evidently believed that it was valuable for him to be able to obtain advice of this kind from an individual in his private office having direct access to him and we have commented in paragraph 24 above on some of the particular issues that may arise from the nature of the relationship. We believe that (certainly while one or both of the individuals remained in post) the passage of time will reduce more slowly the public interest in maintaining confidentiality over the fruits of that advice than it might in the case of advice from civil servants or advice from an independent adviser with a more restrictive brief or a more distant relationship. We regard this as a strong point in favour of maintaining the exemption in this case.

b. The timing of the preparation of the report, which coincided with the passage through Parliament of the Bill which became the FOIA. At the time it could reasonably have been expected, by those writing and those receiving the report, that it would be covered by an absolute exemption. We received evidence of a sort to the effect that Lord Birt did have such an expectation. Although this may place Lord Birt in a position where a decision to disclose may seem to introduce a degree of unfairness, it is not obvious how that personal concern about confidentiality may be translated into a public interest to that effect. The extent of the discouragement to anyone asked to perform a similar role in the future will have been reduced because, once the FOIA passed into law, those commissioning independent advice would certainly know that the possibility existed of the public interest balance leading to a decision to publish at some stage in the future. And it seems very unlikely that they would not have explained that fact to anyone

considering accepting the position. We conclude that the argument, although not strong, nevertheless carries some weight.

c. The inclusion in the Report and Letter of a number of strong opinions and particularly contentious recommendations. We identify these in the confidential annex to this Decision, where we also explain what our conclusion is on each. We believe that although this argument carries weight in respect of both the Report and the Letter it has greater impact on the latter, which is a more personal communication and contains more direct language. It was also, by its nature, a less balanced document in that Lord Birt selected particular aspects of the report to emphasise in it.

37. This is a finely balanced case with a number of factors distinguishing it from others in which advice to Ministers has been requested. Our overall conclusion, based on the issues listed in paragraph 36 above and the other points made in the confidential annex to this decision, is that at the particular moment in time when Mr Evans made his request the public interest in maintaining the exemption continued to outweigh the public interest in disclosing it. Our conclusion applies to the factual elements of the Report, as well as the opinions and recommendations, because it is not possible to distinguish the two for separate consideration under section 35(4).

38. We should add that in the course of the hearing our attention was drawn to a recent decision of the Information Commissioner (FS50088745) in which he supported a refusal to disclose minutes and agendas of meetings between the Prime Minister and Lord Birt. It seemed to us that there were a number of elements of that case which made it quite different from this case, not least the fact that the information requested was found to contribute little or nothing to inform public debate. We found it of no help in reaching a decision on the case before us.

Is Section 36 engaged?

39. This remains an issue for decision even though, as we have mentioned in paragraph 12 above, several slides from the Report were disclosed to Mr Evans on the day before the hearing. We still have to determine whether the Cabinet Office should have disclosed that material, and any other statistical information contained

in the Report, at the time when Mr Evans made his request. Our conclusion is that this was statistical information which contributed to the "informed background" to the policy decisions encapsulated in the White Paper and/or the Strategic Plan for the purposes of section 35(2) (so that it fell outside that exemption) and its disclosure would not have prejudiced, or been likely to have prejudiced, the effective conduct of public affairs at the time (so that section 36 was not engaged).

40. An issue arose during the hearing as to whether the Report or Letter contained any other statistical information that ought to be disclosed. There are certainly other instances of numbers or percentages appearing in the Report but, having reviewed the detailed context and heard counsels' submissions on the point, we did not detect any which we felt could be separated from the surrounding material without losing all meaning and, as a result, the characteristic of "information" or the ability to constitute "informed background" for the purposes of section 35(2).

41. In light of our conclusion that section 36 was not engaged we do not need to go on to consider the third (public interest) question set out in paragraph 16 above.

Conclusion

42. For the reasons set out above we allow the appeal in respect of the Report (save for the statistical information referred to in paragraph 39 above) and find that the Cabinet Office was correct in its view that it was not required to disclose the Letter in response to Mr Evans' request. We will issue a substituted Decision Notice to that effect. Our decision is unanimous.

Signed

Chris Ryan

Deputy Chairman Date: 21st October 2008