

A shot across the bow?

Paul Gibbons, Information Compliance Manager at the School of Oriental and African Studies (better known for blogging in his personal capacity as 'FOI Man'), discusses one less covered aspect of the Justice Select Committee report

At the end of July 2012, the Justice Select Committee published its long awaited report on its post-legislative scrutiny of the Freedom of Information Act ('FOIA'). The Committee found that the Act "has been a significant enhancement of our democracy." Campaigners, afraid that MPs would recommend that the Act be curtailed, were relieved, whilst critics, amongst them the former Cabinet Secretary, Lord Gus O'Donnell, have since made clear their disappointment. Calls to charge for FOI requests and a new absolute exemption for policy information were ruled out. Further, the Committee said that public bodies should not be able to delay consideration of the public interest and internal reviews indefinitely. Criminal prosecutions under section 77 FOIA should be made easier, and result in higher fines.

Conversely, the Committee argued that damage to government policy making should be avoided through more routine use of the ministerial veto. In addition, the Committee preferred private bodies providing public services to be held to account through contractual clauses rather than designation under FOIA.

A more careful read of the Committee's report reveals that the Committee may have intended to send some more immediate messages to another audience. Though the Committee had not been overtly critical of the Information Commissioner, and in fact took on board many of the messages that Christopher Graham put to it in his characteristically robust manner, there were some clear signals that MPs think that a change in his approach to certain aspects of FOI is in order.

As noted above, there was no recommendation to make section 35, the exemption covering policy formulation and development, absolute. However, the Committee appears to have agonised at length on the issue of providing a 'safe space' for policy officials to discuss government business. Despite eventually concluding that it could not justify "any major diminution of the openness created by the Freedom of Information Act," the Committee went on to caution (at paragraph 201) that "everyone involved in both using and determining that space [for policy discussions], that the Act was intended to protect high-level policy discussions" (paragraph 201).

It is very difficult to see how this could

be aimed at anyone other than at the Information Commissioner's Office. After all, other than the First-Tier Tribunal (Information Rights), no other body or person could be the target of such a call. It appears as though the Committee was suggesting that recent rulings to disclose Cabinet minutes and NHS risk registers have been a step too far.

Elsewhere, the Committee is even more explicit as to its target audience. Universities had indicated in their evidence that they were concerned about protection for those carrying out animal research. In its conclusions, the Committee encouraged universities to rely on section 38 (the exemption for health and safety) and stressed that it "expects that the Information Commissioner will recognise legitimate concerns" (paragraph 222).

Again, universities, together with NHS bodies and others, raised concerns about FOI endangering their competitiveness in an environment where they are increasingly competing against private providers. The Committee looked at this and could reach no conclusion as to whether the exemption at section 43 was sufficient to protect public bodies. But it did state explicitly (at paragraph 231) that "there is a strong public interest in competition between public and private sector bodies being conducted on a level playing field to ensure the best outcome for the taxpayer".

It is presumably going to be difficult for the Commissioner and anyone else applying the Act to ignore such strong statements on the practical exercise of exemptions in the Act. Whilst we may have to wait a while to hear what the government thinks of the Justice Committee's conclusions on FOI, it is possible that their impact on the Commissioner and Tribunals will be almost immediate.

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