The Campaign for Freedom of Information

Suite 102, 16 Baldwins Gardens, London EC1N 7RJ
Tel: 020 7831 7477
Fax: 020 7831 7461
Email: admin@cfoi.demon.co.uk
Web: www.cfoi.org.uk

FREEDOM OF INFORMATION: SOME INTERNATIONAL CHARACTERISTICS

Maurice Frankel

Director, Campaign for Freedom of Information, UK

Paper given at a seminar entitled "Transparency in Europe' for government officials from EU member states, organised by the Dutch Ministry of the Interior and Kingdom Affairs, The Hague, 15-16 February 2001

Bovine **secrets**

A striking example of the dangers of secrecy can be seen from the findings of the official inquiry into the handling of the UK's BSE outbreak. In the months after discovering the new disease, the UK Ministry of Agriculture adopted a policy of "positive censorship". Officials were prevented from publishing their findings or discussing them with independent scientists. As a result, farmers and veterinary officers who saw infected animals did not realise what was wrong with them and did not report the cases to the ministry – which therefore failed to appreciate how widespread the problem was. The Inquiry found that *"had there been a policy of openness rather than secrecy, this would have resulted in a higher rate of referral of cases to…[the ministry] in the earlier part of 1987…[which] might have led to a better appreciation of the growing scale of the problem and hence to remedial measures being taken sooner than they were"*.[1]

The problems did not end there. In 1990, it was discovered that pigs could contract BSE under experimental conditions – suggesting that the risk might not be limited to beef. The ministry

[1] The BSE Inquiry. Report, evidence and supporting papers of the Inquiry into the emergence and identification of Bovine Spongiform Encephalopathy (BSE) and variant Creutzfeldt-Jakob Disease (vCJD) and the action taken in response to it up to 20 March 1996. October 2000, London, the Stationery Office, HC 887-1, paragraph 180

decided to conceal the findings until new regulations had been prepared. These were drafted in what the Inquiry called “speed and secrecy”. There was no consultation, even with the enforcing authorities or the ministry’s own specialists. The results were deeply flawed. Not only did they overlook major sources of potential infection but they were “unenforceable and widely disregarded”. The Inquiry found that had pigs actually been capable of spreading the disease, which fortunately was not the case, the new regulations would not have protected human health.[2]

The officials were seeking to avoid alarming the public and damaging the farming industry. But in fact they inflicted even greater damage, not only on the industry, but on the public’s health - and the government’s credibility. Secrecy may not just deny the public essential information – it may be responsible for bad decisions, and damage to the government’s own interests.

FOI principles

Even though ministers and officials may recognise of importance of openness, the political and bureaucratic pressures to control information can be irresistible. That is why legislation to guarantee openness – a freedom of information (FOI) law - is essential.

FOI laws usually have a common format. They provide the individual with a right of access to documents held by government and other public authorities. The applicant is not required to give reasons for, or justify his request, and the authority cannot withhold information from those it considers do not have a valid interest. Information can be withheld only where the law permits it. Exemptions to the right of access generally apply where disclosure would harm specific interests such as defence, security, international relations, law enforcement, privacy, commercial interests, or the decision-making process. Refusals can be challenged by appealing to (depending on the country) an existing ombudsman, a special information commissioner or commission, the courts, or a combination of these.

FOI laws now exist in over 30 countries across the world.[3] Most EU member states now have such legislation, the exceptions being Austria, Italy, Luxembourg and Germany[4] where under existing legislation only those directly affected by, or with a legal interest in, a particular decision

2 BSE Inquiry, Vol. 5 paragraph 4.641

3 These include Australia, Belgium, Belize, Bosnia and Hertzegovina, Bulgaria, Canada, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Iceland, Ireland, Israel, Japan, South Korea, Latvia, Lithuania, Netherlands, New Zealand, Norway, Poland, Portugal, Slovakia, South Africa, Spain, Sweden, Thailand, Trinidad & Tobago, Ukraine, United Kingdom, USA. This list does not include those countries with general constitutional provisions on access to information, but no express statutory right. (An internal survey of FOI legislation can be found on the Privacy International web site, http://www.privacyinternational.org/issues/foia/foia-survey.html

4 Germany is proposing to introduce legislation and has published a draft bill.

are entitled to information.[5] The limitations of this approach are illustrated by the fact that a journalist writing about on an issue, but not personally affected by it, would have no right to information.[6]

The mere existence of an FOI Act is no assurance that it will be effective. The law is not a tap, which once turned on generates a constant flow of information. It is a tool which shifts the balance of power between government and citizen towards the latter. But even under FOI governments may be generous with information that shows them in a favourable light, but reluctant to release material that would exposing shortcomings, assist their critics, undermine a key policy or generate unwelcome pressure, for example, for new expenditure.

The legislation must be capable of extracting information in these circumstances. Exemptions must be narrowly drawn, and apply only where disclosure is shown to be harmful. Even information which may cause harm should be disclosed where there is an overriding public interest in openness. The timescale for responding must be short. If charges for information are allowed, they must be modest. The appeal body must be capable of dealing with cases speedily and should not involve costs (eg of legal representation) which may prevent the ordinary citizen from challenging decisions. Finally, its role should not be limited to an impartial adjudication of disputes, but should include the promotion of greater openness.

A statement of purpose

In many laws this is done by a statement of objectives, which may affect the interpretation of the substantive provisions. To describe the purpose of an FOI law may seem like a statement of the obvious. But how obvious is the purpose of a law which may contain only a briefly stated right of access, followed by page after page of exemptions? Is the aim to allow the citizen to penetrate the bureaucrat's shell of secrecy – or to help the bureaucrat select the most plausible justification for denying access?

Not all laws contain such statements. The UK government resisted it,[7] maintaining that a purpose clause would 'unbalance' the law, by favouring openness over the competing claims of confidentiality and privacy. Other laws set out their purpose, for example:

---

5 Although Greece has an FOI law, it has been suggested that it may also be interpreted so as to allow access only by interested parties. See: European Commission, Secretariat General, Directorate B, SG/B/2, 'Overview of Member States' National Legislation Concerning Access to Documents', Brussels, 9 October 2000

6 Most EU member states also have separate legislation implementing EU directives on data protection (directive 95/46/EC) and access to environmental information (90/313/EEC)

7 The UK Freedom of Information Act 2000 was passed in November 2000 but is not yet in force.

> "to enable members of the public to obtain access, to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of public bodies" - *Ireland*[8]
>
> "in the interests of effective, democratic governance" - *Netherlands*[9]
>
> "to ensure the free interchange of opinion and enlightenment of the public" – *Sweden*[10]

The most complete statement can be found in the recently revised Finnish law, which provides an insightful account of the role of FOI in a modern democracy:

> "to promote openness and good practice on information management in government, and to provide private individuals and corporations with an opportunity to monitor the exercise of public authority and the use of public resources, to freely form an opinion, to influence the exercise of public authority, and to protect their rights and interests."[11]

These purposes must be taken into account in the making of decisions under the Act.[12]

What information exists?

One of the features of FOI is that citizens exercise the rights themselves, without depending on lawyers, journalists or elected representatives to obtain information for them. The user nevertheless faces real problems in using this legislation. Requesters must usually describe the documents they want, or the topic about which information is sought. This may be easy enough where what they want is their own personal files. But the ordinary citizen usually has no idea what kind of information can be found in other official files. Even relatively sophisticated users, such as political journalists or experienced NGOs, may have little insight into the materials generated during the policy-making or administrative process.

Some FOI laws require public authorities to actively assist requesters, which may help to narrow the gap. Others require authorities to publish guides to the classes of records they hold, though usually not the individual documents. Under the Canadian FOI law, a single publication describes

---

8 Freedom of Information Act 1997 [Ireland], Long title.

9 Act of 31 October 1991, containing regulations governing public access to government information *(Wet openbaarheid van bestuur)*, [Netherlands] preamble.

10 Freedom of the Press Act [Sweden], Chapter 1, Article 1

11 Act on the Openness of Government Activities, 1999 [Finland], section 3.

12 Act on the Openness of Government Activities, 1999 [Finland], section 17.

the types of records held by each federal body.[13] The US legislation requires agencies to publish details of previously disclosed records which are likely to be sought by other applicants – these must also be indexed and made available electronically.[14] Although this may appear relatively unambitious (since it deals only with what has been released, not with undisclosed material) it provides an excellent introduction to the potential of the legislation.

The Finnish law requires authorities to take the legislation into account when designing their information systems, so that these permit "effortless realisation of access to the documents" within them. They are also required to provide publicly available indexes to their documents, and ensure that staff are adequately informed about the public's rights of access to the documents they handle.[15]

Swedish public bodies must list on a public register each individual document which they receive, or have produced in final form, with a brief indication of its contents.[16] This provides users with a remarkable degree of insight, into the precise documents that exist and which may be requested.

There may be other user-friendly provisions. The Danish and Netherlands laws envisage that applications may be made verbally, unlike many which require the request to be in writing. The Belgian legislation gives applicants the right to have documents *explained* to them.[17] Some laws, such as those in the Netherlands and UK, apply to *all* requests for information, regardless of whether the applicant mentions – or even knows about – the right of access. This contrasts with the position under some other laws, where an applicant who fails to cite the legislation has no rights under it, which must seriously disadvantage the less informed requester.

Most countries provide access to *recorded* information only. But officials may not have the time to make exhaustive notes of everything they do – and sometimes may deliberately not record sensitive data. The Danish act requires officials to make notes of factual information which they have received by word of mouth.[18] New Zealand's law goes even further and provides a right of access to *unrecorded* as well as recorded information, recognising that officials may be perfectly capable of explaining why a recent decision was taken, even though no formal record of the

---

13 Access to Information Act 1982 [Canada], section 5(1)(b). This is also available on the Internet at http://infosource.gc.ca/Info_1/index-e.html

14 Freedom of Information Act [USA], 5. U.S.C. section 552(a)(2)(D) and (E)

15 Act on the Openness of Government Activities, 1999 [Finland], section 18

16 Secrecy Act [Sweden], Chapter 15, Articles 1 and 2.

17 Act No 94-1724 of 11 April 1994 on disclosure of information by the administration, *(Loi relatif à la publicité de l'administration)* [Belgium], Article 4(1). See also the forthcoming book by F. Schram, Manuel Publicité de l'administration. Brussels. Politeia, 2001.

18 Act No 572 of 19 December 1985 on Access to Public Administration Files [Denmark], Article 6(1)

reasons has been kept.[19]

The form of exemptions

The key to any FOI law are the exemptions. There is considerable agreement across national laws about the areas covered by exemptions. But the *degree* of protection provided by the exemptions varies.

At one extreme are exemptions which exclude *entire classes* of information from access altogether. Any information in these classes can be withheld even if the actual disclosure would not cause harm. Examples of class exemptions include documents relating to meetings of the Council or Ministers or Secretaries of State (Portugal),[20] documents created by or for submission to a court or statutory inquiry (UK),[21] documents relating to negotiations with other states (Finland),[22] reports of financial regulatory bodies (USA)[23] and material gathered for the purpose of public statistics or scientific research (Denmark).[24] The Danish law used to also exempt all documents relating to EU proposals, but this was repealed in 1991.

More commonly, exemptions are based on tests harm. The precise test may vary from country to country. For example, the exemptions for international relations in various English language laws refer to information whose disclosure would "affect adversely" international relations (Ireland)[25], "prejudice" (South Africa)[26], "be injurious to" (Canada) or "damage" (USA)[27] them. The UK government initially proposed a high test of harm, of "substantial harm", for all exemptions, but later retreated to the lower test of "prejudice"[28] though draft legislation for Scotland still uses the

19 Official Information Act 1982 [New Zealand], section 2(1). According to the Ombudsman, who enforces the New Zealand law, "the fact that information has not yet been reduced to writing does not mean that it does not exist and is not 'held' for the purposes of requests under the official information legislation." *Ombudsman Quarterly Review 4(3), 1998, p1*

20 Law 65/93 on Access to Administrative Documents [Portugal], Article 4(2). This excludes from the scope of the law documents which do not relate to administrative activities, including those of the Council of Ministers.

21 Freedom of Information Act 2000 [UK], section 32

22 Act on the Openness of Government Activities, 1999 [Finland], section 24(1)

23 Freedom of Information Act [USA] Exemption 8

24 Act on Access to Public Administration Files [Denmark], section 10(6)

25 Freedom of Information Act 1997 [Ireland], section 24(1)(c)

26 Promotion of Access to Information Act 2000 [South Africa], section 41(1)(a)(iii)

27 Information relating to international relations falls within Exemption 1 of the US FOI Act dealing with national security, the terms of which are partly defined by Executive Order 12958 issued by President Clinton in April 1995.

28 Freedom of Information Act 2000 [UK], section 27(1)

test of "prejudice substantially".[29]

Some laws apply a proportionality test, rather than an explicit harm test, though the effect may be similar. The Danish law, for example, provides that access to files may be limited where "protection is essential with regard to…protection of Danish foreign policy".[30] The Swedish law contains a harm test[31] and also requires that any restriction be "necessary having regard to…relations with a foreign state or an international organisation".[32]

Others appear to describe a more explicit balancing of benefit against the harm of disclosure. Thus the Belgian exemption allows information to be withheld where the public interest in disclosure does not outweigh the interest in protecting the state's international relations.[33] The Netherlands law adopts a similar formula.[34] For certain exemptions, including international relations, the UK Act has a two-fold test: information can be withheld if disclosure could prejudice international relations but may still have to be disclosed on public interest grounds – though any ruling on public interest can be vetoed by ministers.[35] The table below illustrates these approaches.

Type of exemption	***Example***
Class exemption	"all information *relating* to defence"
Harm test exemption	"any information *harmful* to defence"
Proportionality	"but only to the *extent necessary* to protect defence"
Public interest	"but only if the harm to defence *outweighs* the public interest in disclosure"

29 Scottish Executive, Freedom of Information, Consultation on Draft Legislation, SE 2001/65, section 31(1)

30 Act on Access to Public Administration Files [Denmark], section 13.1.2

31 The specific exemption is contained in the Secrecy Act.

32 Freedom of the Press Act [Sweden], Chapter 2, Article 2.1

33 Act on disclosure of information by the administration, [Belgium], Article 6.1.3.

34 Nor shall disclosure of information take place insofar as its importance does not outweigh…relations between the Netherlands and other states or international organizations". Act of 31 October 1991, containing regulations governing public access to government information [Netherlands] Section 10(2)(a)

35 Freedom of Information Act 2000 [UK], section 27(1) and section 2(2)(b). The veto provision is found in section 53(2). However, no 'prejudice' test applies to information supplied in confidence by another state or international organisation [section 27(2)] and disclosure is possible only on public interest grounds, subject to a possible veto

Policy-making

All FOI laws provide some protection for the internal thinking process of government. It may be explained by the need to allow ministers and officials to 'think the unthinkable' – that is, discuss contentious issues in private, particularly at a time when their proposals are unformed and uncertain. It may be easier for those in government to themselves criticise ideas they disagree with, if they know that the criticism will not become public. Finally, there is the urge to present a 'united front', so that the government is seen to be speaking with a single voice – however vigorously its members may be kicking each others' shins under the table.

But openness has important advantages. It may expose weaknesses in official thinking, and allow errors to be identified before too much damage is done. The prospect of informed scrutiny may stimulate officials to be more rigorous in their analysis, and ensure that they have properly examined the potential flaws in their arguments. It may make it easier for them to resist pressure to simply tell ministers what they want to hear. Openness may also enhance public confidence in government, reassuring people that difficult issues have been fully examined, or revealing that what they assumed to be a simple issue of right and wrong is a complex matter of balancing conflicting rights.

Member states all to a greater or lesser degree protect the opinions, advice or the exchange of views which take place during policy-making. In some cases a very broadly defined exemption is used. The Danish law has a wide class exemption for internal case material, including documents prepared by the authority for its own use. These remain exempt after decisions are taken.[36]

The French law does not apply to incomplete or 'preparatory' documents, but these may become available once the decision to which they refer has been made.[37] However, the legislation also contains an exemption for information whose disclosure would impair "the secrecy of Government deliberations".[38] This may be regarded as a class exemptions, at least for advice and exchange of views at the highest levels of government, though it would not be available to officials in other authorities.

The Netherlands law contains a mandatory exemption prohibiting the disclosure of "personal opinions on policy" contained in documents drawn up for during internal consultation. Personal opinions "may" be disclosed in the interests of effective democratic governance "in a form which

36 Act on Access to Public Administration Files [Denmark], section, section 7

37 This is based on a ruling of the Conseil d'Etat, the superior administrative court, not an exemption in the legislation. (See: Errera, R. 'Access to Administrative Documents in France: Reflections on a Reform', in: Norman Marsh (ed) 'Public Access to Government-Held Information', Stevens, London, 1987.

38 Law 78-753 of 17 July 1978 on the freedom of access to administrative documents, Article 6.

cannot be traced back to any individual".[39] However, even where anonymised, the Act appears only to *allow*, not require, an authority to release such material.

Other laws protect such internal material only until the relevant decision has been finalised. The Swedish law has no exemption for policy discussions, as such. However, there is no right to obtain internally generated documents until a decision has been "finally settled" and the documents accepted for filing and registration.[40] Not all working papers will necessarily be retained for filing, but those that are cannot then be withheld on the grounds that they related to policy-making.

Portugal's law also permits access once "the decision has been taken" though in a case where a decision is delayed the document becomes available a year after it was prepared.[41]

Under the Finnish law, certain types of documents which provide a coherent account of the basis for and alternatives considered in relation to a decision or proposal become publicly accessible when they are 'fit for their purpose' - even if they relate to 'unfinished business'.[42] Other types of documents become accessible when "consideration of the pertinent matter has been concluded".[43]

The Irish law adopts a different approach. Information relating to an authority's "deliberative processes", such as opinions and advice, is exempt if disclosure would be "contrary to the public interest".[44] The potential harm to the public interest caused by revealing a proposed decision must in particular be considered. In several cases, the Irish Information Commissioner has required the disclosure of deliberative materials *after* the decision has been taken, but he has also made it clear that such material could be disclosed before decisions are concluded if to do so would not be harmful.[45]

Under the UK Act, virtually all information relating to the formulation of government policy is exempt, unless the balance of public interests favours disclosure.[46] However, any decision by the

---

39 Act of 31 October 1991, containing regulations governing public access to government information [Netherlands] Section 11. If the individuals agree, information can be disclosed in a form which identifies them.

40 Freedom of the Press Act [Sweden], Chapter 2, Articles 7 and 9. Documents also become publicly available when they are supplied to anyone outside the authority which created them

41 Law 65/93 on Access to Administrative Documents [Portugal], Article 7(4)

42 Act on the Openness of Government Activities, 1999 [Finland], section 6(5)

43 Act on the Openness of Government Activities, 1999 [Finland], section 6(9)

44 Freedom of Information Act 1997 [Ireland], section 20(1). However, submissions to the cabinet are subject to a separate provision which exempts them for five years [section 19(2)].

45 Information Commissioner of Ireland, 'The Freedom of Information Act – Compliance by Public Bodies', July 2001.

46 Freedom of Information Act 2000 [UK], section 35(1)(a)

UK Information Commissioner requiring disclosure on public interest grounds could be vetoed by ministers – a provision not found in the equivalent Irish exemption.

Most of the laws referred to here do not normally permit *factual* information relating to policy decisions to be withheld. In some laws, such as the Danish,[47] Swedish[48] and Australian,[49] factual information is explicitly excluded from the corresponding exemption. Some others define the exemption in terms which appear to exclude factual information. The UK law contains a extremely narrow exclusion, purely for *statistical* information relating a decision which *has been taken*.[50] The disclosure of other factual and statistical information relating to policy making depends whether, on balance, disclosure is held to be in the public interest.

On this question, one law stands out above all others. Ireland's Freedom of Information Act explicitly prevents factual and statistical information from being withheld under the policy exemption. But it goes beyond that. The *analysis* of such information must be disclosed if requested.[51] Other important classes of information are also excluded from the exemption, including reports into the performance or effectiveness of a public body and, crucially, scientific and technical expert opinion and advice.[52] This provides the clearest promise that information relating to major health or safety hazards, such as the BSE examples described above, cannot be concealed from the public.

---

47 Act on Access to Public Administration Files [Denmark], Section 11(1)

48 Freedom of the Press Act [Sweden], Article 9

49 Freedom of Information Act 1982 [Australia], Section 36(5)

50 Freedom of Information Act 2000 [UK], section 35(2)

51 Freedom of Information Act 1997 [Ireland], section 20(2)(b). Ireland's law has a separate exemption, in section 19, for Cabinet papers and minutes. However, factual information submitted to the Cabinet cannot be withheld if it relates to a published decision.

52 Freedom of Information Act 1997 [Ireland], section 20(2)(e).