Independent Commission on Freedom of Information: call for evidence
Response from the British Humanist Association

20 November 2015

About the BHA

The British Humanist Association (BHA) is the national charity working on behalf of non-religious people who seek to live ethical and fulfilling lives on the basis of reason and humanity. It is the largest organisation in the UK campaigning for an end to religious privilege and to discrimination based on religion or belief, and for a secular state.

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

We believe the current protections are the correct ones. If the public interest favours disclosure, then that means (by definition) that it is in the public interest for the information to be released. Therefore to take away the public interest test would be acting against the public interest.

The consultation document quotes the Justice Select Committee as saying that 'We accept that case law is not sufficiently developed for policy makers to be sure of what space is safe and what is not.' This suggests that case law needs to have more time to develop, and not that there is a need to change the law.

We have been involved in two significant FOI cases, both involving sections 35/36, where a request we submitted to the Department for Education (DfE) led to the Information Commissioner and then Information Tribunal overruling the DfE in deciding that the public interest favoured disclosure.

The first case (*Department for Education v The Information Commissioner & British Humanist Association* EA/2012/0136,0166,0167 – https://humanism.org.uk/2013/01/15/landmark-freedom-of-information-victory-for-bha-vs-department-for-education/) concerned the names, locations and religions of groups applying to set up Free Schools. The DfE was routinely publishing this information for successful applications, but only upon announcing their success, and it was not at all publishing the information for unsuccessful applications. Before Free Schools were introduced such information would routinely be published (in fact applications would be subject to open, competitive public consultation).

In the case the DfE relied on section 35 and argued the public interest laid against disclosure. It argued that publishing the names of unsuccessful applicants would discourage repeat applications; and that ministers and officials needed space to consider applications free from public sight. It even alleged harassment of some free school applicants, in one case supposedly resulting in a death threat. To support its case it relied on a survey of past applicants' views on disclosure, whereby past free school applicants were told their 'details' might be released and they should respond to the survey to support the DfE's case.

On this the Tribunal ruled that 'The bias in design and description of the questionnaire fatally undermines any reliance that can be placed upon it. The Tribunal is satisfied that the analysis of the questionnaire carried out by the British Humanist Association fairly and appropriately demonstrates the fundamental flaws. The Tribunal was surprised that a Department of State should have chosen to rely on a survey which even on its face was of doubtful reliability but which on further analysis is deeply suspect.'

Indeed, the upshot of the case was that the information was ordered to be released, as it has been in for all subsequent 'waves' of Free School applicants (albeit see our answer to question 5). The DfE was also found wrong to rely on section 35, with section 36 applying instead (and the public interest being in favour of disclosure). And the outcome has been none of the negative impacts that the DfE feared. This shows that the DfE was clearly over-zealous in its interpretation of the extent of the public interest against disclosure. It appears to us that ministers were overly protective of a flagship programme and perhaps wanted to avoid embarrassing headlines that some of the more fringe groups that applied might have generated. But in so doing they led to accusations of secrecy that were in themselves more damaging: the consequence was a loss of transparency, accountability and democratic input when compared to previous school approval processes. The Information Tribunal's decision has helped reverse that.

The second case related to civil servants' internal briefings produced in the lead-up to extending state funding to Steiner schools through the Free Schools programme (*Department for Education v The Information Commissioner & Richy Thompson obo British Humanist Association* EA/2014/0017 – https://humanism.org.uk/2014/06/25/bha-victory-information-tribunal-government-ordered-disclose-steiner-school-documents/). Three such schools had been so funded, and the BHA has a range of concerns about this from pupils' wellbeing through to the quality of education provided (https://humanism.org.uk/wp-content/uploads/BHA-BRIEFING-concerns-about-the-state-funding-of-Steiner-schools.pdf). It was leaked to the BHA that the internal briefings also expressed serious concern about such funding, prompting the BHA's request. Again the DfE relied on section 35 and argued that the public interest laid against disclosure, this time relying on 'safe space' and 'chilling effect' arguments.

However, given the seriousness of the nature of the document's contents, it was decided that the public interest laid in favour of disclosure. The documents showed civil servants' concerns focused on allegations of racism and systematic bullying amongst private Steiner schools (https://humanism.org.uk/2014/07/31/government-forced-release-briefings-expressing-serious-concerns-racism-bullying-independent-steiner-schools-losing-information-tribunal-case-bha/). This prompted questions about the correctness of the decision to allocate such funding. Since the release of the documents no further Steiner schools have been approved through the Free Schools programme. Therefore we would argue improper decision-making was exposed and ministers held to account. A weaker public interest test may well have prevented this.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

We do not see why such information should explicitly be afforded any different level of protection by the law from other information. The fact that such discussions are particularly sensitive is considered when weighing up the public interest, with the public interest consequently lying further against disclosure. This seems to us to be the correct approach.

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

As with question 2: we do not see why such information should explicitly be afforded any different level of protection by the law from other information. The fact that such documents are particularly sensitive is considered when weighing up the public interest, with the public interest consequently lying further against disclosure. This seems to us to be the correct approach.

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

We are content to see the veto continue to exist in the narrow way it has before, although we would prefer it didn't as we think that courts/tribunals/the ICO, in being independent of government, are better placed to make impartial decisions about where the public interest lies.

We think the ruling in the Prince of Wales case was the correct one (and, as annex B makes clear, an exceptional case in its longevity regardless of the ultimate outcome). As the consultation document says, 'The justification given for the existence of the Cabinet veto is that there will be a small number of situations in which the executive will be best placed to assess the public interest, and will have the authority granted to it by the electorate to do so. In those situations it is asserted that the executive should be able to make the final decision on where the public interest lies – subject to judicial oversight to ensure that decisions are not arbitrary or irrational.' What happened in the Prince of Wales case is that the cabinet minister in issuing the veto merely restated the arguments that had been rejected by the courts/tribunals/ICO and did not bring any special insight into play as a result of being best placed to make the assessment. This was the cause of the Supreme Court's reversal.

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

We think that legally the current system works very well, and the statistics in annexes A to B reflect this. However we also think the ICO should use its powers to issue enforcement notices, something it has only ever done twice in FOI cases, most recently in 2010.

Our relevant experience is with respect to obtaining the names, religions and locations of groups applying to set up Free Schools. To reiterate what was set out in our response to question one, in 2012 we won a First Tier Tribunal case (*Department for Education v The Information Commissioner & British Humanist Association* EA/2012/0136,0166,0167 – https://humanism.org.uk/2013/01/15/landmark-freedom-of-information-victory-for-bha-vs-department-for-education/) which set a precedent that the Government had to provide this information as soon as it held it.

This timeliness of the provision of the information is important for reasons of transparency and enabling democratic input. Applications for Free Schools are made in a series of 'waves', and this case focussed on the first two. The way each wave worked is that groups apply to the DfE to open Free Schools; the DfE assesses the applications; it then approves which to approve/reject; and it then announces those it approved. As well as establishing that the DfE must announce those it rejected, the Tribunal case also established that it must provide the details for all those applications *as soon as* it had them (after the standard 20 working days it has to respond), i.e. before it even

decided which to approve/reject. This enabled more democratic input into the approvals process, much as was possible in school approvals processes before the Free Schools programme was introduced.

The case focussed on the first two waves of applications and by the time the case concluded the third wave had also occurred. We are currently on the tenth wave and yet the DfE is continuing to ignore the Tribunal's decision and not provide the information straight away, after the application window closes – as the Tribunal precedent established it must. A detailed timeline of the subsequent cases is available (https://humanism.org.uk/wp-content/uploads/Timeline-of-the-BHA%E2%80%99s-FOI-requests-for-names-of-Free-School-applicants.pdf) but we will set out the details below.

Initially (for waves four to seven) the DfE ignored the Tribunal decision and continued to rely on exemptions where the Tribunal had established a precedent that it couldn't. This led to successive ICO appeals from us, all successful, but the process of taking the decisions to the ICO took so long that by the time the ICO had ruled in favour of release, the DfE had already decided which applications to approve to open. This meant that the information was no longer timely and so the DfE was effectively able to continue to ignore the Tribunal's precedent through bureaucratic obfuscation.

Around wave six we asked the ICO to issue a fixed enforcement notice under section 52 of the Act, so that the DfE could not continue to behave as it had been but would have to automatically provide the relevant data in response to requests in the future. Unlike with asking for a decision notice there was no clear process for us to do this. This led the ICO to arrange to meet the DfE to discuss the issues holistically as a first step.

The consequence was that the DfE agreed to start providing the information prior to deciding which Free Schools to approve – which it has done for waves seven to nine. However, it still is not doing so immediately. In waves eight and nine it claimed an extension in providing a response and then an exemption (the same one each time) but then changed its mind upon internal review. Currently (as of 9 November) it has asked for a similar extension for wave ten. This is in spite of the straightforward nature of the cases, matching the many before them where it has been obliged to provide the information promptly each time.

As a consequence the DfE is still obfuscating, just not to the point that the ICO has to get involved – instead providing the information right before that stage. This is not how the law intends for the DfE to behave. We will be considering whether to approach the ICO again regarding enforcement.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FoI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

We think that the relatively tiny cost of government responding to FOI requests is money well spent. The increased scrutiny of government that the Act has introduced has strengthened our democracy and held officials and ministers to account on numerous occasions. It has also on occasion exposed financial irregularities that have led to savings which may well be comparable to the cost of FOI in the first place.

If any controls are introduced, then they should be targeted at certain kinds of requests or requesters that are in some way deemed to be frivolous or nuisance requests, or intended to gain

competitive benefit for a corporation. There should certainly not be up-front fees, as this would prevent too many requests from being possible. There should also not be fees for internal review, as this may well lead to authorities refusing the initial request when they don't want to provide the information in the hopes that no review is forthcoming (a la the DfE in our response to question 5). But if there are such fees, they should be very nominal (for example 50p), enough to deter nuisance requesters from the hassle of paying the fee but not to deter any serious requesters.

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