

# The Campaign for Freedom of Information

Suite 102, 16 Baldwins Gardens, London EC1N 7RJ

Tel: 0171-831 7477

Fax: 0171-831 7461

Email: [admin@cfoi.demon.co.uk](mailto:admin@cfoi.demon.co.uk)

Web: [www.cfoi.org.uk](http://www.cfoi.org.uk)



## FREEDOM OF INFORMATION BILL

Briefing for Second Reading 7.12.99

**Hon. President:** Godfrey Bradman  
**Co-Chairs:** James Cornford, Neil McIntosh  
**Director:** Maurice Frankel

**Parliamentary Co-Chairs:** Helen Jackson MP  
Archy Kirkwood MP  
Richard Shepherd MP

# **FREEDOM OF INFORMATION BILL**

## **Briefing for Second Reading 7.12.99**

**Although the Freedom of Information (FOI) Bill applies to an extremely wide range of public bodies its substantive rights are weak; it gives too much power to ministers and authorities to withhold information without effective challenge.**

**Following the reports of two select committees<sup>1,2</sup> some improvements to the much criticised draft FOI Bill have been made. But the Bill still suffers from fundamental defects, and continues to fall far short of the commitments made in the government's own white paper.<sup>3</sup>**

**This briefing deals in particular with two main concerns:**

- The large number of 'class exemptions' which protect all information falling within particular classes, regardless of whether disclosure would cause harm. These should be amended to apply only where disclosure can be shown to be harmful.**
- The fact that ministers and authorities – not the Information Commissioner - have the final word on whether information should be disclosed in the public interest. The Commissioner should be able to make binding rulings on public interest disclosure.**

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<sup>1</sup> House of Commons, Public Administration select committee, 3rd report session 1998-99, 'Freedom of Information Draft Bill', HC 570, July 1999.

<sup>2</sup> House of Lords, 'Report from the Select Committee Appointed to Consider the Draft Freedom of Information Bill', session 1998-99, HL 97, July 1999.

<sup>3</sup> *Your Right to Know*. Cm 3818, December 1997

In particular, the briefing deals with

- The Exemptions (*page 3*)
- The discretionary public interest test (*page 5*)
- Policy information (*page 14*)
- The Investigations exemption (*page 24*)
- The Scottish FOI proposals (*page 25*)
- The approach to policy advice under the New Zealand FOI Act. (*page 27*)

## 1. THE EXEMPTIONS

The bill's access right is subject to a mixture of 'harm test' and 'class' exemptions:

**'Harm test'** exemptions require authorities seeking to withhold information to demonstrate that disclosure would be harmful. The white paper proposed that the test should be whether disclosure would cause 'substantial harm'. The bill has adopted the weaker test of "prejudice". The government has rejected the recommendations of two select committees that the test, should be restored to "substantially prejudice" for at least some exemptions.<sup>4</sup>

A 'prejudice' test applies exemptions for defence,<sup>5</sup> international relations<sup>6</sup>, relations with the devolved administrations,<sup>7</sup> the economy,<sup>8</sup> crime prevention,<sup>9</sup> immigration controls,<sup>10</sup> the administration of justice,<sup>11</sup> the exercise of regulatory functions,<sup>12</sup> audit functions<sup>13</sup> and commercial interests.<sup>14</sup>

**'Class' exemptions** allow all information within a particular class to be withheld, even if disclosure would not be harmful. The white paper rejected the use of such exemptions<sup>15</sup> but they feature heavily in the bill and are likely to be a source of considerable secrecy.

Class exemptions apply to: all information relating to the formulation or development of government policy, including factual information,<sup>16</sup> all ministerial communications,<sup>17</sup> the

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<sup>4</sup> Public Administration select committee, HC 570, paragraph 71; House of Lords committee report, HL 97, paragraph 25

<sup>5</sup> Clause 24(1)

<sup>6</sup> Clause 25(1)

<sup>7</sup> Clause 26(1)

<sup>8</sup> Clause 27(1)

<sup>9</sup> Clause 29(1)(a)

<sup>10</sup> Clause 29(1)(e)

<sup>11</sup> Clause 29(1)(c)

<sup>12</sup> Clause 29(1)(g)

<sup>13</sup> Clause 31(1)

<sup>14</sup> Clause 41(2)

<sup>15</sup> The white paper stated: "we do not propose that the Act should contain exempt categories at all, but rather that disclosure should be based on a 'contents basis'." Cm 3818, paragraph 3.8

<sup>16</sup> Clause 33(1)(a)

obtaining of advice from law officers,<sup>18</sup> information about ministers' private offices,<sup>19</sup> information about various security bodies including the National Criminal Intelligence Service,<sup>20</sup> information obtained in confidence from other governments and international bodies,<sup>21</sup> information held by the police or regulators in connection with investigations into offences, including those in which all proceedings have ended,<sup>22</sup> court records including the final report of any tribunal or statutory inquiry,<sup>23</sup> information subject to Parliamentary privilege,<sup>24</sup> information about communications with the Royal Family,<sup>25</sup> information about honours,<sup>26</sup> information accepted by a public authority in confidence,<sup>27</sup> information subject to legal professional privilege,<sup>28</sup> information about trade secrets,<sup>29</sup> information whose disclosure is prohibited by statute or Community obligations,<sup>30</sup> and information which is reasonably accessible to the public available already.<sup>31</sup>

In addition, a number of near-class exemptions apply to information whose disclosure would "in the reasonable opinion" of the authority prejudice the convention of collective ministerial responsibility, inhibit the frank provision of advice or the exchange of views for the purposes of deliberation or prejudice the effective conduct of public affairs.<sup>32</sup> Giving legal weight to the authority's opinion will protect most decisions from challenge by the Commissioner, unless they are unreasonable in judicial review terms, that is irrational.

### **The Commissioner's powers**

The Commissioner can order the disclosure of information which an authority is wrongly claiming to be exempt.<sup>33</sup> Where the claim relates to:

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<sup>17</sup> Clause 33(1)(b)

<sup>18</sup> Clause 33(1)(c)

<sup>19</sup> Clause 33(1)(d)

<sup>20</sup> Clause 21

<sup>21</sup> Clause 25(2)

<sup>22</sup> Clause 28(1)

<sup>23</sup> Clauses 30(1) and 30(2)(b)

<sup>24</sup> Clause 32(1)

<sup>25</sup> Clause 35(1)(a)

<sup>26</sup> Clause 35(1)(b)

<sup>27</sup> Clause 39(1)

<sup>28</sup> Clause 40(1)

<sup>29</sup> Clause 41(1)

<sup>30</sup> Clause 42(1)

<sup>31</sup> Clause 19(1)

<sup>32</sup> Clause 34(2)

<sup>33</sup> The Commissioner can issue either a decision notice under clause 50(4) or an enforcement notice under clause 52(1) requiring the authority to take specified steps. Failure to comply with such a notice would be dealt with by a court as contempt of court under clause 53(3).

- a *harm test* exemption, the Commissioner can substitute her<sup>34</sup> decision for the authority's as to whether the specified harm would be caused.
- a *class* exemption, the Commissioner can only order disclosure if she finds the information does *not* fall into the class. Apart from this limited check, ministers and authorities would have a free hand to withhold such information.

However, decisions under both types of exemption would be subject to the bill's discretionary public interest provision.

## 2. THE DISCRETIONARY PUBLIC INTEREST TEST

For information falling under most (but not all<sup>35</sup>) of the bill's exemptions, and for information whose disclosure would cost more than a specified limit<sup>36</sup> an authority must :

“consider....whether, in the exercise of the authority's discretion, to communicate the information to the applicant”<sup>37</sup>

In doing so, it must:

“have regard to all the circumstances of the case and to the desirability of...communicating information ...wherever the public interest in disclosure outweighs the public interest in maintaining the exemption in question”.<sup>38</sup>

**This would be an extremely powerful provision, were it not for the fact that the Commissioner is explicitly prevented from *ordering* disclosure under these provisions<sup>39</sup>.**

**The public interest test provides the only route of access to a vast amount of information**

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<sup>34</sup>The government has announced that the present Data Protection Registrar, Elizabeth France, will initially hold the post of Commissioner.

<sup>35</sup>The public interest test does not apply where information is exempt on the grounds that it: is already accessible from other sources; relates to bodies dealing with security matters; is held in records of a court, tribunal or inquiry; is personal information about the applicant; was obtained in confidence from a third party; is subject to a statutory prohibition on disclosure; it has been exempted by an order made by the Secretary of State [clause 13(1)(a)]

<sup>36</sup> Where the cost of dealing with a request exceeds a particular limit, an authority is not required to comply with it. [Clause 11(1)]. For central government, this limit is likely to be set at £500

<sup>37</sup> Clause 13(3)

<sup>38</sup> Clause 13(4)

<sup>39</sup> Clause 50(7) and Clause 52(2)

**held by authorities, particularly that subject to the large number of sweeping class exemptions. Allowing authorities the final say on public interest allows them to retain ultimate control over most of their information.**

If the Commissioner finds that an authority has failed to consider the public interest at all, she can send the decision back for reconsideration. But if she thinks the authority has made the wrong decision, all she can do is make a non-binding “*discretionary disclosure recommendation*”<sup>40</sup> which a minister or authority is free to reject.

**An authority which has been negligent or complacent or made errors of judgement or unjustified concessions to vested interests will be invited to decide whether the public interest requires it to reveal details of its own malpractice. Although the Commissioner’s recommendations may carry some persuasive weight, an authority determined to avoid scrutiny can simply ignore them.**

The Macpherson report into the Stephen Lawrence murder inquiry exposed a catalogue of error and incompetence that few public authorities would willingly have acknowledged. Would a *recommendation* have elicited the crucial disclosures? Or would the Metropolitan Police argue that the Commissioner had failed to appreciate the harmful effects of disclosure on policing?

What decision will be made where the information directly undermines the position of the head of the organisation? In 1994, the Public Accounts Committee referred to the fact that West Midlands Health Authority had been responsible for “*a waste of at least £10 million, at the expense of health care for sick people in the West Midlands*”. In the PAC’s words the official responsible:

“was able to follow his own path, making a bonfire of the rules in the process, uncontrolled either by the Regional Health Authority or regional senior management. These were very serious failings at all levels of management, and the Chairman and members of the Regional Health Authority had seriously neglected their duty to secure the accountability of regional management”.<sup>41</sup>

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<sup>40</sup> Clause 48(1)

In this case, the disclosure decision would be made by the officers whose negligence had caused the problem. There can be no justification for such an arrangement.

Would the last government have *voluntarily* revealed the secret changes to its policy on arms exports to Iraq, a fact which it repeatedly went out of its way to avoid acknowledging in response to Parliamentary Questions? Would the present government be prepared to voluntarily release information which would seriously undermine contentious policies such as the part-privatisation of the London underground or air traffic control system, particularly if ministers' credibility were at stake?

### **The Ombudsman precedent**

The Parliamentary Ombudsman also only has the power of recommendation, and his recommendations are normally accepted. How useful is this as a guide to the prospects for the Bill?

The Parliamentary Ombudsman also supervises the openness code introduced by the former government in 1994.<sup>42</sup> Sir William Reid, the former Ombudsman, reported in 1995 that:

“there is a tendency in some departments to use every argument that can be mounted, whether legally-based, Code-based or at times simply obstructive, to help justify a past decision that a particular document or piece of information should not be released instead of reappraising the matter in the light of the Code with an open mind.”<sup>43</sup>

Although departments are reluctant to be seen to be flouting the Ombudsman's authority, in effect they have come close to doing so. The present Ombudsman, Mr Michael Buckley, said in 1997 that departments:

“fear that they are setting a precedent...they do not want to say yes, that the department accepts this interpretation of the Code. It turns into a process almost of negotiation”.<sup>44</sup>

He has referred to departments “*haggling*” over the interpretation of the code, and of time consuming delays in which departments: “*dispute my interpretation of the Code and the*

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<sup>41</sup> Public Accounts Committee, 8<sup>th</sup> Report, Session 1993-94, ‘The Proper Conduct of Public Business’, HC 154, January 1994, page xii

<sup>42</sup> Code of Practice on Access to Government Information

<sup>43</sup> Parliamentary Commissioner for Administration, Annual Report 1995, page 51

<sup>44</sup> Evidence to Public Administration Committee, 2/12/97

*exemptions under it; or dispute my judgement regarding the "harm" test.*"<sup>45</sup> Most graphically, he commented:

"if the Government wants me to act as referee we cannot have a situation in which every time I award a free kick everyone troops off the field for an elaborate investigation of the rule book and to telephone the FA."<sup>46</sup>

**It had been assumed that the FOI bill, by creating a statutory right of access, would end such haggling. But by denying the Commissioner the right to make final rulings on the public interest, the bill is likely to preserve the existing unhelpful approach.**

**In a small number of cases the Ombudsman's recommendations have been rejected.** Before the election, the Ministry of Defence refused to accept a recommendation that it compensate the parents of a serviceman who had died in an accident during the Falklands conflict. The MOD had failed to disclose the truth about the death, withheld information from the inquest and wrongly blamed the individual himself for the accident. The complainant later succeeded in obtaining a second inquest, which overturned the original verdict. Despite the Ombudsman's recommendation, the MOD refused compensation for their legal costs.<sup>47</sup>

The last government also rejected an Ombudsman recommendation that compensation should be paid to the victims of Channel Tunnel blight.<sup>48</sup> It eventually changed its mind, but only after a new Transport Secretary had taken office, and as the general election - with a large number of marginal seats in the blighted areas - approached.

Other authorities are markedly more reluctant to accept Ombudsman findings. Around 6 per cent of the Local Government Ombudsmen's recommendations to local councils have been rejected by them over the years.<sup>49</sup> If this pattern is repeated under FOI, it would severely damage public confidence in the legislation. The many quangos covered by the bill may be even less willing than local authorities to act on recommendations. Dissent is likely to be

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<sup>45</sup> Written evidence to Public Administration Committee, January 1998

<sup>46</sup> Oral evidence to the Public Administration Committee, 3/2/1998

<sup>47</sup> Parliamentary Commissioner for Administration, Annual Report 1997-98, page 39. Following the election, the new government reconsidered the position and agreed to pay compensation.

<sup>48</sup> Parliamentary Ombudsman, Fifth Report 1994/95, HC 193

<sup>49</sup> Local Government Ombudsman, Summary Annual Report For the year ended 31 March 1996

greater amongst the private bodies brought under the bill.<sup>50</sup>

### **What is the public interest?**

The concept of ‘public interest’ is well known at law, particularly in actions for breach of confidence. The judges have stressed that the public interest is not synonymous with what the public finds ‘interesting’.<sup>51</sup> The courts will refuse to enforce an obligation of confidentiality which is used to conceal wrongdoing. This principle has its roots in an 1856 case which held that “there is no confidence in iniquity”.<sup>52</sup> Subsequent cases have expanded the principle beyond crime and crime and fraud to cases where there is danger to public safety or misconduct.<sup>53</sup>

Statutory public interest tests can also be found in legislation such as the recent Data Protection Act 1998.<sup>54</sup> But the most direct parallel to the bill is in the open government code, which requires authorities to disclose exempt information where:

“any harm or prejudice arising from disclosure is outweighed by the public interest in making information available”.<sup>55</sup>

The official guidance on the code, issued by the last government, states:

“The public interest in disclosure is particularly strong where the information in question would assist public understanding of an issue subject to current national debate, or improve the transparency and accountability of a particular function of Government”<sup>56</sup>

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<sup>50</sup> Clause 4 permits private bodies exercising public functions or providing a service under contract to a public authority to be designated as public authorities for the purposes of the bill.

<sup>51</sup> “There is a world of difference between what is in the public interest and what is of interest to the public”. Griffiths LG, in *Lion Laboratories Ltd v Evans*, [1984] 2 All ER 417 at 435

<sup>52</sup> *Gartside v. Outram*, (1856), 26 L.J. Ch. at p 114.

<sup>53</sup> Thus Lord Denning, then Master of the Rolls, stated in 1969: “I do not look on the word ‘iniquity’ as expressing a principle. It is merely an instance of just cause or excuse for breaking confidence. There are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret.” *Fraser v Evans*, [1969] 1 All E.R. 8, at 11

<sup>54</sup> Thus the processing of personal data for the purposes of journalism, literature or art is exempt from many of the Act’s restrictions where the person involved reasonably believes the restriction is incompatible with the journalistic etc purpose and that “*having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest*”. Data Protection Act 1998, section 32(1)

<sup>55</sup> Code of Practice on Access to Government Information, 2<sup>nd</sup> Edition, Part II, ‘Reasons for Confidentiality’

“...disclosure [on public interest grounds] might be envisaged where there would be some breach of the law or other wrongdoing, or exposure of a significant risk to public health or to the environment or public safety.”<sup>57</sup>

## **Appeal rights**

**If the Commissioner was all-powerful, the government’s reluctance to give her the power to compel disclosure in the public interest might be more understandable. In fact, authorities already have comprehensive rights of appeal against the Commissioner.**

The Commissioner’s decisions can be challenged by appeal to the Information Tribunal.<sup>58</sup> Even her formal requests to an authority for information can be appealed against.<sup>59</sup> The Tribunal’s decisions themselves can be challenged, on a point of law, in the courts.<sup>60</sup> This should give ministers all the protection they need against the possibility of mistaken decisions. They should have no need of the freedom to simply ignore the Commissioner.

## **The two-stage decision**

The public interest provision suffers from another problem, caused by splitting the decision into two self-contained stages: first, asking if the information is exempt and, second, considering disclosure in the public interest.

The bill encourages authorities to make these decisions over separate time-frames. The exemption decision must be made within 20 days.<sup>61</sup> But the decision on the public interest need only be made within a “reasonable” time,<sup>62</sup> suggesting it can be made later. Decisions will trickle out in confusing two-stage process, obscuring the point at which ‘no’ has finally been said.

Dissatisfied applicants will be required to use an authority’s internal complaints procedure,

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<sup>56</sup> Guidance on Interpretation. Code of Practice on Access to Government Information. 2nd Edition, 1997, paragraph 3

<sup>57</sup> NHS Executive, Guidance on Implementation of the Code of Practice on Openness in the NHS”, May 1995, paragraph 9.43

<sup>58</sup> Clause 56(1)

<sup>59</sup> Clause 51(3)

<sup>60</sup> Clause 58

<sup>61</sup> Clause 9(1)

<sup>62</sup> Clause 13(6)

before they can complain to the Commissioner.<sup>63</sup> The complaint may even degenerate into an extraordinary four stage process, in which two separate internal complaints are made to the authority itself (first about the decision on exemption, and later about the public interest) followed by two separate complaints to the Commissioner.

### **Other jurisdictions**

Most overseas FOI laws which contain public interest tests allow the appeals body to make binding rulings; a precedent which Scotland proposes to follow.

#### *Scotland*

The proposed Scottish FOI Act will allow Scotland's Information Commissioner to make legally binding rulings on disclosure in the public interest, where harm-tested exemptions are involved. This is a major improvement over the UK bill.<sup>64</sup> The test of harm in these cases will be whether disclosure "substantially prejudices" particular interests, a tougher test than the UK's "prejudice".

The Commissioner's rulings on public interest in relation to *class* exemptions will be subject to a collective ministerial veto, which must be approved by the entire cabinet. This represents a modest improvement over the UK veto, which can be exercised by any single minister without reference their colleagues.

#### *Ireland*

Ireland's Freedom of Information Act 1997 contains public interest tests in its exemptions for policy advice, commercial confidentiality, negotiations, the economic and financial interests of the state and public bodies, personal information, research and the protection of natural resources. In each case, the Information Commissioner makes a legally binding ruling on the public interest in disclosure. These rulings cannot be overturned by ministers and can be challenged only by appeal to the High Court on a point of law.<sup>65</sup>

The Irish Act does contain some provisions for ministerial certificates, but only in relation to security, defence, international relations and law enforcement – exemptions which do not

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<sup>63</sup> The Home Office consultation paper on the draft bill stated: "The Commissioner will not have to take on a case which has not been considered by any complaints procedure set up by an authority". 'Freedom of Information. Consultation on Draft Legislation'. Cm 4355, May 1999, paragraph 42.

<sup>64</sup> Scottish Executive, 'An Open Scotland. Freedom of Information, a Consultation', November 1999, SE/1999/51Paragraph 6.5

(with one minor exception<sup>66</sup>) include a public interest test.

A certificate prevents a ministerial claim for exemption being reviewed by the Commissioner. However, they can only be issued where a record is “of sufficient sensitivity or seriousness” to justify it<sup>67</sup> and are subject to judicial review on a point of law.<sup>68</sup> They lapse after 6 months unless reviewed and endorsed by the Prime Minister, acting jointly with other prescribed ministers (other than the minister who issued the certificate).<sup>69</sup>

This is a far more limited form of veto than the UK bill, which effectively gives any individual minister and public authority a total veto across (a) the large number of class exemptions, and (b) in relation to any issue of public interest, under class and harm test exemptions.

#### *New Zealand*

New Zealand’s Official Information Act 1982 contains public interest tests for a series of its exemptions, including those dealing with the confidentiality of advice, collective ministerial responsibility, the confidentiality of communications with the Sovereign, trade secrets and commercial interests, confidential information, commercial and industrial negotiations, the economy, protection of health and safety, privacy and legal professional privilege.<sup>70</sup>

The Act is enforced by the Ombudsman, whose recommendations are legally binding. They can, however, be overridden by a collective veto of the whole cabinet. Originally, the Act allowed an individual minister to exercise a veto, but these were issued so regularly the system was overhauled in 1987.

The government had originally argued that political pressure would effectively deter use of the veto and that ‘*it would be a very brave Minister indeed who resorted to this device save in the most exceptional circumstances*’.<sup>71</sup> The same argument is currently being advanced in the UK to suggest that ministers will not be prepared to ignore the Information Commissioner’s

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<sup>65</sup> Freedom of Information Act 1997 (Ireland), section 42

<sup>66</sup> One provision in the law enforcement exemption, section 23(3)(b) does contain a public interest test and may be subject to a certificate

<sup>67</sup> Freedom of Information Act 1997 (Ireland), section 25(1)

<sup>68</sup> Freedom of Information Act 1997 (Ireland), section 42(2)(a)

<sup>69</sup> Freedom of Information Act 1997 (Ireland), section 25(7)

<sup>70</sup> Official Information Act 1982 (New Zealand), section 9

<sup>71</sup> The comment was made by the then Minister of Justice.

recommendations.

In fact, the New Zealand veto was used seven times in the Act's first six months. According to a leading commentary on the Act, the initial experience:

“showed that public criticism of the responsible Minister by the Opposition was easily stigmatized as political point scoring, and, in any even, easily weathered. In truth, members of Parliament do not ordinarily cross the floor on such issues nor, as the Danks Committee [whose report led to the Act] thought, are incidents of non-disclosure by veto punished by the electorate at the next election.”<sup>72</sup>

The experience led to a tightening up of the veto procedures in 1987, since when not a single veto has been issued. The process requires the government to act collectively, setting out the veto in an Order in Council made within 21 days of the Ombudsman's decision. The Order in Council must be published in the official *Gazette* and laid before the House of Representatives. It must state the reasons for the veto and these may not rely on arguments not placed before the Ombudsman at the time of his investigation.<sup>73</sup> An Order in Council may be challenged in the High Court on the grounds that the decision to issue it was wrong in law. Regardless of the outcome the legal costs of such a challenge must be paid by the Crown, unless the action was unreasonable.

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<sup>72</sup> Freedom of Information in New Zealand', I Eagles, M Taggart, G. Liddell, OUP 1992, p. 569-570

<sup>73</sup> Official Information Act 1982 (New Zealand), sections 32 and 32A

### 3. POLICY INFORMATION

The bill contains an overlapping series of class exemptions, preventing the disclosure of information about the background to policy decisions.

Class exemptions, containing no test of harm, protect *all* information relating to the “formulation or development of government policy”, “ministerial communications” and “the operation of any Ministerial private office”.<sup>74</sup> A minister’s letter to colleagues, reminding them that new regulations are about to come into force would be exempt as would the number of staff employed in the minister’s office.

A series of near-class exemptions protects information held by government or other public authorities which in their “reasonable opinion” would be likely to prejudice collective responsibility, inhibit the frankness of advice or of exchange of views, or otherwise prejudice “the effective conduct of public affairs”.<sup>75</sup> The reference to the authority’s “opinion” will usually prevent the Commissioner challenging these decisions. The Government’s background papers on the bill confirm that:

“by making the harm test subjective (the reasonable opinion of a Minister), the Commissioner, in practice, could intervene only if he or she could show that the Minister’s action was unreasonable in the sense of being irrational or perverse.”<sup>76</sup>

The reference to the “effective conduct of public affairs” itself offers wide scope for withholding information. It appears to be based on an exemption in New Zealand’s FOI Act, but that contains no less than four individual safeguards against abuse – all of which have been omitted from the UK exemption.<sup>77</sup>

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<sup>74</sup> Clause 33(1)

<sup>75</sup> Clause 34(2)

<sup>76</sup> Home Office. “Freedom of Information. Preparation of Draft Legislation. Background Material”, 1999, page 12

## Scope of the exemptions

Between them, these exemptions permit the development of policy, including the factual basis of decisions, to take place in secret and remain secret long after decisions have been taken, announced and implemented.

They do not attempt to target sensitive civil service advice of a kind which might not be offered if disclosure was anticipated, or information whose disclosure might undermine decision-making. They apply to *all* information considered during the development of a policy, including purely factual information, analysis of the facts, scientific advice, extrapolations from existing trends or simple descriptions of existing practice. Unlike other countries' FOI laws, and indeed the openness code introduced by the last Conservative government, they do not seek to place limits on the scope of the exemptions, going instead for the widest possible blanket coverage.

The only countervailing factor is the duty on ministers to consider the *discretionary* release of policy related information (a) in the public interest<sup>78</sup> and (b) insofar as it consists of background factual information<sup>79</sup>. But the Information Commissioner will not be able to require disclosure under these provisions.

The Government's background papers acknowledge that one of its "*main concerns*" is:

"that the Commissioner should not be able to challenge a decision by a public authority not to disclose information of this kind".<sup>80</sup>

The kind of safeguards which might be aimed at preventing exposure of deep-rooted policy conflicts within a divided cabinet are applied across the board, extending to mundane, consensual discussions about the small print of an agreed policy. No distinction is made between early discussions in which ministers "think the unthinkable" and the reasoned

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<sup>77</sup> Section 9(2)(g) Official Information Act 1982 (New Zealand) allows information to be withheld in order to "maintain the effective conduct of public affairs". However, this provision (i) applies only if the damage to the conduct of public affairs would result from harm to the frank expression of opinions or by exposing officials to improper pressure – it is not open ended as in the UK bill (ii) requires objective evidence of such harm, the authority's "opinion" is irrelevant (iii) requires that it be "necessary" to withhold information for one of these reasons, a stricter test than the bill's, and (iv) requires that the information be disclosed if the harm is outweighed by the public interest.

<sup>78</sup> Clause 13(4)

<sup>79</sup> Clause 13(5)

<sup>80</sup> Home Office. "Freedom of Information. Preparation of Draft Legislation. Background Material", 1999, p. 11

assessment of the likely impact of a settled policy. Almost any information capable of casting light on the background to or justification for new decisions could be withheld.

This approach implies that any public insight into the workings of government is by definition likely to be damaging. It takes no account of the possibility that it may lead to more informed debate, enhance public understanding of complex decisions, reassure the public that issues have been thoroughly examined, or expose weaknesses in official thinking to informed scrutiny. Indeed, the *prospect* of public scrutiny may itself help to ensure greater rigour of analysis.

This approach is particularly strange in light of the ‘Modernising Government’ white paper<sup>81</sup>, which proposes a new approach to policy making, involving “*more new ideas, more willingness to question inherited ways of doing things, better use of evidence and research in policy making*”. A key element is “*involving others in policy making*” and the white paper urges that the public and outside should be involved “*early in the policy making process*”<sup>82</sup>. ‘Modernising Government’ appears to assume a degree of openness which the FOI bill itself fails to provide.

### **Select committee experience**

This is a problem long familiar to select committees. In 1989, Mr Michael Mates MP the defence committee’s then chairman referred to the government’s “unnecessarily restrictive” approach to revealing the contribution of different departments to policy:

“Many decisions affecting defence expenditure also involve considerations of economic, industrial, employment, and, most often, foreign policy. When the Government takes a decision other than one which is right from the purely defence point of view, it may be incumbent upon us to find out the reasons for that decision; but witnesses at Ministerial as well as official level have in the past often sought to refuse us answers. I believe this is rarely justified. If the MOD wants to do something, but the Treasury thinks it is too expensive, this is part of a responsible way of arriving at a decision of the Government as a whole. It does not spell the end of collective responsibility to tell a Select Committee that was the reason for the decision...”<sup>83</sup>

In its 1989 report on the future of the Brigade of Gurkhas, the committee noted:

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<sup>81</sup> Cm 4310, March 1999

<sup>82</sup> *Modernising Government*, paragraph 6

<sup>83</sup> Select Committee on Procedure, ‘The Working of the Select Committee System’, Session 1989-90, Vol. II, Minutes of Evidence, page 97. Evidence of Michael Mates MP.

“witnesses would give us no information about the progress made by the Ministry in considering the future of the Brigade. They would not tell us, for example, whether the Brigade’s own study had been completed, nor what progress had been made with the Ministry’s study, nor whether the Chiefs of staff had yet considered the question, nor even whether matters had yet been considered at a senior level in the Ministry of Defence. There is no element of national security involved in this; and even if there were, we would, as always, be prepared to take classified evidence.”<sup>84</sup>

Shortly before the last election, the then chairman of Defence Committee commented:

“In the course of our current inquiry into defence medical services, MoD have refused the Committee access to a report on the operational capability of the medical services on the grounds not of security classification but that it constitutes advice to ministers. This type of factual study, while in the end it may influence Ministers to change policy, is unlikely to be a classic piece of civil service advice whose integrity must be maintained.”<sup>85</sup>

The problem has continued since the election. In March 1999, the Defence Committee reported:

“Ministers declined to allow us to see the draft Corporate Plan for the DERA [Defence Evaluation and Research Agency] on the grounds that it constituted 'advice to Ministers'. There was a similar reluctance to give the Committee information on the internal workings of the SDR [Strategic Defence Review] process. We were also refused sight of the report of the MoD's Chief Scientific Adviser into the appropriate level of longer term research investment. And only after much toing and froing was permission given for Assistant Chiefs of Staff to brief the Committee on issues underlying the SDR.”

The Committee concluded:

“We do not find the use of the 'advice to Ministers' proviso at all satisfactory. It is a catch-all category redolent of the worst excesses of the abuse of the old Official Secrets Act. Its application is arbitrary and unchallengeable.”<sup>86</sup>

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<sup>84</sup> Defence Committee, First Report, Session 1988-89, ‘The Future of the Brigade of Gurkhas’, HC 68

<sup>85</sup> Michael Colvin MP, Chairman of the Defence Committee, in: Liaison Committee. ‘The Work of Select Committees’, 1st report, Session 1996-97, HC 323-I, February 1997, paras 22-24

<sup>86</sup> Defence Select Committee, First Special Report, HC 273, Annual Report of the Committee for Session 1997-98, 10 March 1999

## **Harm tests and factual analysis**

The Public Administration select committee called on the government to make information relating to policy formulation subject to a harm test, and to exclude factual information and its analysis from the scope of the exemption.<sup>87</sup> These recommendations have not been adopted.

### **The bill's current approach is weaker than that:**

- **promised by the government in its white paper**
- **apparently endorsed by the Home Secretary**
- **currently applied under the openness code, introduced by the Conservatives**
- **introduced under the 1977 Croham directive**
- **proposed for the Scottish FOI Act**
- **adopted under the Irish and New Zealand FOI Acts**

### **1. The white paper**

The Government's white paper rejected a class exemption for policy advice, stating "*we are prepared to expose government information at all levels to FOI legislation*". It proposed that information about internal discussions should still be available, subject to "*a test of simple harm*" that is, "*would disclosure of this information cause harm?*"<sup>88</sup> (This contrasted with the more stringent "substantial harm" test proposed for other exemptions.)

The white paper identified a series of factors that would be taken into account in deciding whether harm had been caused (such as the need to protect collective responsibility and the frankness of internal discussion) but indicated that decisions would be taken on a case by case basis, depending on the document in question. The bill has reversed this approach.

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<sup>87</sup> Public Administration select committee, 'Freedom of Information draft bill', 3rd report session 1998-99, HC 570-I, paragraphs 90-93

## 2. The Home Secretary

In October 1998, three months after assuming responsibility for Freedom of Information from the Cabinet Office, the Home Secretary was asked what steps he was taking to improve the transparency of “interdepartmental communication on policy development”. Mr Straw replied:

“Information on the policy development process will be covered by the Act but, as the White paper ‘Your Right to Know’ made clear, this information could be withheld if *disclosure would cause harm* to the decision-making and policy advice processes.”<sup>89</sup>

(emphasis added)

The actual bill makes no reference to any such test of harm.

In his evidence to the Public Administration select committee, Mr Straw said the “*issue of factual or background information...is important and...I think on the whole ought to be disclosed*”.<sup>90</sup> Yet the bill only invites, not requires, departments to release such information.

## 3. The Code

The bill also represents a retreat from the openness code introduced by the Conservatives in 1994. Under this, information relating to policy can only be withheld if disclosure would “harm the frankness and candour of internal discussion”.<sup>91</sup> The bill rejects any form of harm test.

The code also requires that “the facts and analysis of the facts” relied on in reaching decisions must be published by departments.<sup>92</sup> The bill only requires authorities to *consider* the release of “factual information” relating to decision-taking and makes no reference to the disclosure of “analysis”.

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<sup>88</sup> Your Right to Know, Cm 3818, paragraph 3

<sup>89</sup> Hansard, Written Answers, 21/10/98, col. 1151

<sup>90</sup> Select committee on Public Administration, Session 1998-99, third report, ‘Freedom of Information Draft Bill’, HC 570, Evidence given on 21/7/99, Q 1076.

<sup>91</sup> Code of Practice on Access to Government Information, Exemption 2, Internal Discussion and Advice

<sup>92</sup> Code of Practice on Access to Government Information, Part 1, paragraph 3(i)

#### 4. The Croham directive

The bill still arguably falls short of the so-called ‘Croham directive’ issued under the last Labour government in 1977. This provided that “factual *and analytical material*” (emphasis added) should normally be published once decisions have been taken.<sup>93</sup> The bill makes no reference to ‘analysis’.

Lord Butler, the former cabinet secretary, told a House of Lords select committee in July 1999 that:

“when we were coming up to the 1997 election, knowing what the government policy was in this matter, my senior colleagues and I gave some thought to how we could regularly structure submissions to Ministers in a way that would enable us easily to separate the background which was publishable from, as it were, the subjective advice which was confidential. It would take a bit of training and changing practice to do that, but I think that people could very readily adapt to that.”<sup>94</sup>

#### 5. The Scottish FOI proposals

The bill has already been overtaken by recent proposals for an FOI Act in Scotland. The Scottish Executive has proposed that factual background information will not fall within the policy class exemption and will have to be disclosed subject to a test of “substantial prejudice” to collective responsibility, the frankness of internal discussion or of advice.<sup>95</sup> Even if substantial prejudice is caused, the Scottish Commissioner could if appropriate *order* disclosure on public interest grounds.

#### 6. Other FOI laws

Other countries’ FOI laws also offer a more discriminating approaches to the release of policy information.

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<sup>93</sup> Croham Directive, reproduced in ‘A consumers’ guide to open government’, Outer Circle Policy Unit, March 1980.

<sup>94</sup> Report from the Select Committee Appointed to Consider the Draft Freedom of Information Bill, Session 1998-99, HL paper 97, Q.357

<sup>95</sup> ‘An Open Scotland’, Annexe C.

## *Ireland*

The equivalent provision in Ireland's *Freedom of Information Act 1997*:

- applies only to material relating to an authority's "deliberative processes"
- applies only if disclosure would be "contrary to the public interest",
- does not apply at all to factual information and its analysis or scientific or technical expert advice.<sup>96</sup>

## *New Zealand*

New Zealand's *Official Information Act 1982* balances the need to protect certain interests against the public interest in releasing information. The main elements are:

- information can be withheld if do so is "necessary" to maintain:
  - (i) the constitutional conventions relating to collective and individual ministerial responsibility; the political neutrality of officials; and the confidentiality of advice<sup>97</sup>; or
  - (ii) the effective conduct of public affairs by the free and frank expression of opinions or the protection of staff from improper pressure<sup>98</sup>
- information must be disclosed if in the specific circumstances these considerations are outweighed by the public interest in openness<sup>99</sup>.
- The public interest is determined in the light of the Act's purposes, which include the promotion of more effective public participation and of greater accountability of ministers and officials<sup>100</sup>.

In both countries, advice – and particularly the weighing up of competing options – is usually protected while decisions are being considered. Once decisions have been taken, there is a stronger presumption that the discussion of options can be disclosed, in the

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<sup>96</sup> Freedom of Information Act 1997 (Ireland), section 20(1)

<sup>97</sup> Official Information Act 1982 (New Zealand), section 9(2)(f)

<sup>98</sup> Official Information Act 1982 (New Zealand), section 9(2)(g)

<sup>99</sup> Official Information Act 1982 (New Zealand), section 9(1)

<sup>100</sup> Official Information Act 1982 (New Zealand), section 4(a)

interests of accountability. According to the former New Zealand Ombudsman the approach is:

“to recognise that at certain stages of the policy making process information must be protected for the sake of the process. Those withholding provisions protect the process rather than the information...But once the process has been completed it no longer requires confidentiality; then the emphasis frequently changes in favour of disclosure”.<sup>101</sup>

According to the head of one New Zealand agency:

“A large number of briefing papers to ministers are now published, and these include, for example, most of the briefing papers from departments to an incoming government, but it is not unusual for ministers to introduce policies which ignore or run counter to the advice of their officials. Where this happens there is often comment in the media that ministers have not adopted the advice of their officials. Ministers may be called upon to justify their policies, which they usually do by reference to the democratic process and the need to take into account the wishes of their electors. The situation does not appear to be particularly embarrassing to either the ministers or the departments involved. Indeed it could be argued that one of the consequences of the Official Information Act is that it has helped to reduce the politicization of the public service by making it more obvious if advice is partisan.”<sup>102</sup>

A senior New Zealand civil servant has commented:

Ideally, and generally in practice, policy decisions should be preceded by a period of consultation with interested parties. During this phase information should be freely available to enable genuine consultation to take place. But once the issues have been distilled and Ministers are able to consider the matter, the deliberative process needs protection because it cannot proceed in public. Once decisions have been publicly announced, the surrounding information should in principle be available....information needs to be withheld for a limited time only.

Other political values may conceivably require long- term protection of the information. The maintenance of collective ministerial responsibility is an instance. On the other hand, it seems to me that some of the conventions referred to in the Act will generally be best served by disclosure. An example is the political neutrality of officials. If officials are politically neutral, as they are meant to be, they have nothing to fear from disclosure. If they are partisan, disclosure may well promote the convention.

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<sup>101</sup> Nadja Tollemache. Paper at a seminar on 16/5/89 organised by the Institute of Policy Studies on the Official Information Act 1982.

<sup>102</sup> Judith Aitken, Chief Executive of New Zealand’s Education Review Office, In: A McDonald & G Terrill, editors, ‘Open Government, Freedom of Information and Privacy’ Macmillan, 1998, page 131-

The free and frank expression of opinions exception is also under consideration ...Most of you will be aware that the scope of the exception has been somewhat limited by successive Ombudsmen. And rightly so. I don't think that I have personally ever wished to rely on this exception as a reason for withholding information. This may be because the policy papers that I am generally associated with are not normally characterised by opinion of any kind; instead they seek to evaluate a range of researched options for Ministers. Where I have found the exception relevant and legitimate is in maintaining effective consultation with private sector interests. Some private sector consultees express real concern that their opinions freely and candidly given might be disclosed. And that concern ought to be respected.<sup>103</sup>

A number of New Zealand cases illustrating that country's approach appear at the end of this briefing.

Such a policy may seem radical in the UK context, but it is no more revolutionary than the 1994 decision to start publishing the monthly minutes of the meetings between the Governor of the Bank of England and the Chancellor of the Exchequer, after a delay of only 6 weeks. This has been extended by the present government's decision to release the minutes of the Monetary Policy Committee after an even shorter period. The benefits of the policy are indicated by one commentator:

“The minutes of the Monetary Policy Committee may be a sanitised version of what actually happened, but they are presumably a reasonable semblance of the truth and always make fascinating reading. From the Bank of England's perspective, their greatest purpose is to lend credulity and accountability to its decision-making, for almost invariably they show the committee to have acted in a thoroughly sensible and pragmatic manner.

This transparency is all the more important in the present circumstances, with interest rates still high and growth declining, for it explains and justifies the policy stance. We may not agree with it, but at least we can see how the MPC is arriving at its decisions. The Bank of England gets a pretty rough press as things are, but without these minutes it would be a good deal rougher and unforgiving.”<sup>104</sup>

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<sup>103</sup> John Belgrave, Secretary for Justice. Paper presented at a seminar held by the Legal Research Foundation and the New Zealand Institute of Public Law, Old Government Building Wellington and University of Auckland, 25- 26 February 1997

<sup>104</sup> ‘Outlook’ column, *Independent* business section, 15.10.98

## 4. INVESTIGATIONS

Information relating to investigations into possible offences are covered by a blanket exemption which would apply even after legal proceedings had been completed, or it had been decided that no offence had been committed.<sup>105</sup> The class exemption would cover investigations by both the police and regulatory bodies, from Trading Standards Officers to Health and Safety Executive inspectors.

The government claims that it is necessary to continue this exemption indefinitely “to preserve the judicial process and to ensure that the criminal courts remain the sole forum for determining guilt”.<sup>106</sup> But it is more likely to protect miscarriages of justice from scrutiny, and shield complacency or incompetence on the part of police or regulators. The Macpherson report into the Stephen Lawrence murder inquiry raises questions about how widespread such problems may be.

Macpherson argued that to establish public confidence in the police there must be “a vigorous pursuit of openness and accountability across Police Services”. It argued that all police information should be available, subject to the “substantial harm” test which the FOI white paper had proposed for most exemptions.<sup>107</sup> The report explicitly rejected a class exemption of the kind now proposed:

“we consider it an important matter of principle that the Police Services should be open to the full provisions of a Freedom of Information Act. We see no logical grounds for a class exemption for the police in any area”

The bill’s exemption will also deny the public information about potential hazards. The investigations into the Paddington rail crash, which involves consideration of possible offences, could be withheld. Bacteriological surveys taken by environmental health officers investigating food poisoning outbreaks would also be withheld under this provision.

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<sup>105</sup> Clause 28(1)

<sup>106</sup> Government response to the Public Administration select committee report on the Freedom of Information Draft Bill, 22/10/99

<sup>107</sup> Recommendation 9 of the Macpherson report proposed: “That a Freedom of Information Act should apply to all areas of policing, both operational and administrative, subject only to the ‘substantial harm’ test for withholding disclosure”

Clause 29 already allows such information to be withheld in circumstances where it might “prejudice the administration of justice”, “prejudice the prevention or detection of crime”, “prejudice the apprehension or prosecution of offenders” or prejudice various regulatory functions.<sup>108</sup>

An additional class exemption, preventing disclosure when *no such harm* could be caused, is wholly unnecessary.

## 5. SCOTLAND

The Scottish Executive has rejected key elements of the Westminster FOI Bill in its recent proposals for a Scottish FOI Act.<sup>109</sup> The proposed Act would contain a mixture of harm-tested and class exemptions, based partly on those in Scotland’s existing openness code of practice, and partly on the UK Bill’s. It would be enforced by an independent Scottish Information Commissioner.

The Scottish Act would apply to information held by the Scottish Executive, the Scottish Parliament and Scottish public authorities. Information supplied to Scottish bodies in confidence by UK ministers, information held by Government departments (such as the Department of Social Security) operating in Scotland, and cross-border public authorities would be subject to the UK Act.<sup>110</sup>

### Main differences

- To withhold information covered by harm-tested exemptions, authorities would have to show that disclosure would cause “substantial prejudice” instead of the UK bill’s test of “prejudice”<sup>111</sup>
- The Scottish Commissioner would have the power to *order* disclosure in the public interest where a harm-test exemption is involved.<sup>112</sup> The UK Commissioner can only *recommend* disclosure.

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<sup>108</sup> Clause 29(1)(a) to (c) and (g)

<sup>109</sup> Scottish Executive, ‘An Open Scotland. Freedom of Information, a Consultation’, November 1999, SE/1999/51, available on: <http://www.scotland.gov.uk/library2/doc07/opsc-00.htm>

<sup>110</sup> Paragraphs 1.6 and 1.8

<sup>111</sup> Paragraph 4.9

<sup>112</sup> Paragraph 6.5

- A number of broad class-based exemptions similar to those in the UK bill would apply, for example for information about policy formulation, ministerial communications, investigations involving possible offences and information in confidence. In these areas the Commissioner’s decisions on public interest would not be final but could be overruled by a certificate issued collectively by the whole cabinet.<sup>113</sup> This is a modest improvement on the UK bill, where individual ministers can reject the Commissioner’s recommendations. A collective veto may also provide a more substantial hurdle for a coalition government (as currently exists in Scotland) than for a single-party administration. It is not clear whether authorities other than the cabinet will be able to exercise any right of veto
- Factual background information would *not* be covered by the class exemption on policy formulation, as it is in the UK bill. It could be withheld only if disclosure would “substantially prejudice” collective responsibility, the frankness of internal discussion or the provision of advice. The Commissioner could order disclosure of such information in the public interest.
- The bill may contain a “purpose clause”, setting out its objectives.<sup>114</sup> The UK government has resisted such a provision, which has been called for by two select committees.

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<sup>113</sup> Paragraph 6.5

<sup>114</sup> Paragraph 4.8

## 6. NEW ZEALAND POLICY ADVICE CASES

The following cases illustrate how policy advice cases are dealt with under New Zealand's Official Information Act.

### 1. University funding

An application was made for (a) a submission by the University Grants Committee (UGC) to the Minister of Education proposing an increase in the block grants to universities and (b) a Treasury report on the submission, which was considered by a cabinet committee, which decided to defer action on the funding application until a separate review was complete. The requests were refused on the grounds that disclosure would inhibit the free and frank expression of opinions, and undermine the conventions relating to the confidentiality of official advice.

However, the Ombudsman found that both documents were "rather short on opinion" and were "predictable and largely factual in nature". He did not accept that the exchange of opinions between officials would be inhibited by their release. He noted that much of the UGC's argument had already been aired in its annual report, that the government's reasoning for its decision had been announced in a press release, and that the Treasury report "contained, by the Treasury's own admission, nothing of any great sensitivity". The Ombudsman concluded that disclosure of the actual Treasury report would not inhibit ministerial discussions. The strongest argument against disclosure was that it "might have caused some difficulty for the Minister...who had endorsed the UGC advice which had then been partially rejected". But in the circumstances, and given how much of the advice and facts was already publicly known, he concluded that full disclosure would not undermine the convention relating to the confidentiality of advice and called for their disclosure.<sup>115</sup>

### 2. Geothermal energy

The Minister of Energy refused to release a paper submitted to a cabinet committee which had refused to license the use of a number of geothermal bores for energy generation. The Ombudsman noted that "the issue was clearly of acute political sensitivity": the boreholes

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<sup>115</sup> Case 1161/1162, in: Mai Chen & Sir Geoffrey Palmer, *Public Law in New Zealand: Cases, Materials, Commentary and Questions*, Oxford University Press, Auckland 1993.

were considered an environmental threat; but the government's refusal to license them, apparently in breach of its previously declared objectives, had been challenged by the applicants. The Ombudsman accepted that withholding the information was necessary to maintain the constitutional convention relating to the confidentiality of the advice which the minister had given to the cabinet committee. However, the Ombudsman also accepted that "there was a strong public interest in releasing the scientific and factual information" which the *departments* (as opposed to the minister) had submitted, so as to ensure that "the correct scientific information was placed before the Ministers". The Ombudsman distinguished such scientific opinion from the "advice" which was protected by the exemption. He found it was not practicable to require release of an edited copy of the cabinet submission itself, partly because some of the information had been provided in the form of oral briefings to individual ministers, and called for a full written summary to be provided instead.<sup>116</sup>

### 3. Semi-automatic rifles

In another case, the Ombudsman considered whether a police report on proposals to restrict the import of military style semi-automatic rifles should be disclosed. He concluded that the factual and background material should be disclosed but suggested that there might be a case for withholding the *recommendations*, for the time being, so as to allow "undisturbed Ministerial consideration" of a "sensitive and controversial" issue.

But he went on to note that there were particular public interest reasons for requiring earlier disclosure of the recommendations, because important public safety issues were involved and a decision had been long delayed:

"On matters of particular sensitivity, the constitutional convention protecting confidentiality of advice by officials is there to protect the Minister against premature disclosure which would interfere with his ability to make a sound decision. However...it seemed to me that account should also be taken of the passage of time. The report was nearly one year old. It had awaited consideration by three successive Ministers of Police. In my view that lessened somewhat the strength of the "necessity" to withhold the information.

Balanced against that are the interests in participation and accountability which are strong in

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<sup>116</sup> Cases 1123,1162, in: Mai Chen & Sir Geoffrey Palmer, *Public Law in New Zealand: Cases, Materials, Commentary and Questions*, Oxford University Press, Auckland 1993.

relation to a matter of this nature. The issue of firearms control is one in which the principle of public safety is paramount, and in my opinion that required the greatest possible transparency in the making of laws and policies.”

For these reasons I formed the opinion that the withholding of the information was outweighed by other public interest considerations...The Police accepted my opinion that this request should not have been refused and agreed to make available the information.”<sup>117</sup>

#### **4. Producer boards**

A request was made for an interdepartmental report examining proposals to reform the country’s producer boards. It was refused and the refusal upheld by the Ombudsman, on the grounds that the options discussed in the report:

“were still under consideration by Ministers and disclosure of the information under the Act would clearly pre-empt whatever action Ministers decided to take”

A year later, further requests for the same report were made. By that time circumstances had changed: the government had decided not to proceed with public consultation recommended in the report; further consideration of reform had apparently ceased; and the Minister had told the boards that the review was complete.

The Treasury argued that the report should still be withheld “because the issues raised in it were still under active consideration”. The Ombudsman concluded that the fundamental reform dealt with in the paper “had not been proceeded with and did not appear to be under active consideration’, and called for its disclosure.<sup>118</sup>

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<sup>117</sup> Tenth Compendium of Case Notes of the Ombudsmen. Office of the Ombudsman. Wellington. April 1993. Case W2159

<sup>118</sup> Tenth Compendium of Case Notes of the Ombudsmen. Case Nos W1718, 2154 & 2284