



# Open Government

## CODE OF PRACTICE ON ACCESS TO GOVERNMENT INFORMATION

Guidance on interpretation  
Second Edition (1997)



## CODE OF PRACTICE ON ACCESS TO GOVERNMENT INFORMATION GUIDANCE ON INTERPRETATION

### CONTENTS

<b>PART 1 - Introduction</b>	<b>3</b>
Code Purpose and Aims .....	3
Information the Government will release.....	5
Publication of facts and analysis with policy statements .....	5
Explanatory guidelines.....	8
Giving reasons with decisions .....	10
Citizen's Charter requirements.....	11
Requests for information .....	11
Information rather than documents.....	12
Responses to requests for information .....	14
Scope .....	15
Charges.....	16
Disproportionate cost .....	17
Relationship to statutory access rights .....	17
Public records .....	18
Jurisdiction of courts, tribunals or inquiries .....	19
Investigation of complaints .....	20
Crown Copyright .....	20
Third Party copyright.....	21
Computers.....	21
Information for journalists.....	21
<b>PART II - Exemptions</b>	<b>23</b>
Preamble to exemptions .....	23
1. Defence, security and international relations.....	25
2. Internal discussion and advice .....	28
3. Communications with the Royal Household .....	33
4. Law enforcement and legal proceedings .....	34
5. Immigration and nationality.....	40
6. Effective management of the economy and collection of tax.....	41
7. Effective management and operations of the public service .....	43
8. Public employment, public appointments and honours.....	46
9. Voluminous or vexatious requests .....	49
10. Publication and prematurity in relation to publication .....	50
11. Research, statistics and analysis.....	52
12. Privacy of an individual.....	55
13. Third party's commercial confidences .....	60
14. Information given in confidence .....	64
15. Statutory and other restrictions .....	68
<b>Part III - Fees and Charges</b>	<b>69</b>

Distinguishing Code requests .....	69
General issues on applying charges .....	69
Internal review .....	70
Treatment of receipts .....	70
Legal authority to charge.....	71
VAT .....	71
Annex A: Illustrative scheme of charges .....	72
Annex B: Marginal extra receipts ('Luce' scheme).....	75
Annex C: In-year marginal extra receipts scheme.....	76
<b>PART IV - Functions Delivered by Contractors</b>	<b>77</b>
Introduction .....	77
Information about contracted functions provided to the public .....	77
Services to the Government.....	78
Protection of confidentiality by contractors .....	79
Information about contractual processes and prices .....	79
Review of complaints concerning contractors' information by the Ombudsman .....	81
<b>PART V - Answering Parliamentary Questions</b>	<b>83</b>
Guidance to Officials on Drafting Answers to Parliamentary Questions .....	83

## CODE OF PRACTICE ON ACCESS TO GOVERNMENT INFORMATION

### GUIDANCE ON INTERPRETATION

#### PART I - INTRODUCTION

This guidance is intended to assist departments, agencies and public bodies in their application of the Code of Practice on Access to Government Information to particular cases and circumstances. It is advisory only, and cannot cover all possible circumstances. It will be supplemented and amended as experience develops; it should not therefore be regarded as final and definitive. Extracts from the Code are in italics. The words "Government" or "department" are used throughout these notes. The Code applies also to those agencies and public bodies within the jurisdiction of the Parliamentary Commissioner for Administration, and applies to them as it does to departments. References to departments normally include references to agencies and public bodies. Please send any comments on the Guidance, or requests for information about updating, to Room 421, Office of Public Service, Cabinet Office, 70 Whitehall, London SW1A 2AS.

#### **Code Paragraph 1: Purpose**

1. The approach to release of information under the Code should be positive. Interpretation of the Code should be based on the assumption that information relating to a department's areas of responsibility should be made available unless it is exempt under Part II.
2. The exemptions describe various circumstances in which disclosure may not be in the public interest, although in those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available. The reasoning behind them is described in Chapter 3 of the White Paper on Open Government (Cm 2290).

#### **Code paragraph 2: Aims**

3. The aims set out in paragraph 2 of the Code are relevant to interpretation. 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.

4. The emphasis is on assisting understanding, consideration and analysis of existing and proposed policy. The Code does not provide access to the details of the process underlying the Government's preparation of proposals: deliberative space or ability to think in private are protected by exemption 2.
5. Facts and analyses should not be unnecessarily secret at any stage, but it is especially important that the reasoning underlying the Government's proposals and preferred course of action should be clear, properly prepared, and made available when decisions are announced. This does not preclude putting the issues out for consultation before the Government's preferred course is decided, but it will be for Ministers to decide case by case whether Green Papers or consultative documents are to be issued at an early stage of the decision making process. Departments should plan from the earliest stages of policy preparation which factual and analytical information is to be published when the policy is announced.
6. The results of consultation exercises are themselves likely to fall into the category of facts and analysis which can be made publicly available at the time the final proposal or decision is announced. There is no obligation to publish responses, although departments may decide on occasion that this would be appropriate. However, responses to a consultation exercise should be available on request. This does not necessarily require provision of the individual responses themselves although this will often be the most straight-forward way of providing the information. The invitation to comment should state that, unless confidentiality is requested, it will be assumed that responses can be made available to others. Exemptions 12 (*Individual Privacy*) and 14 (*Information given in Confidence*) may be of relevance.
7. The aim of giving reasons with decisions affecting individuals and companies is consistent with well-established practice in most areas of government, and a still developing line of decisions in judicial review cases. There are some exceptions to this rule, explained in paragraphs 39 to 41 below. This approach is also consistent with the Government's deregulation initiative, which emphasises removal of unnecessary restrictions, and proper explanation of those requirements that are essential.
8. The principles and aims of the Citizen's Charter were first set out in the Citizen's Charter White Paper (Cm 1588, July 1991) and in first and second annual reports (Cm 2101 and Cm 2540).
9. The Government's policies on open government also recognise the duty of all those who have access to Government information to protect information which is properly exempt from release, including private personal information and commercially sensitive information. Care should be taken to guard against inadvertent disclosure and unauthorised access. (See Exemptions 12, 13 and 14.)
10. Many of the statutory restrictions on disclosure listed in Annex B of Cm 2290 prohibit or restrict the disclosure of information given to the Government in confidence. There are also cases where the Courts have held that there is an implied duty of confidentiality. In neither case are these restrictions set aside by the Code (see Exemption 15).

11. The arrangements for classification of information will help to ensure the physical security of information which is exempt from disclosure under the Code. The criteria for use of protective markings relate to the degree of harm arising from unauthorised disclosure or other compromise. They do not correspond to the criteria for exemption in Part II of the Code, which relate to decisions on the balance between public interest in disclosure and in necessary confidentiality. Information does not need to be classified to be exempt from disclosure under the Code, nor can classification be taken, without further examination, to mean that all the information contained in a document is properly exempt from disclosure.

### **Code Paragraph 3: Information the Government will release**

12. Paragraph 3 of the Code commits the Government, subject to the exemptions in Part II of the Code, to make certain information available as a matter of course, and to release other information in response to specific requests. The way that information is made public is a matter to be judged case by case. If there is very limited demand for information on a particular topic, it may be wasteful to produce a priced publication. More limited availability may satisfy demand, but it is good practice to have some means of letting those who are likely to be interested know what is available (see paragraph 26 below).

### **Code paragraph 3(i): Publication of facts and analysis with policy statements**

13. Section 3(i) of the Code of Practice commits departments:

*to publish the facts and analysis of the facts which the Government considers relevant and important in framing major policy proposals and decisions; such information will normally be made available when policies and decisions are announced.*

14. This is one of the requirements of the Code of Practice under which departments are expected to volunteer information, rather than wait for a request to be submitted. It fits with the second theme of the approach set out in the White Paper on Open Government:

"providing timely and accessible information to the citizen to explain the Government's policies, actions and decisions." (Cm 2290, paragraph 1.7)

15. Where a complaint is made that a department has not volunteered enough information under this part of the Code, the department may be able to redress the deficiency by providing additional information.
16. Departments should also bear in mind that providing background material with major policy announcements may help to reduce the volume of subsequent information requests. Such planned information flows should generally be easier to manage.

## Definitions

### *Facts and analysis of the facts*

17. There has been a presumption in favour of publishing analytical and factual background material since the Croham Directive of 1978, but the requirement was linked to a particular form of Programme Analysis and Review (PARs) which has been largely replaced by Efficiency Scrutinies and other methods since 1979. The increasing presumption in favour of open government, spurred by the process of Parliamentary scrutiny and challenge, has led to a progressive increase in the amount of factual and analytical information produced with White Papers and other policy documents. The intention of the Code of Practice is to ensure that this practice becomes more widespread and consistent.
18. The assumption is that the factual and evaluative information which formed the basis for Ministerial decisions, including expert analysis and scientific appraisal where relevant, should be shared with Parliament and the public. This should not entail the disclosure of policy advice, see Exemption 2, or information which is covered by the exemptions dealing with other sensitive matters, for example defence security and international relations (Exemption 1). Departments should plan from the earliest stages of policy preparation which factual and analytical information is to be published when the policy is announced.
19. The Code does not set rules about the nature of the analytical methods or techniques used, which will vary widely from subject to subject. However, in order to facilitate as far as possible the publication of factual and analytical information, departments may wish to consider drafting internal documents so that there is a clear separation between factual analysis and research on the one hand and sensitive policy advice on the other. The New Zealand Ombudsman has summed up the benefits of this approach:

"There is a need for well structured reports which identify the issue, set out the options for addressing it and the advice offered on the option. This approach will ensure the separation of the factual information from advice and will enable information to which one of the withholding provisions may apply to be identified more easily. Many reports currently contain an unclear mixture of fact and advice making application of the withholding provisions difficult and time consuming. This often results in frustration for the requester's expectation for the early release of the requested information."

Such an approach is good administrative practice and may assist departments in achieving greater openness.
20. When a major decision is being announced, consideration should be given to whether any of the internal discussion preceding the decision might be published, either at the time of the announcement or at a later date within the normal thirty year period for disclosure of such information. In doing so the provisions of Exemption 2 should be considered. In particular the following points will need to be taken into account:

- Some types of internal discussion will normally be judged more publishable at or soon after the point of decision than others. These include the projections and assumptions relating to internal policy analysis; the background analysis of alternative policy options; and information related to alternative policy options (see paragraph 2.19). However even in these cases there will be instances when information will remain sensitive for some years after the relevant decision is made.

On the other hand, internal opinion and advice is much less likely to be disclosable before a number of years have elapsed, given the degree to which the sensitivity of such information can endure over time;

- In order to protect the frankness and candour of internal discussion officials involved in such discussion need to be confident that such information will not be open to scrutiny before it has ceased to be sensitive. Any decision taken in favour of early release will need to be satisfied on this point.

If it is decided that internal discussion might be made available after a predetermined date within the thirty year limit, the material in question will need to be earmarked and a review carried out on expiry of that date. However it is accepted that the priority which can be given to this exercise will depend on the departmental resources available.

***... which the Government considers relevant and important ...***

21. It is not necessary to swamp Parliament and the public by an indiscriminate approach to this requirement of the Code. Material should concentrate on the key facts. Those who wish to probe detail can use the opportunities under the Code for requesting further information.
  - "Relevant" in this instance implies selection of the information which the Government saw as having a bearing on the matter in question.
  - "Important" implies those matters on which the Government placed weight in reaching its decision.

***... in framing major policy proposals and decisions***

22. There is no straightforward way to define a major policy proposal. A general rule might be that a new proposal or decision is "major" if it would be announced to Parliament (if Parliament were sitting) and/or published with the expectation of significant press coverage and public debate. A common-sense approach is encouraged, in which the degree of likely public and parliamentary interest is taken into account when deciding on the form of publication.
23. Where a policy affects more than one department or has been developed with input provided by a number of departments, it may be appropriate for each department separately to make available the background information relating to its own activities, coordinated if necessary by the department responsible for preparing the overall policy announcement.

***Such information will normally be made available when policies and decisions are announced.***

24. This requirement may be exacting when policy development is moving at pace. This underlines the importance of advance planning, but in cases where it proves impossible to have everything ready by the time of an announcement, the aim should be to supply it as soon as practicable thereafter, and in good time to inform significant stages in Parliamentary decision making, for example the second reading of a Bill or a debate on the issue in question.
25. The way that information is made available can vary. The requirement could be satisfied by printing the background information as an appendix to a White Paper, as a separate publication (priced or otherwise), by issuing it with press notices or by announcing in press notices that further information packs are available from the department. When information is placed in the Library of the House or given with Written Answers, departments should bear in mind that House facilities and Hansard are not always readily available to or checked by those with an interest in the subject, and a reference to the fact that background information is available from the department in press notices or publicity material will be helpful. As with existing policy announcements, departments should continue with whatever special arrangements are currently used to keep the most relevant special interest groups or bodies informed of their decisions and announcements.
26. Departments may wish to consider how to keep MPs and the public aware of the information that has been provided under this part of the Code of Practice. For example:
  - Departmental annual reports could include bibliographies listing the information provided during the year; and
  - Ministers may also wish to make periodic announcements (perhaps by written answer) of the information which has been made available, and how it can be obtained.

### **Code paragraph 3(ii): Explanatory guidelines**

27. Paragraph 3(ii) of the Code commits departments:

***to publish or otherwise make available, as soon as practicable after the Code becomes operational, explanatory material on departments' dealings with the public (including such rules, procedures, internal guidance to officials, and similar administrative manuals as will assist better understanding of departmental action in dealing with the public) except where publication could prejudice any matter which should properly be kept confidential under Part II of the Code.***

28. This requirement of the Code is aimed at clarifying for those who have dealings with departments the reasons for the department's approach. It applies to functions which affect businesses as well as those affecting individual citizens, and therefore supports the Government's policies on deregulation in reducing arbitrary or unexplained requirements.
29. The Citizen's Charter has already done a great deal to resolve such difficulties by making standards and entitlements explicit. A continuing high priority under this part of the Code should be given to making available concise explanatory material for each activity or service operated, which gives a fair account of the requirements and criteria. These simplified versions should - to the greatest extent possible - be written in plain language, avoiding administrative jargon.
30. Such shortened and explanatory versions of the operations of the schemes will be sufficient for most applicants. Departments should also progressively prepare for release the internal guidelines used by staff in dealing with the public.

*... as soon as practicable*

31. This recognises that this will be a major task in some areas, and should not displace other more urgent work. Departments should plan for the progressive release of all the guidelines and other material used in their dealings with the public. This need not mean publication where departments consider that the level of interest would not justify it, or where the guidelines in question are voluminous, but eventually the aim should be to make all guidelines available for purchase or inspection on request. It will be important to ensure that any shortened explanatory material does not misrepresent them.
32. In some areas of work the schemes in operation change very rapidly, and departments have pointed out that work done preparing outdated or obsolescent material for publication would not be a sensible use of resources. The priority should be to make available the guidelines currently in use. Any request concerning previous versions of the guidelines, or the rules for discontinued schemes, should be dealt with as an information request under the Code.

*... except where publication could prejudice any matter which should properly be kept confidential under Part II of the Code.*

33. The decision as to whether or not to make guidelines available hinges on whether the public interest is best served by disclosure or retention. For example guidelines pertaining to some decisions are subject to a statutory authority or a convention which does not permit their release. In such cases departments may be expected to show what legal or public interest considerations justify confidentiality.
34. In other cases it may be necessary to withhold parts of the internal guidelines where, for example, there is a risk that knowledge of them might lead to improper personal gain, subversion of the purpose of the scheme or distortion of the decision-making process. Released versions of guidelines should make it clear that certain sections have been removed and cite the relevant exemptions.

### **Code Paragraph 3 (iii): Giving reasons with decisions**

35. Paragraph 3 (iii) of the Code commits departments:
- ... to give reasons for administrative decisions to those affected*
36. This extends the Citizen's Charter principles of increased openness and accountability so that administrative decisions are seen to be made fairly and according to clear rules. Absence of reasons can suggest that decisions have no rational basis and exposes the decision taker to allegations of unfair or improper administration.
37. Giving reasons can benefit both the public and the department as it will usually reassure those affected that the decision has been given adequate consideration and that all the relevant factors have been taken into account. Reasons can also help those affected by decisions to point out any important information that has been overlooked, promoting better informed decision-making.
38. The intention is that existing good practice should be extended to all areas where administrative decisions have an impact on individuals and companies.
39. Reasons given with decisions need not always be full - particularly where explanatory material on the scheme or benefit involved has been or can be made available.
40. The encouragement of reasoned decisions applies also to responses to requests for information under the Code. Where information is withheld, an explanation should normally be given, explaining which exemption or exemptions were relevant to the decision. Reasons for refusing or restricting access to information under the Code of Practice should make clear which exemption has been applied (see also paragraph 65 below).
41. The footnote to paragraph 3(iii) of the Code refers to some justifiable exceptions to the practice of giving reasons:
- There will be a few areas where well-established convention or legal authority limits the commitment to give reasons, for example certain decisions on merger and monopoly cases or on whether to take enforcement action.*
- These examples are not a comprehensive list. Some Statutory Instruments, for example the rules on Rent Assessment Panels, provide that reasons will not be given unless asked for. Where refusal to give reasons is challenged, departments should be ready to explain either why it is in the public interest not to give reasons, or to show what convention or legal authority governs the case.
42. In providing reasons with decisions, no information need be supplied which is covered by one of the exemptions under the Code. The Code does not require departments to elaborate or enter into debate on reasons given in formal decision letters.

43. Where decisions are reached in accordance with statutory procedures developed in accordance with the rules of natural justice, for example the Inquiries Procedure Rules, the statutory procedures should continue to be followed. Ministers, and those acting on their behalf, will not normally enter into a debate about decisions reached in accordance with such statute and statutory procedure.

### **Code paragraph 3(iv): Citizen's Charter requirements**

44. Paragraph 3(iv) of the Code commits departments:

*to publish in accordance with the Citizen's Charter*

- *full information about how public services are run, how much they cost, who is in charge, and what complaints and redress procedures are available;*
- *full and where possible comparable information about what services are being provided, what targets are set, what standards of service are expected and the results achieved.*

45. The Citizen's Charter Unit in the Cabinet Office (OPS) has responsibility for taking forward these elements of the Code, which incorporate and restate what is already good practice in many departments.

### **Code paragraph 3(v): Requests for information**

46. Paragraph 3 (v) of the Code commits departments:

*to release, in response to specific requests, information relating to their policies, actions and decisions and other matters related to their areas of responsibility.*

47. The requirement to respond to specific requests for information, and the possibility of internal review and complaint to the Ombudsman when the requester is not satisfied with a response, is the main mechanism by which the Code is intended to secure progress towards more open government.
48. There are already substantial flows of information from Government to the public, and a great deal of information is provided on request. It is not intended to formalise and add new bureaucracy to these exchanges, and existing information flows should to a great extent go on undisturbed.
49. Many requests will not specifically mention the Code, but if the requester is not satisfied with the information provided and subsequently invokes the Code, the procedures for review would become available and the requester should be informed accordingly.

50. Departments have discretion to decide how to adapt their existing information systems to meet the requirements of the Code. There are, however, a few general points of good practice:
- departments should establish contact points from which requesters can obtain information on such matters as how to make a request, whether a charge is applicable and how to seek internal review of unsatisfactory or delayed responses;
  - departments may also find it worthwhile to prepare leaflets giving such information which they can send out on request;
  - there will need to be arrangements for redirecting requests that have been put to the wrong department or which could best be answered by the department which leads on the issue or which originated the information in question; these can build on those used for redirecting correspondence. It will usually be right to check with the receiving department that they can deal with the request, to avoid requests being misdirected; and
  - departments, agencies and bodies should be able to monitor progress on requests, perhaps by using systems similar to those used to log and trace correspondence.

#### **Code paragraph 4: Information**

51. Paragraph 4 sets out some limits to the information that will be provided on request under the Code:

*There is no commitment that pre-existing documents, as distinct from information, will be made available in response to requests.*

52. The Code is a commitment to provide information relating to the policies actions and decisions of departments, and other matters related to their area of responsibility. It does not constitute a right of access to documents or records. The emphasis is on factual and analytical information, and the reasoning behind decisions and policies.
53. Basing the Code on information rather than documents reflects the increasing variation of forms in which information is held, in computers and word processors as well as on paper. It also emphasises the substance of what is in documents or other records, rather than the form in which they are written.
54. Requests for information should be met in the simplest, most cost-effective way. This will usually be by letter giving the information requested. The public has no right, under the Code, to a copy of a particular document. However, the Ombudsman has indicated that on occasion the simplest way in which to meet a request for information may be by release of an actual document. Where a department receives a request for a copy of a particular document, this should be construed as a request for all the information contained in that document and treated accordingly. There may be occasions on which it

is appropriate to send photocopies (for example of a letter which has been published or a factual record) but great care must be taken not to release discussion and/or advice given on policy matters. Copies of documents relating to internal deliberative processes (advice, submissions, meeting notes, correspondence between Ministers or between officials or bodies) should not normally be provided. However, copies of Ministerial letters which have been placed in the House library should be made available on request and decisions on other Ministerial correspondence not touching on the internal deliberative process should be made on a case-by-case basis.

***The Code does not require departments to acquire information they do not possess***

55. Reasonable efforts must be made to locate information, and this may involve contacting the requester to specify more exactly what information he is seeking. Where information is not possessed there is no obligation to acquire or create it. A reasonable search should be made before denying that a department holds information it might be expected to possess.
56. Where the information is not available because a request has been directed to the wrong department, the request should be redirected, with the agreement of the receiving department, and the person requesting the information should be notified.
57. Opinion: the Code does not oblige departments to give an opinion on a particular matter unless there would be a reasonable expectation that it should do so in the normal course of business.
58. Advice: the Code does not require answers to be given to hypothetical questions, unless this would be a normal part of advice on, for example, a regulatory requirement. Departments may be asked the legal basis for their actions and requirements, but cannot give definitive interpretations of the law, and may need to say that advice should be sought from a legal adviser. (See also Exemption 4 for privilege in the context of legal proceedings.)

***The Code does not require departments ... to provide information which is already published***

59. Where information is in the public domain - because it is covered in a published report or in a reply given in Hansard - departments should be as helpful as possible in referring requests to a source, and can without breach of copyright provide short extracts or copies of Hansard or Crown publications, although they are under no obligation to do so. Similarly where information sought is available in standard text books or publications, there is no obligation to undertake research on behalf of the requester. (See paragraphs 92 to 95 below on Copyright).

***The Code does not require departments ... to provide information which is provided as part of an existing charged service other than through that service.***

60. Where information is available as part of a charged service nothing in the Code creates an entitlement to free access to the products of that service. Requesters should be told what is available and how to apply. The Code does not preclude the establishment of new charged services.

### **Code paragraph 5: Responses to requests for information**

61. Paragraph 5 of the Code says:

*Information will be provided as soon as practicable. The target for response to simple requests for information is 20 working days from the date of receipt. This target may need to be extended when significant search or collation of material is required. Where information cannot be provided under the terms of the Code, an explanation will normally be given.*

*Information will be provided as soon as practicable.*

62. This means that the information should be provided as soon as it can be made available (there is no need to wait until the target date arrives) but it also recognises that from time to time it may not be possible to meet the target. Where the reason for delay is not the difficulty with the request itself, but general pressure of work, for example when a division that is busy dealing with a matter in the news receives a lot of requests for information relating to it, an acknowledgement, and perhaps a summary information sheet might be sent, together with an explanation if more time is needed to reply to a detailed query.

*The target for response to simple requests for information is 20 working days from the date of receipt.*

63. "Simple" is not defined, but should include most requests that do not require extended search or consideration and additional charges. An interim response, explaining the nature of any difficulties, should be sent if a response is behind time.

*This target may need to be extended when significant search or collation of material is required.*

64. Applicants should be notified if it is going to take more than 20 working days to respond to their request. No fixed extended period for responding to requests that are not simple is set, this will depend on the amount of work to be done. Care should be taken to reply as soon as practicable. Undue or unexplained delay is likely to attract criticism.

*Where information cannot be provided under the terms of the Code, an explanation will normally be given.*

65. Reasons for refusal of information need to be given in enough detail to explain the refusal adequately. If the information requested falls under an exemption the response should explain which exemption the department considers relevant, with any additional explanation which might be helpful. See notes on Exemptions (1) and (13) for infrequent exceptions to this requirement, where it would be against the public interest to confirm or deny that information exists. This should not be used as an excuse when

information has not been traced. When information has been refused, for whatever reason, or if a charge has been made for providing information, the applicant should be informed of his right to request an internal review and ultimately to appeal to the Ombudsman through an MP. See notes on Exemptions (2) and (15) regarding circumstances in which an applicant should be informed that an appeal to the Ombudsman on grounds of non-disclosure would be unlikely to succeed.

### **Code Paragraph 6: Scope**

66. Paragraph 6 of the Code says:

*The Code applies to those Government departments and other bodies within the jurisdiction of the Ombudsman (as listed in Schedule 2 to the Parliamentary Commissioner Act 1967).<sup>1</sup> The Code applies to agencies within departments and to functions carried out on behalf of a department or public body by contractors. The Security and Intelligence Services are not within the scope of the Code, nor is information obtained from or relating to them.*

67. Schedule 3 of the Parliamentary Commissioner Act 1967 sets out a range of matters which are not within the Ombudsman's jurisdiction. To a large extent there are parallels with the matters exempt from disclosure under the Code. In the event of a complaint, however, the Ombudsman will need to establish (i) whether it is one he can investigate and (ii) whether he should. Departments are encouraged to assist the Ombudsman's staff with the information necessary to answer those questions.

68. Section 11(3) of the Act allows Ministers to give notice to the Ombudsman that disclosure of certain documents or information would be prejudicial to the safety of the state or otherwise contrary to the public interest. Schedule 3 paragraph 1 of the Act allows Ministers to certify that a matter should not be subject to investigation because it affects relations or dealings between the Government of the United Kingdom and any other Government or international organisations of States or Governments. Ministers have confirmed that these powers will not normally be used to block investigation of complaints concerning the operation of the Code.

*The Code applies to agencies within departments and to functions carried out on behalf of a department or public body by contractors.*

69. Agencies within departments are not listed separately in Schedule 2 because they are legally part of a department, and jurisdiction does not have to be separately specified. Information in respect of agency business should normally be provided by the agency

---

<sup>1</sup> *In Northern Ireland the Code applies to public bodies under the jurisdiction of the Northern Ireland Parliamentary Commissioner for Administration and the Commissioner for Complaints, with the exception of local government and health and personal social services bodies, for which separate arrangements are being developed as in Great Britain. Some Northern Ireland departments and bodies are expressly subject to the jurisdiction of the Parliamentary Commissioner under the 1967 Act.*

concerned. The Ombudsman has agreed that in general he will investigate complaints concerning agencies directly with the Chief Executive.

70. Action taken by contractors on behalf of a department may be investigated by the Ombudsman as they are brought within jurisdiction by section 5(1) of the Parliamentary Commissioner Act 1967, which enables the Commissioner to investigate action taken by or on behalf of a department or other body. The availability of information about Government functions should not be reduced because they are undertaken by a contractor. (Further guidance is provided in Part IV.)

### **Code paragraph 7: Charges**

71. Paragraph 7 of the Code says that:

*Departments, agencies and public bodies will make their own arrangements for charging. Details of charges are available from departments on request. Schemes may include a standard charge for processing simple requests for information. Where a request is complex and would require extensive searches of records or processing or collation of information, an additional charge, reflecting reasonable costs, may be notified.*

72. Departments should not charge for the provision of information which it is necessary for the public to have as part of fair and accountable performance of their functions. Information explaining:

- benefits, grants, rights and entitlements;
- the standards, and availability of services;
- the reasons for administrative decisions made in applicant's case;
- the ways in which the citizen may exercise rights to appeal or complain about a decision;
- regulatory requirements affecting affairs of a business, or commercial interests; and
- the main points of existing departmental policies or initiatives;

should usually be available free of charge.<sup>2</sup>

73. There may be a charge if a request for information does not come within one of these categories, and causes additional work.

---

<sup>2</sup> Except insofar as a service (for example providing press notices) or regulatory system is subject to fees. See also paragraph 58 above on the limits to provision of legal interpretation and advice.

74. Charges may consist of a simple flat fee for straight-forward requests, but higher charges may be requested if the information sought will take several hours to prepare. Such charges should not exceed the additional cost to the department of the work caused by the request. Departments may ask for payment of the estimated charge before further work is carried out but should not charge more than the estimated amount, without notice and confirmation that the requester is willing to pay. A note on fees and charges is at Part III.
75. Charges for the provision of information under the Code by Government departments or other public bodies are not subject to VAT.
76. There should be arrangements for internal review of proposed charges if the requester queries them. Unreasonable charges are one of the matters on which the public may complain, through a Member of Parliament, to the Ombudsman.
77. When a department has received several requests for information relating to a particular matter, it may be possible to respond by preparing a general note for publication as soon as possible. This will usually be less expensive for the applicant than charging the work in full to a single requester. The position should be explained to those who have requested information, and care should be taken to avoid undue delay.

#### Disproportionate Cost Threshold

78. The disproportionate cost threshold which applies to Parliamentary Questions and Answers does not apply to requests for information under the Code. Where a Minister has declined to answer a question on grounds of disproportionate cost, it is open to a Member of Parliament to seek the same information as a Code request if he is willing to pay a charge.

#### **Code Paragraph 8: Relationship to statutory access rights**

79. Paragraph 8 of the Code explains its relation to statutory rights of access:

*This Code is non-statutory and cannot override provisions contained in statutory rights of access to information or records (nor can it override statutory prohibitions on disclosure). Where the information could be sought under an existing statutory right, the terms of the right of access takes precedence over the Code. There are already certain access rights to health, medical and educational records, to personal files held by local authority housing and social services departments, and to personal data held on computer. There is also a right of access to environmental information. It is not envisaged that the Ombudsman will become involved in supervising these statutory rights.*

*The White Paper on Open Government proposed two new statutory rights to information:*

*an access right to personal records, which was proposed in Chapter 5.*

*an access right to health and safety information, proposed in Chapter 6.*

*Where a statutory right is proposed but has yet to be implemented, access to relevant information may be sought under the Code, but the Code should not be regarded as a means of access to original documents or personal files.*

Where the information requested could be sought under an existing statutory right of access to information or records, the terms of the right of access take precedence over a non-statutory Code. Exemptions in the Code are broadly consistent with those in access rights, but the wording of statute should govern interpretation where an access right applies.

80. Departments should respond helpfully to requests for information which would be available under the proposed access rights and should consider giving access to pre-existing documents or records. The Code cannot, of course, override statutory restrictions.
81. If the Ombudsman is asked to investigate a complaint about refusal of information which could have been sought under a statutory access right, his function will not be that of a court interpreting the legislation in question. It is open to him to decide, under section 5(2) of his Act, not to investigate because the applicant had an alternative remedy, but this is a matter which he has discretion to determine. He is not precluded from investigating requests for personal information or health and safety information under the Code in the period between the coming into force of the Code and the proposed legislation.
82. It should be remembered that one of the reasons for introducing statutory rights in some areas is to clarify the rights of third parties whose confidences are at issue when information is sought, or to remove, where it is justifiable to do so, restrictions on disclosure of information. Statutory restrictions cannot be set aside under the Code, and particular care needs to be taken with information protected by statutory guarantees of confidentiality or obtained by compulsion (see Exemptions 14 and 15). Departments should consult their legal advisers in these cases.

### **Code Paragraph 9: Public Records**

83. Paragraph 9 of the Code describes its relationship to access to public records:

*The Code is not intended to override statutory provisions on access to public records, whether over or under thirty years old. Under s12(3) of the Parliamentary Commissioner Act 1967, the Ombudsman is not required to question the merits of a decision if it is taken without maladministration by a Government department or other body in the exercise of a discretion vested in it. Decisions on public records made in*

***England and Wales by the Lord Chancellor, or in Scotland and Northern Ireland by the Secretary of State, are such discretionary decisions.***

84. The Code commits departments to the provision of information, and does not provide access to documents. While the Code can apply retrospectively, it is not intended to provide a means of opening of records closed under the Public Records Acts. Paragraph 9 is intended to ensure that procedures for the closure of public records, as recently amended by the White Paper on Open Government, are not overturned by the Code. The Ombudsman would not normally investigate claims relating to access to actual records unless evidence of maladministration was put before him.
85. Nor is the Code intended as a means by which historical research can be assisted. Exemption 9 refers to the need to retrieve files not in current use as one reason why a request may be refused, because it would entail unreasonable diversion of resources from current work. It would, however, be reasonable for information to be requested about past events where they are a matter of continuing public concern, or the request concerns some continuing injustice or matter which needs to be remedied.

### **Code paragraph 10: Jurisdiction of courts, tribunals or inquiries**

86. Paragraph 10 of the Code is intended to ensure that the Code does not override or disturb arrangements for disclosure of documents in legal proceedings of various kinds:

***The Code only applies to Government-held information. It does not apply to or affect information held by courts or contained in court documents. ("Court" includes tribunals, inquiries and the Northern Ireland Enforcement of Judgements Office). The present practice covering disclosure of information before courts, tribunals and inquiries will continue to apply.***

87. This reflects paragraph 3.10 of the White Paper which says:

"Our system of justice is open. It is not only carried on in public, except when the nature of the subject matter, eg the private affairs of the citizen or matters of national security, cause the court to sit in chambers or in camera; but it requires the prosecution in criminal cases and all litigants in civil cases to reveal all documents, however private, relevant to the doing of justice in the case. To this there are some exceptions, in particular the doctrine of public interest immunity. In the field of government, this provides for certain classes of document, eg matters of national security or high level advice to Ministers, to remain confidential unless the overriding requirements of justice require their disclosure. The courts have developed their own system for the handling of these difficult issues. Except insofar as it may become Government policy to invite the courts to accept a change in practice in relation to a particular class of documents in favour of wider publication, it is not intended that this White Paper should lead to any change in present practice in this area."

88. Where there is actual or likely litigation it will be for the Court to decide what disclosure is required in the interests of justice. Administrators should alert their legal advisers

when requests are made for information which is or is likely to be disclosed, relevant to or otherwise dealt with in proceedings before a Court, tribunal or inquiry. Most such requests will be sensitive, either because the information is itself sensitive or because the Crown will be concerned not to tread on the toes of or interfere with the relevant decision maker or to prejudice its own or another's position in such proceedings. (See also guidance to Exemption 4.)

### **Code paragraph 11: Investigation of complaints**

89. The Code provides for both internal and external complaints procedures:

*Complaints that information which should have been provided under the Code has not been provided, or that unreasonable charges have been demanded, should be made first to the department or body concerned. If the applicant remains dissatisfied, complaints may be made through a Member of Parliament to the Ombudsman. Complaints will be investigated at the Ombudsman's discretion in accordance with the procedures provided in the 1967 Act.*

90. Departments should make their own arrangements for internal review of complaints that they have failed to comply with the Code. This should in all cases be a single stage process. The aim should be to ensure that the applicant has been fairly treated under the provisions of the Code, that any exemptions have been properly applied, and that charges are reasonably and consistently applied. It is good practice to allow for such review to be conducted by someone not involved in the initial decision. Further details of the principles which should underlie complaints systems are contained in the booklet

"Effective Complaints Systems: Principles and Checklist", available from the Citizen's Charter Unit in Cabinet Office (OPS) or telephone 071-270 6348.

91. The Ombudsman's procedures for investigating complaints may include access to papers and records, and it should be noted that he has powers to see all papers relevant to a request, except for Cabinet papers.

### **General Points**

#### **Crown Copyright**

92. Where a department provides government information to a member of the public, copyright in the material belongs to the Crown. Given the circumstances and the spirit of the Code, departments will not normally wish to limit further copying and use of the material. They may therefore include a statement to the effect that the information may be freely reproduced without seeking formal permission to do so.
93. If, in particular cases, departments do wish to restrict the further reproduction of the information provided, the following wording should be applied to the documents

"(C) Crown copyright reserved.

For permission to reproduce, please apply to the Controller of HMSO."

### Third Party Copyright

94. Departments will need to be careful that they do not provide copies of information in which a third party owns the copyright without first seeking the owner's permission. Infringement of copyright by the reproduction of any substantial part of any work in a material form (sections 16 and 17, Copyright, Design and Patents Act 1988) is an offence.
95. The Code does not give any authority to copy documents when to do so would infringe the copyright of a third party. In general there is copyright in letters, individual journal articles, individual items in newspapers, photographs, drawings, tabulations, and computer programmes as well as books and monographs, whether they have been published or not. Normally the author's consent is needed before any of these could be copied for supply to members of the public. However, where material was supplied to the Government in the course of its business and the copying is carried out for the purpose for which the material was communicated or any related purpose which could reasonably have been anticipated by the copyright owner, the material may be copied without express authorisation. In cases of doubt, legal advice should be sought, but it should always be remembered that it will often be possible to supply the information by stating the substance of the material in one's own words without copying the material itself.

### Computers

96. Departments may sometimes be asked to provide requested information in computer disc form. The same copyright considerations apply as for written information. If departments wish to assert copyright in computer-readable material, they will need to issue an end-user licence to specify the uses to which the material may and may not be put. HMSO should be contacted for advice in these cases.

### Information for Journalists

97. Nothing in the Code of Practice should alter the normal practice of departments and agencies in providing information to journalists free of charge. Press Offices should be as helpful as possible in this way.
98. There may be cases where journalists wish to seek considerably more information than can be provided in the day to day run of business with a Press Office and wish to invoke the Code of Practice to obtain that. In such cases, journalists should be treated no differently to any other

individual seeking information under the Code of Practice; they will need to recognise that there may be a charge for providing information and they may need to adjust their deadlines to fit in with the target response time for such requests.

## CODE OF PRACTICE ON ACCESS TO GOVERNMENT INFORMATION GUIDANCE ON INTERPRETATION

### PART II - EXEMPTIONS

#### Preamble to exemptions

*The following categories of information are exempt from the commitments to provide information in this Code. In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.*

*Reference to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.*

*The exemptions will not be interpreted in a way which causes injustice to individuals.*

- 0.1 The preamble governs interpretation of all the exemptions in the Code. Because the Code is not statutory it cannot set aside restrictions on disclosure which are based in law. These will include those statutory provisions restricting disclosure which leave no discretion to disclose in the public interest. It may also in some circumstances include circumstances where there is a common law duty of confidentiality.
- 0.2 Subject to these statutory and legal constraints, decisions on disclosure will require judgement and discretion. As with other functions, decisions may be made by officials acting in accordance with the general policy and instructions of the Minister, and of the Government collectively as expressed in this Code. It is for Ministers to arrange with their Departments how far they wish decisions to disclose or not disclose information to be referred to them or brought to their attention.<sup>3</sup> Civil servants have no duty independent of such Ministerial instructions, and the Code does not release them from their broad duty not without authority to disclose information which is held in confidence within Government.
- 0.3 Where an exemption refers to harm or prejudice, it is not necessary to prove that actual harm or prejudice is certain to result from disclosure, although the harm or prejudice which may result must be serious enough to override the general presumption in favour of disclosure. Risk or reasonable expectation of harm can be taken into account. The weight to be attached to risk depends on the nature of the harm that could occur. Where the harm arising from disclosure could be extremely serious - as for example with certain security risks or damage to the effectiveness of the armed forces in the event of war - it

<sup>3</sup> In non-ministerial departments or non-departmental public bodies, similar arrangements may need to be agreed with the head of department or board.

would not be necessary to show that harm is likely to occur to take it into account. But where a risk is neither likely nor grave, it should be given less weight. "Reasonable" may be taken to mean "not irrational, absurd or ridiculous". The public interest in making information available should also be taken into account. However, potential embarrassment which may be caused to civil servants or Ministers should not be a factor in deciding whether information should be made available.

- 0.4 When applying the harm test, departments should bear in mind that the sensitivity of information will reduce over time, although some information will remain sensitive for many months, if not years, after the relevant decision is made. When considering whether to release information in response to a specific request, departments should always weigh up the harm which could result from disclosure at the time the request is made rather than by reference to when the relevant decision was taken.
- 0.5 The balance of public interest in disclosure cannot always be decided solely on the basis of the effect of a specific disclosure. The exemption covering the proceedings of Cabinet and Cabinet committees, for example, is based on the need for confidence in the confidentiality of such discussions, and not primarily on whether the disclosure of particular information would cause harm.
- 0.6 The statement that exemptions will not be interpreted in a way which causes injustice to individuals reflects the need for the Code not to be interpreted in a way which undercuts the existing functions of the Ombudsman in investigating maladministration leading to injustice. Where he would have been likely to find that failure to give particular information amounted to maladministration causing injustice, nothing in the Code restricts his ability to reach such a finding. As noted in paragraph 10 of Part I of the Code, the Code is not intended to change the existing arrangements by which the Courts decide what disclosure is necessary in the interests of justice in criminal and civil proceedings.

### 1. *Defence, Security and international relations*

- (a) *Information whose disclosure would harm national security or defence.*
- (b) *Information whose disclosure would harm the conduct of international relations or affairs.*
- (c) *Information received in confidence from foreign governments, foreign courts or international organisations.*

1.1 Defence, security and international relations are legitimate subjects for public information and debate. This exemption is not intended to protect information necessary to inform debate in these areas, including the factual and analytical basis of policy. Nor, in the field of defence, should the exemptions prevent disclosure of factual information relating to legitimate concerns on such matters as loss of life, or hazards and environmental intrusion arising from military operations or use of land. However there are various matters concerning which it will be generally accepted that it would not be in the public interest for information to be disclosed, because disclosure would lead to harm or a risk or reasonable expectation of harm.

#### ***Information whose disclosure would harm ... defence***

1.2 The purpose of the exemption is to protect:

- information whose disclosure would adversely affect the operational effectiveness of the armed forces and their capacity to protect the country from external aggression; and
- information whose disclosure would put at risk servicemen and their civilian support staff, including those of friendly forces, and those under their protection.

#### ***Information whose disclosure would harm national security***

1.3 The purpose of the exemption is to protect information whose disclosure would harm national security, including information which could be of assistance to those engaged in espionage, sabotage, subversion or terrorism. This includes the protection of individuals and sites which may be at risk, and the protection of information whose disclosure would prejudice the operations, sources and methods of the security and intelligence services.

### Complaints against the operation of the security and intelligence services

1.4 There are special procedures for investigation of complaints against the Security Service, the Intelligence Service and GCHQ.

#### ***Information whose disclosure would harm the conduct of international relations or affairs***

1.5 The purpose of the exemption is to protect information which would impair the effectiveness of the conduct of international relations. The harm or risk of harm which arises will need to be explained. It includes:

- disclosure which would impede negotiations, for example by revealing a negotiating or fall-back position, or weakening the Government's bargaining position;
- disclosure which would undermine frankness and candour in diplomatic communications, for example the appraisal of personalities or political situations; and
- disclosure which would impair confidential communications and candour between governments or international bodies.

The Foreign and Commonwealth Office should be consulted in any cases of doubt.

1.6 The exemption is consistent with very high levels of transparency and information about policy, and should not, in particular, be interpreted in a way which undermines the agreed policy of the European Union to secure greater openness about the workings of Community institutions and preparation of policies.

### ***Information received in confidence from foreign governments, foreign courts or international bodies***

1.7 Whether or not harm would be caused by the release of the particular information in question, account should be taken of the possible effect on the maintenance of good working relations between the United Kingdom and other governments and international organisations, and the need to continue to offer effective guarantees that information received in confidence will not be released. The requirement is especially important in respect of international cooperation on such matters as law-enforcement (including action against fraud and drug trafficking).

1.8 Not all information provided by a foreign government or organisation will necessarily fall into this category. The factors to look for are:

- the circumstances in which the information was supplied (covering letters or associated papers may reveal whether it was "in confidence"); and
- whether the information is in the public domain in the country of origin.

### **Giving reasons for refusal**

1.9 Where prejudice to security, defence or international relations could arise from confirming that information relevant to a request existed, responses to requests may say that if the information sought were held, it would be exempt under the Code. The justification for non-disclosure, specifying the harm or risk of harm arising from disclosure, will nevertheless need to be explained to the Ombudsman in the event of a complaint.

Note on the Official Secrets Act 1989

- 1.10 Unauthorised or negligent disclosure of highly sensitive information may be an offence. The Official Secrets Act 1989 makes it a criminal offence for Crown Servants to disclose certain categories of information. The 1989 Act makes it an offence to disclose official information in six specified categories (security and intelligence, defence, international relations, foreign confidences and information that might lead to the commission of a crime) if the disclosure is damaging to the national interest.

## 2. *Internal discussion and advice*

***Information whose disclosure would harm the frankness and candour of internal discussion, including:***

***proceedings of Cabinet and Cabinet Committees;***

***internal opinion, advice, recommendation, consultation and deliberation;***

***projections and assumptions relating to internal policy analysis; analysis of alternative policy options and information relating to rejected policy options;***

***confidential communications between departments, public bodies and regulatory bodies.***

- 2.1 The Code commits departments to give information on the factual and analytical background to new policies, but there is an important distinction between the process by which a decision or policy has been reached (which remains confidential) and explanation of the basis of the decision once reached (which should be as full and open as possible).
- 2.2 This need not inhibit consultation on policy options and proposals, although the form and timing of consultation will continue to be for Ministerial decision.
- 2.3 It will be for departments to decide on a case by case basis whether information falling within any of the categories in this exemption should be released. However, by its very nature this type of information will often be particularly sensitive. Because of this, it is important that departments consider the effect that disclosure might have on future internal discussion. It is not possible to consider a request for this type of information in isolation without considering the overall harm which might result to the internal decision making process. It is not the intention to change or undermine the long-established conventions protecting the confidentiality of the internal decision-making process. It is the process by which the Government reaches a collective view, and takes account of the confidential advice of officials, which requires protection. Accounts of the conventions include:
- Questions of Procedure for Ministers;
  - the Armstrong Memorandum;
  - the Radcliffe Report; and
  - the Report of the Royal Commission on Standards in Public Life.
- 2.4 Although it may on occasion be appropriate to answer questions on whether or not particular decisions were referred to and approved by Ministers, departments should not normally disclose the specific level at which particular decisions were taken, which

particular Minister or official took the decision, or the manner in which a Minister consulted colleagues.

- 2.5 There is nothing directly corresponding to Cabinet confidentiality and collective responsibility in the Non-Ministerial bodies to which the Code applies, including departments headed by non-Ministerial office holders and non-departmental public bodies. However, there is still a place for private deliberation in coming to an agreed position.
- 2.6 It is also an established rule that, after a general election, a new administration does not have access to the papers of a previous administration of a different political complexion where such access could undermine the doctrine of collective responsibility. For a fuller account of conventions on access by Ministers to the papers of previous administrations see the Prime Minister's Parliamentary answer of 24 January 1980 (*Hansard* cols. 305-7).

### *Proceedings of Cabinet and Cabinet committees*

- 2.7 The exemption protects the confidentiality of the Cabinet process. This is consistent with long standing conventions, observed by successive Governments. In the case of Cabinet and Cabinet Committee papers in particular, there is a presumption that, by weakening the principle of private deliberation at the highest level of government, disclosure will be harmful to the public interest.
- 2.8 The Cabinet Secretariat should be consulted on any question relating to the Cabinet process or papers. The Government has departed from precedent in publishing the terms of reference and membership of Ministerial Committees, but confidentiality as to the timing and agendas of particular meetings continues to be observed. Section 8(4) of the Parliamentary Commissioner Act 1967 reads:

"No person shall be required or authorised by virtue of this Act to furnish any information or answer any question relating to the proceedings of Cabinet or any committee of the Cabinet or to produce so much of any document as relates to such proceedings; and for the purposes of this subsection a certificate issued by the Secretary of the Cabinet with the approval of the Prime Minister and certifying that any information, question or document or part of any document so relates shall be conclusive."

- 2.9 The requirements in Questions of Procedure for Ministers should be closely observed:

"17. The internal process through which a decision has been made, or the level of Committee by which it has been taken, should not be disclosed. Decisions reached by the Cabinet or Ministerial Committees are binding on all members of the Government. They are, however, normally announced and explained as the decision of the Minister concerned. On occasions it may be desirable to emphasise the importance of a decision by stating specially that it is the decision of her Majesty's Government. This, however, is the exception rather than the rule.

18. Collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees should be maintained. Moreover Cabinet and Committee documents will often contain information which needs to be protected in the national interest. It is therefore essential that Ministers take the necessary steps to ensure that they and their staff preserve the privacy of Cabinet business and protect the security of Government documents."

- 2.10 Factual and analytical information should not be treated as exempt simply because it has been considered by Cabinet or a Cabinet Committee. It can be released in accordance with the provisions of the Code, or protected if it is otherwise exempt. In practice, such factual and analytical information will often be available in an alternative form and could be collated from a non-Cabinet source. Departments should not normally disclose if particular factual or analytical material has been considered by Cabinet or a Cabinet Committee. Occasionally, cases may arise where the only sources available for dealing with a Code request are Cabinet or Cabinet Committee documents. If, in these circumstances, information is refused under any of the Code's exemptions, the applicant should be informed that an appeal to the Ombudsman on the grounds of non-disclosure would be unlikely to succeed because the document in question was a Cabinet or Cabinet Committee paper to which, under Section 8(4) of the Parliamentary Commissioner Act 1967, the Ombudsman would not have access.

***Internal opinion, advice, recommendation, consultation and deliberation***

- 2.11 The justification for confidentiality of internal opinion, advice, recommendation and deliberation is the need to ensure that matters can be discussed candidly and frankly within government, and a full record kept without taking account of the possibility of publication within any period of time during which the material might remain sensitive. However, in each case the harm which would arise from disclosure should be weighed against the public interest in making the information available, bearing in mind the time which has elapsed since the original advice was given (see paragraph 0.4)
- 2.12 Exposure of differences between Ministers, between Ministers and their civil servants or between civil servants, could prejudice working relationships and effective discussion of policy, especially if it led to dissenting or different views being quoted in political argument to attack the policy or action which had eventually been decided. Disclosure could under-mine frankness and candour, the adequacy for their purpose (and in due course for the historian) of record keeping, it could undermine collective responsibility and in certain circumstances the political neutrality of the Civil Service.
- 2.13 It is not the intention, however, to withhold this class of information only where internal differences and disagreements would be revealed, or where it concerns with matters of particular sensitivity. It is important that reasonable expectations of confidentiality are preserved when opinion, advice and deliberation are put on record.
- 2.14 The White Paper on Open Government explained the reason for confidentiality of internal deliberations and advice:

"Governments and public authorities should be able to think in private, and this means that notes of internal discussions and exchanges should be protected. In the absence of such protection there would be a risk of loss of candour in discussions, and an increasing gap between what is said at meetings and on the telephone and what is recorded on the files.

Confidentiality of advice is all the more important where the permanent Civil Service is politically neutral. Candid and robust advice could become more difficult if it could be disclosed and quoted one way or the other in support of political positions, and political neutrality and the confidential relations between civil servants and Ministers could be eroded. It is not credible, as is sometimes argued, that all that needs to be done is to remove the name of the official when publishing the advice." (Cm 2290, paragraphs 3.14 and 3.15)

- 2.15 Advice includes opinion and recommendations on possible courses of action. It need not necessarily include a firm expression of view, and may sometimes consist of the evaluation of the political, administrative or financial aspects of an issue for decision, or an assessment of presentational or handling options.

***Projections and assumptions relating to internal policy analysis; analysis of alternative policy options and information relating to rejected policy options***

- 2.16 The Code commits the Government to publishing the facts and analysis of the facts which were considered important and relevant in framing policies, and to give reasons generally with administrative decisions. It does not, through this exemption, commit the Government to the disclosure of all internal analysis, projections and assumptions.
- 2.17 There is a presumption in favour of disclosing the material which the Government has acted on. While in some circumstances it may be in the public interest to publish analysis of alternative and rejected options, it would not in the Government's view be in the public interest to create an invariable obligation to do so.
- 2.18 The Civil Service is accountable to Ministers and serves the elected Government of the day. It may from time to time need to assess options or proposals which are not the Government's preferred options and to do so objectively and dispassionately. Ministers and their officials will also need to explore unpopular and difficult options, or to prepare plans for reacting to possible events. Governments might have a legitimate wish not to disclose that a particular analysis had been conducted, or what conclusions had been reached. Wide disclosure may in practice limit analysis of policy options within government. This could cause certain possibilities to go unexplored, put undue pressure on officials to take account of the Government's political interests and intentions, or cause the Government to rely on private or political sources of advice.
- 2.19 While this exemption preserves the possibility of confidentiality, it is not obligatory. Where it is judged that publication or analysis of alternative possibilities or policies would assist public debate or understanding, Ministers have discretion to authorise publication. The exemption would not justify withholding information about the expected effects of policies which are being implemented, nor would it normally justify withholding facts which those outside government need in order to produce their own analysis.

*Confidential communications between departments, public bodies and regulatory bodies*

- 2.20 Communications between departments or public bodies may properly be confidential for a range of reasons including the following:
- because they involve an exchange of information which is confidential under the terms of the Code;
  - because they are part of the deliberative process;
  - because they relate to plans of action and premature disclosure would impair their effectiveness; or
  - because a facility for confidential exchange of views is justifiable in relation to a need for candid and effective communication.

Expert advice

- 2.21 There is less need for confidentiality in respect of advice from expert advisory committees, especially where the members of committees are not civil servants, where the availability of the assessment will enhance public debate and understanding of an issue, and it is important that there should be opportunities for scientific assessment and analysis to be contested or made available for peer group review.
- 2.22 Advisory committees themselves are not usually within the jurisdiction of the Ombudsman, although their advice will often be disclosed as part of the factual and analytical basis of policy and decisions, and the Ombudsman may be asked to investigate complaints concerning refusal by departments to disclose expert advice on which they have relied.
- 2.23 The White Paper on Open Government recognised certain limited circumstances in which refusal to disclose might be justified:

" In many circumstances it will be right to publish expert analysis when policies and decisions are announced - for example the reasons why a particular product or process has been found to be unsafe or resources available for scientific research have been distributed in a particular way. In other cases, expert analysis is a systematic part of the process of policy formation, and while it will be right to present the analytical considerations underlying an announced policy or consultation paper, it would be damaging to internal candour to disclose internal expert advice and analysis invariably and in full. This might create pressure on key advisers to avoid expressing differences of view on a critical option or decision." (Cm 2290, paragraph 3.16)

3. *Communications with the Royal Household*

***Information relating to confidential communications between Ministers and Her Majesty the Queen or other Members of the Royal Household, or relating to confidential proceedings of the Privy Council.***

- 3.1 The purpose of the exemption is to ensure that confidential communications between the Queen and her Ministers continue to receive appropriate protection.
- 3.2 Not all matters concerning the Royal Household are confidential. Communications which are formal or ceremonial and are already published will not be exempt.

#### 4. Law enforcement and legal proceedings

- (a) *Information whose disclosure could prejudice the administration of justice (including fair trial), legal proceedings or the proceedings of any tribunal, public inquiry or other formal investigations (whether actual or likely) or whose disclosure is, has been, or is likely to be addressed in the context of such proceedings.*
  - (b) *Information whose disclosure could prejudice the enforcement or proper administration of the law, including the prevention, investigation or detection of crime, or the apprehension or prosecution of offenders.*
  - (c) *Information relating to legal proceedings or the proceedings of any tribunal, public inquiry or other formal investigation which have been completed or terminated, or relating to investigations which have or might have resulted in proceedings.*
  - (d) *Information covered by legal professional privilege.*
  - (e) *Information whose disclosure would harm public safety or public order, or would prejudice the security of any building or penal institution.*
  - (f) *Information whose disclosure could endanger the life or physical safety of any person, or identify the source of information or assistance given in confidence for law enforcement or security purposes.*
  - (g) *Information whose disclosure would increase the likelihood of damage to the environment, or rare or endangered species and their habitats.*
- (a) *Information whose disclosure could prejudice the administration of justice (including fair trial), legal proceedings or the proceedings of any tribunal, public inquiry or other formal investigations (whether actual or likely) or whose disclosure is, has been, or is likely to be addressed in the context of such proceedings*
- 4.1 This exemption is designed to protect the integrity and effectiveness of legal proceedings including those in the civil and criminal courts, proceedings before tribunals, and certain other formal proceedings of inquiry or investigations including planning inquiries, investigations in regulatory areas or accident and disaster inquiries.
- 4.2 The Code is not intended to circumvent or modify the existing rules or practices of disclosure in legal proceedings. (See notes on paragraph 10 of Part I of the Code concerning information held by courts and tribunals.)
- 4.3 To establish that information is covered by the exemption it would be necessary to show a link to specified proceedings or investigations, and where the proceedings are likely there must be reasonable grounds for expecting that they will take place.

- 4.4 The wording of exemption 4(a) reflects the Rules of the Supreme Court dealing with pre-action discovery. These provide, inter alia, for the application before the commencement of proceedings for an Order for discovery where:

"the applicant and the person against whom the order is sought are likely to be parties to subsequent proceedings in the High Court in which a claim for personal injuries is likely to be made."

It has been held that "likely" was satisfied if the position was that the action might, or might well, proceed in the unknown circumstances of what discovery might reveal - in other words where there is a "reasonable prospect" of there being subsequent proceedings.<sup>4</sup>

- 4.5 In addition, many Government departments and other public authorities who are not parties to cases receive requests for information by parties in civil proceedings who wish to use the information to strengthen their cases or defences. As the disclosure of such information is likely to be addressed in the context of the proceedings and as disclosure outside this context may prejudice the position of the departments or public authorities, the information may be refused under Exemption 4(a). However, the exemption should not be used to deny access to information already in the public domain or otherwise freely publicly available unless there is a well founded concern that its release would prejudice the position of the body asked for the information.
- 4.6 When prospective proceedings seem likely to be at issue, information which is not otherwise exempt under the Code should not be denied solely on the grounds that it relates to a matter which might in future become the subject of proceedings. It would not be right for example to withhold reasons for decisions on the grounds that they might be challenged, with a view to disclosing them only as required by a court. On the other hand departments need not necessarily regard the Code as obliging them to cooperate with trawling for information in advance of possible proceedings.

**(b) *Information whose disclosure could prejudice the enforcement or proper administration of the law***

- 4.7 References to proper administration of the law apply to both criminal and civil law. Reference to law enforcement therefore includes, as well as policing, regulatory functions and related investigations, all proceedings that could lead to prosecutions, penalties, sanctions, disqualification or loss of licence.
- 4.8 Exemption 4(b) applies, inter alia, to information which would prejudice regulatory and enforcement procedures. The White Paper on Open Government noted that the confidentiality of information received in such processes often has statutory protection:

"A great deal of sensitive information is obtained by public authorities in the course of enforcing and administering regulations relating to competition, fair trading, company

<sup>4</sup> The relevant Order is Order 24 rule 7A (based on section 33 of the Supreme Court Act 1981). For the interpretation of "likely" see: Dunning v. Board of Governors of the United Liverpool Hospitals (1973) 2 All ER 454, subsequently approved in Harris v. Newcastle Health Authority (1989) 2 All ER.

law, financial services, banking, pensions and insurance. Unauthorised disclosure of information collected in these contexts is often a criminal offence ... The Government believes that the existing statutory restrictions are important, and should only be amended if a specific need is shown. In addition to the legal and ethical considerations arising if past statutory guarantees of confidence and companies' legitimate expectations of confidentiality are set aside, ill-disciplined disclosure could impair the ability of the regulators to secure information, effectively reducing their ability to protect the public interest." (Cm 2290, paragraph 3.13. See also Exemptions 14 and 15.)

- 4.9 Particular care should be taken when considering a request for disclosure of information which falls within a category which it is in the public interest to protect from disclosure regardless of the nature of the specific information requested. Even if the information is itself innocuous, repeated disclosures or a policy of disclosure will weaken the strength of the argument against disclosure of information or documents in that category, no matter how strong those arguments may be in principle. For example, repeated disclosure of information provided in witnesses' testimony to DTI inspectors appointed under the Companies Act 1985 will weaken arguments that information in that category warrants particular protection from disclosure because the risk of disclosure will make witnesses less willing to testify fully. It may be right that disclosure should be made, but the implications should be fully considered first. In all such cases, departmental legal advisers should be consulted.

*... including the prevention, investigation or detection of crime, or the apprehension or prosecution of offenders*

- 4.10 The White Paper on Open Government expressed the justification for this exemption as follows:

"There should be no commitment to disclose information which would help potential lawbreakers and criminals, put life, safety or the environment in danger, or prejudice the security of penal institutions. This means for example that information about addresses or other matters of interest to terrorists or information about the location of some rare species or habitats should not be disclosed. Investigation of suspected crime including fraud must normally be kept secret from the suspect and others. Witness statements, names and addresses of witnesses and reports from the police and others to prosecutors could, if disclosed other than as required by the courts, jeopardise law enforcement or the prevention or prosecution of crime, or be extremely unfair to a temporary suspect against whom (in the event) no real evidence existed. It is in the interests of both the individuals concerned and the integrity of the prosecution process that material relating to both live and completed prosecutions and to prosecutions which do not go ahead can be kept confidential." (Cm 2290, paragraph 3.12)

- 4.11 Information which might fall to be protected under this exemption could include:
- the existence, nature or details of plans or investigative techniques for tackling crime or fraud, where disclosure could assist suspects or criminals to counter lawful methods of crime prevention or detection;
  - information obtained or prepared in the course of such investigations;

- information whose disclosure could reasonably be expected to injure an enforcement process, although not obtained or prepared as part of that process;
- information obtained in confidence as part of an investigation, for example to determine the cause of an accident, but not to lay charges or assess blame for the purpose of civil remedy, where it is likely that disclosure could prejudice cooperation with such inquiries in future cases (see also Exemption 14);
- information which could be useful in an escape attempt from or disruption of a penal institution, police cells, court buildings or other place of detention;
- any information which could facilitate the commission of an offence - for example information on criminal methods or techniques;
- technical information relating to weapons or potential weapons, or to counter measures;

4.12 There should be a reasonable expectation that disclosure could undermine the effectiveness of law enforcement processes or facilitate the commission of an offence. This need not amount to a probability, but absurd or highly speculative claims should be avoided.

***(c) Information relating to legal proceedings or the proceedings of any tribunal, public inquiry or other formal investigation which have been completed or terminated, or relating to investigations which have or might have resulted in proceedings***

4.13 In the course of investigations, a large amount of information may be gathered and evaluated. Some of this will turn out to be unsubstantiated or irrelevant, and it may become apparent that there are no grounds for proceeding. Releasing information other than in court or as part of other appropriate proceedings could prejudice the effective operation of the body conducting operations, and cause unjustified harm to the subject of an investigation.

4.14 However, Exemption 4(c) should not be used to refuse information which is already in the public domain or otherwise freely publicly available, such as the names of parties in proceedings, outcome of completed proceedings, penalties imposed, etc.

***(d) Information covered by legal professional privilege***

4.15 The White Paper on Open Government commented on the justification for confidentiality of government legal advice as follows:

"The right of Government and public authorities to receive legal advice in confidence is usually protected in access legislation. There will be occasions when such advice can and will be published, but Government and public authorities would be significantly handicapped both in litigation and in their day-to-day conduct if they were unable to seek and obtain legal advice in confidence. The Right to Know Bill included an exemption in this area, but it was restricted to information recorded in connection with

pending or contemplated legal proceedings. The Government sees no justification for such a restriction." (Cm 2290, paragraph 3.11)

- 4.16 Legal advice may come from solicitors, barristers and legal advisers generally, whether they are within the department, or from the Treasury Solicitor's Department, the Office of the Parliamentary Counsel or another department, or from external practices or firms. If it is proposed to disclose legal advice, this should only be done with the express agreement of the legal adviser concerned.
- 4.17 The exemption may be applied whether or not litigation is involved or foreseen. It is particularly important where the disclosure of information could:
- circumvent the normal processes of discovery in cases presently before the courts;
  - prejudice the Government's legal position in present or future litigation or negotiations; or
  - impede the ability of government legal advisers to communicate fully and frankly with their clients.
- 4.18 Communications between a lawyer and a third party which come into existence after litigation for the purpose of collecting evidence or information in relation to that litigation is also privileged.

#### Law Officers' advice

- 4.19 There is a long established convention that neither the fact of consultation nor opinions or advice given by the Law Officers, either individually or collectively, may be disclosed outside government without their express approval. In a Written Answer on 20 February 1986 the then Attorney General said:

"... the established convention is that neither [the Law Officers] nor anybody else should be asked to disclose whether, and if so in what circumstances, they have given ... advice, let alone what such advice may have been."

- 4.20 Indirect references to the source of legal advice, such as "advice has been given at the very highest level" would also fall foul of the convention. If there is pressure to disclose the source or content of Law Officers' advice, or to confirm that the Law Officers have been consulted, the Legal Secretariat to the Law Officers or the Lord Advocate's Department, as the case may be, should be consulted.

(e) ***Information whose disclosure would harm public safety or public order or would prejudice the security of any building or penal institution***

- 4.21 This exemption is necessary to protect from disclosure information about the formulation and implementation of counter-terrorist policies, where disclosure would

assist those organisations against which the policies are directed. (See also paragraph 4.9)

4.22 Information which might fall to be protected under this exemption could include:

- information about facilities in which animal research is conducted; or
- information which might reveal points of vulnerability or potential vulnerability in particular buildings, structures or systems, or methods to protect the same from interference or attack; this might include for example floor plans of government buildings, or details of computer security systems.

*(f) Information whose disclosure could endanger the life or physical safety of any person, or identify the source of information or assistance given in confidence for law enforcement or security purposes*

4.23 Information withheld under this section might include any information which would assist terrorist or other hostile or criminal parties to locate or attack a target, for example the address (or in some cases the identity) of a witness. It would include information about persons giving information or assistance to the police.

*(g) Information whose disclosure would increase the likelihood of damage to the environment, or rare or endangered species and their habitats*

4.24 The need for this exemption arises where there is reason to believe that disclosure of information might lead to damage, whether malicious or inadvertent. The damage feared need not necessarily be criminal. Guidance notes on a related point in the Environmental Information Regulations, issued by the Department of the Environment, are as follows:

"Where the disclosure of information would, in the circumstances, increase the likelihood of damage to the environment, that information must be withheld. In some cases the dissemination of environmental information could in fact harm or pollute the environment. For example, information about nesting sites, rare habitats or endangered/protected species should be withheld to avoid the risk of damage. And information about possible Sites of Special Scientific Interest should not be made available until a formal notice is served; making information available prematurely could run the risk of preemptive damage being caused to the site before it was protected. Bodies will need to exercise careful judgement when restricting information in this way." (DoE Guidance on the implementation of the Environmental Information Regulations, SI 1992/3240)

## 5. Immigration and Nationality

***Information relating to immigration, nationality, consular and entry clearance cases. However, information will be provided, though not through access to personal records, where there is no risk that disclosure would prejudice the effective administration of immigration controls or other statutory provisions.***

- 5.1 The discussion of this exemption in the White Paper on Open Government is in the specific context of the proposal for a statutory right of access to personal records but similar considerations apply in the case of the Code of Practice:

"... The Government proposes to exempt records relating to immigration, nationality, consular work and entry clearance cases. These records frequently contain sensitive information provided in confidence by individuals and organisations. Section 44(2) of the British Nationality Act 1981 contains specific provision exempting the Secretary of State from having to give reasons for the granting or refusal of citizenship applications and [subject] access would undermine this statutory provision. In immigration cases where an application is refused and a right of appeal against that decision exists an explanatory statement is prepared setting out the reasons for the decision and submitted to the independent appellate authorities who may request any further information they require in order to determine the appeal. The explanatory statement is also given to the appellant. In those cases where there is no right of appeal, the Government provides full reasons for the refusal to the applicant. The Government believes that these procedures provide the most appropriate way for those whose immigration and entry clearance applications are refused to challenge the decision..." (Cm 2290, paragraph 5.16)

- 5.2 This exemption is not intended to restrict the provision of information from personal records where there is no risk to the effective administration of immigration or other statutory controls but, for the reasons set out in the previous paragraph, this will not be through direct access to those records.

### Jurisdiction of the Ombudsman

- 5.3 It should be noted that Schedule 3 (Matters not subject to investigation) of the Parliamentary Commissioner Act 1967 (as amended) includes the following at paragraph 2:

"Action taken, in any country or territory outside the United Kingdom, by or on behalf of any officer representing or acting under the authority of Her Majesty in respect of the United Kingdom, or any other officer of the Government of the United Kingdom other than action which is taken by an officer (not being an honorary consular officer) in the exercise of a consular function on behalf of the government of the United Kingdom."

6. Effective management of the economy and collection of tax

- (a) *Information whose disclosure would harm the ability of the Government to manage the economy, prejudice the conduct of official market operations, or could lead to improper gain or advantage.*
- (b) *Information whose disclosure would prejudice the assessment or collection of tax, duties or National Insurance contributions, or assist tax avoidance or evasion.*
- (a) *Information whose disclosure would harm the ability of the Government to manage the economy, prejudice the conduct of official market operations, or could lead to improper gain or advantage*

6.1 Disclosure of information about some types of proposals, or even the admission that certain possibilities are being considered, can lead to speculation, disturbance of the markets and even improper gain. It will therefore be necessary to consider the harm test set out in the exemption before releasing information regarding such matters as:

- the currency, coinage or legal tender of the United Kingdom;
- proposals for expenditure;
- a contemplated change in the rate of bank interest or in Government borrowing;
- a contemplated change in tariff rates, taxes, duties or any other revenue services;
- a contemplated change in the conditions of operation of financial institutions;
- a contemplated sale or acquisition of land or property; or
- a contemplated sale or purchase of securities or of foreign or United Kingdom currency.

6.2 The above is not an exhaustive list and is intended only to provide examples of the type of information which might be covered. HM Treasury should be consulted in cases of doubt.

6.3 It is possible that Exemptions 2 and 10 (relating to internal discussion and advice, and prematurity in relation to publication) will also be relevant to information protected here.

**(b) *Information whose disclosure would prejudice the assessment or collection of taxes, duties or National Insurance contributions, or assist tax avoidance or evasion***

6.4 Most information about the tax system can be made available to the public. However, exploitation of the tax system through determined avoidance or evasion can rapidly cost the Exchequer very large sums. The UK's revenue compliance operates on the basis that a small proportion of the information about the working of the system is kept confidential. The White Paper on Open Government made it clear that the Code would not require this information to be released.

6.5 Where disclosure could lead to a loss of tax, duties or National Insurance contributions, this exemption protects information about matters such as:

- loopholes and weaknesses in the system;
- departments' sources of information and investigation procedures; or
- ways of escaping or delaying enforcement action.

Further advice

6.6 In cases of doubt departments should consult:

- Her Majesty's Treasury on part (a) of this exemption;
- Inland Revenue on direct tax matters (income tax, corporation tax, capital gains tax etc.);
- Customs and Excise on indirect tax matters (VAT, excise duties, etc.); and
- the Department of Social Security on National Insurance contributions.

6.7 This exemption applies to factual information as well as to policies and plans.

## 7. *Effective management and operations of the public service*

- (a) ***Information whose disclosure could lead to improper gain or advantage or would prejudice:***
- ***the competitive position of a department or other public body or authority;***
  - ***negotiations or the effective conduct of personnel management, or commercial or contractual activities;***
  - ***the awarding of discretionary grants.***
- (b) ***Information whose disclosure would harm the proper and efficient conduct of the operations of a department or other public body or authority, including NHS organisations, or of any regulatory body.***

### ***Improper gain or advantage***

- 7.1 The exemption is intended to cover information about proposals for grant schemes or other payments or proposed tax, duty or other changes, where advance knowledge could unfairly advantage the applicant. The prematurity exemption might also be used in these instances. In cases where there would be a general public interest in information being released, departments may wish to consider issuing it generally rather than only to the individual who makes the request.
- 7.2 Examples would include much market sensitive information, including announcements which, if they become known in advance, may assist speculation. Government plans for the acquisition of land (other than by compulsory purchase) could fall within this exemption if advance knowledge might encourage speculation or raise prices.

### ***Competitive position***

- 7.3 Where a public body is involved in commercial or trading activities, information may be withheld which would damage the body's competitive position. But the need for commercial confidentiality should be assessed stringently, and balanced against the general presumption of openness when public money is at stake. Transparency as to costs and performance specifications is an important objective of the Government's public service reforms. It serves to expose the costs of particular functions and services so that value for money can be assessed, to promote improvements in management, to keep the risk of fraud and corruption to a minimum, and to enhance accountability. Internal markets and market testing should not lead to false commercial confidentiality requirements. Nor should confidentiality be used to restrict the spread within the public sector of improved methods or applications, even though these may give an initial comparative advantage to the unit which has developed them.

### *Negotiations*

- 7.4 Information which is relevant to negotiations for example internally agreed limits for payments can be withheld if disclosure would prejudice the position of the department, or undermine effective management or dealing with contractors.

### *Effective conduct of personnel management*

- 7.5 Schedule 3, paragraph 10 of the PCA Act 1967 excludes from the Ombudsman's jurisdiction:

"Action taken in respect of appointments or removals, pay, discipline, superannuation or other personnel matters ..."

- 7.6 The management and assessment of personnel may entail holding information which should not be released. The test should be whether disclosure would prejudice effectiveness and efficiency, or breach proper undertakings of confidentiality.

### *Commercial or contractual activities*

- 7.7 Schedule 3, paragraph 9 of the Parliamentary Commissioner Act 1967 excludes from the Ombudsman's jurisdiction action taken in matters relating to contractual or other commercial transactions, except where transactions relate to land purchased compulsorily or in circumstances in which it could have been purchased compulsorily, or the subsequent disposal of such land.

- 7.8 Part IV gives further guidance on the Code's application to the contractual process and contracted functions.

### *Discretionary grants*

- 7.9 The exemption relating to discretionary grants is available where departments can show that disclosure of information would prejudice the successful operation of the grant scheme, and undermine its operation or purpose.

### *Information whose disclosure would harm the proper and efficient conduct of the operations of a department or other public body or authority, including NHS organisations, or of any regulatory body*

- 7.10 This exemption is intended to prevent the disclosure of information where disclosure would be damaging to the work of the department concerned.

- 7.11 The exemption could, for example, be used to protect information relating to the conduct of tests, examinations or audits conducted by a department, where disclosure of the methods used might prejudice the effectiveness of the tests or the attainment of their objectives.

- 7.12 The protection given by the exemption need not be limited to those cases where disclosure would adversely affect the conduct of a particular review, or prejudice the

supply of information in one particular case. It would be sufficient to show that the disclosure of information relating to, or gained in the course of, a particular review would make it more difficult to obtain similar information or conduct other reviews in the future, or that disclosure might have a negative effect on the ability of other departments to conduct similar operations.

8. Public employment public appointments and honours

- (a) *Personnel records (relating to public appointments as well as employees of public authorities) including those relating to recruitment, promotion and security vetting.*
- (b) *Information, opinions and assessments given in confidence in relation to public employment and public appointments made by Ministers of the Crown, by the Crown on the advice of Ministers or by statutory office holders.*
- (c) *Information, opinions and assessments given in relation to recommendations for honours.*

**Personnel Records**

8.1 As with the proposed statutory right of access to personal records (see Cm 2290, Chapter 5) the Code of Practice draws a distinction between Government information which may be of interest to groups and individuals as members of the public, and Government information relating to the different relationship between public sector employees and their employers.

8.2 "Employees" in this context includes members of the Armed Services.

8.3 Information held by departments in their capacity as employers is exempt. There is no specific harm test to be applied other than the general caveat to all the Code exemptions that they will not be interpreted in a way which causes injustice.

8.4 This links in with the restriction on the jurisdiction of the Ombudsman in the Parliamentary Commissioner Act 1967 Schedule 3 (Matters not subject to investigation). Paragraph 10 of this Schedule (as amended) excludes investigation into:

"(1) Action taken in respect of appointments or removals, pay, discipline, superannuation or other personnel matters, in relation to:-

(a) service in any of the armed forces of the Crown, including reserve and auxiliary and cadet forces;

(b) service in any office or employment under the Crown or under any authority to which this Act applies; or

(c) service in any office or employment, or under any contract for services, in respect of which power to take action, or to determine or approve the action to be taken, in such matters is vested in Her Majesty, any Minister of the Crown or any such authority as aforesaid.

(2) Subparagraph (1)(c) above shall not apply to any action (not otherwise excluded from investigation by this Schedule) which is taken by the Secretary of State in connection with:-

(a) the provision of information relating to the terms and conditions of any employment covered by an agreement entered into by him under section 12(1) of the Overseas Development and Co-operation Act 1980 or

(b) the provision of any allowance, grant or supplement or any benefit (other than those relating or superannuation) arising from the designation of any person in accordance with such an agreement."

8.5 Although personnel records are exempt under the terms of the Code, this does not in any way exclude good management practices such as the disclosure of annual performance reports to staff and openness and transparency in the processes of recruitment and promotion.

8.6 Nor does the exemption exclude access being made available to third parties in exceptional circumstances where the balance of the public interest or natural justice requires it. Examples would include:

- access to information with implications for health and safety;
- access to accident reports, and in particular access by next of kin to reports of fatal accidents. (The MoD's policy on the release of Service Board of Inquiry reports to next of kin was set out in a Parliamentary Answer from Viscount Cranborne of 8 December 1992, as follows:

"Service board of inquiry reports are internal documents relating to inquiries held in private. Their content is often technical and complex, and is likely to include specific description of the conduct of named service personnel in the incident under investigation including that of the deceased where a board of inquiry investigates a fatal accident. In view of our obligations to the deceased and to their families it would not be appropriate to make such documents widely available. We do however recognise the special position of next of kin and in future there will be a general presumption that subject to the essential minimum of security requirements, such reports will be made available to them wherever possible, should they so request. This change of practice is in line with the Government's general policy towards greater openness. It also reflects our genuine concern to ensure that next of kin are treated in as sympathetic and helpful a manner as possible.");

- provision of information or documents as appropriate in connection with court or tribunal proceedings (or in connection with formal proceedings which could lead to a court or tribunal case); and
- provision of information, usually in anonymised or statistical form, for the purposes of monitoring or reviewing non-discrimination policies or statutes.

***Information, opinions and assessments ... in relation to public appointments etc.***

8.7 The exemption applies not only to personnel information where the relationship is between employer and employee, but also in respect of individuals holding, or being considered for, other appointments for which Ministers or public bodies are responsible.

8.8 These include:

- Non Departmental Public Bodies (NDPBs), including Tribunals;
- certain National Health Service Bodies, including District Health Authorities and National Health Service Trusts;
- nationalised industries and certain public corporations; and
- judicial appointments and appointment of Queen's Counsel.

***Information, opinions and assessments given in relation to recommendations for honours***

8.9 The purpose of this exemption is to ensure that recommendations, opinions and assessments of individuals for the award of an honour can be made with frankness and candour, and in the knowledge that honest opinions will not become available to the person commented on. It is a necessary condition for the effective operation of the honours system that recommendations made in confidence, and the confidential expert opinions sought in the selection process, should not be seen by the subject.

8.10 Honours are neither a right nor an entitlement. It follows that arguments for access (more particularly, subject access) based on the premise that incorrect or incomplete information might affect the individual's rights, do not apply in this context. This is not to say, of course, that there are not careful checks and balances within the honours system to ensure that factual information is correct, and that a proper balance of opinion is sought.

8.11 There is no public interest argument for disclosure in this area; and confidentiality can indeed be seen as being in individuals' best interests. Nominees are generally not aware that they are being considered for an honour, nor have they given their consent to be considered. Of necessity, many nominations fail and in the great majority of cases this in no way reflects on the quality of the individual's contribution. A clear rule of confidentiality for all honours under consideration avoids problems of individual expectations being disappointed or of public perceptions of failure.

8.12 This exemption links in with the restriction on the jurisdiction of the Ombudsman in the Parliamentary Commissioner Act 1967 Schedule 3 (Matters not subject to investigation). Paragraph 11 of this Schedule excludes investigation into:

"11. The grant of honours, awards or privileges within the gift of the Crown, including Royal Charters."

9. *Voluminous or vexatious requests*

***Requests for information which are vexatious or manifestly unreasonable or are formulated in too general a manner, or which (because of the amount of information to be processed or the need to retrieve information from files not in current use) would require unreasonable diversion of resources.***

- 9.1 There are two strands to this exemption, the first relates to the amount of information sought in an application, and the second to difficulties in identifying, locating or collating the information requested. In each case, the test is whether these factors would mean that meeting an access request would require an unreasonable diversion of resources or otherwise undermine the work of the department (because files are kept out of circulation for extended periods, for example, or staff have to be diverted for a considerable amount of time from other more urgent work).
- 9.2 There is no automatic link to the disproportionate cost threshold, at present ,450, above which answers to written Parliamentary questions need not be given. If a charge is made, the cost to the department of dealing with a request is not the prime consideration. (See also paragraph 78 above.)
- 9.3 Even where an applicant covered in full the costs of dealing with a voluminous application, it might still be reasonable to reject it on the grounds that the opportunity cost of responding, in terms of diversion of staff resources from other work, was unreasonable. The same consideration might apply where repeated requests were made by the same person, which in total amounted to an unreasonable diversion of resources.
- 9.4 Manifestly unreasonable requests would include those which are framed in such a way as to request access to a very large volume of information or so generally as to make it difficult to identify the information sought.
- 9.5 Where a request is framed in very general terms because an applicant is unsure of what information is held and where, departments should attempt to help the applicant to focus their request more narrowly on the specific information which they require.
- 9.6 It may on occasion be necessary to refuse access where the information requested is difficult to identify or to locate. This may be because finding it would require extensive searches in historic files, or because the information is physically not easily accessible, or because it would require a significant amount of processing before it could be released. However, this exemption is not meant to apply where the difficulties are caused by the department's errors in record keeping.
- 9.7 A related problem arises when an unreasonable degree of effort would be required to collate the information requested. Departments are not required to carry out what would amount to research work on the applicants' behalf. In some cases departments will be able to give access to raw research data if this can be done without risk of exposing exempt material.

### 10. Publication and Prematurity in relation to a Planned or Potential Announcement or Publication

***Information which is or will soon be published, or whose disclosure, where the material relates to a planned or potential announcement or publication, could cause harm (for example of a physical or financial nature).***

- 10.1 The Code of Practice commits the Government to provide more information on its own account, without waiting for access requests. The general purpose of this exemption is to avoid damaging the existing mechanisms for providing information, which are often the most cost-effective way of meeting a regular demand for particular types of information. It also recognises that premature release of information can cause harm, for example by creating unnecessary planning blight.

#### ***Information which is ... published***

- 10.2 The exemption can be applied when information requested is available:
- on payment of a fee or other charge, on any statutory public register or otherwise;
  - in records open for inspection at the Public Records Office, Scottish Record Office or any national or local museum or library; or
  - in a document normally available for purchase from a Government department or agency.
- 10.3 If an applicant's information request can be answered by reference to an existing publication, the response need only be to refer the applicant to it, with full details of title, price and availability. If a particular query can be answered by reference to a few pages of a published document, and the holder of the copyright is the Crown, departments may provide photocopies of those pages. (See also paragraphs 92 to 95.)

#### ***Information which ... will soon be published***

- 10.4 Information which is soon to be published need not be provided under the Code of Practice. The applicant should be informed of the position, and given an indication of the expected publication date. Pointers supporting the use of the exemption would be a planned publication date and evidence that release of certain information before that date would damage the impact of the planned publication and would not therefore be in the public interest. How far ahead a publication is planned should not be decisive.

***Information whose disclosure where the material relates to a planned or potential announcement or publication, could cause harm (for example of a physical or financial nature).***

- 10.5 This exemption allows departments to withhold information in certain circumstances subject to a harm test (see paragraph 0.3).

**- a planned announcement**

- 10.6 This exemption allows departments to withhold certain information on the grounds that it is shortly to be announced. When responding to an information request, departments need not give full details of the nature or timing of the planned announcement if to do so would diminish its impact, or would not be appropriate because of market sensitivity or other factors which would make disclosure of timing undesirable.

**- a planned publication**

- 10.7 Similar considerations apply in the case of publications. The information in this case need not be prepared in order to form part of the planned publication. It could, however, be information which might be issued alongside the proposed publication, information which would reveal the content or nature of the publication or whose disclosure would otherwise be premature in relation to the publication.

**- a potential announcement or publication**

- 10.8 Some processes are liable to lead to an announcement or publication in due course, but there may be no announcement or publication planned at present. This may happen where a process - such as a planning process - is necessarily protracted. Until a certain amount of work has been completed it may not be clear that there is any proposal to be taken forward. Within the planning context in particular there is a risk that disclosure of information could lead to speculation causing unnecessary planning blight.

**- harm (for example, of a physical or financial nature)**

- 10.9 The physical, financial or other harm which might be caused by disclosure of a planned or potential announcement should be weighed carefully against the public interest in releasing the information when requested. In particular there is a risk of physical or financial harm occurring when responding to requests for information whose disclosure could cause unnecessary planning blight. This may be the case, for example, for information detailing proposed transport routes under consideration but not yet decided upon.
- 10.10 Care should also be taken not to release information which through its prematurity might harm an announcement or publication which is shortly to take place, for example by diminishing its impact or for reasons of market sensitivity (see paragraphs 10.6 and 10.7).

**Relationship to the Environmental Information Regulations**

- 10.11 With regard to planning information it may be that in some instances the Environmental Information Regulations apply. In all such cases requests should be considered in the light of the Regulations, given their statutory status, rather than the Code.

## 11. Research statistics and analysis

- (a) ***Information relating to incomplete analysis, research or statistics, where disclosure could be misleading or deprive the holder of priority of publication or commercial value.***
- (b) ***Information held only for preparing statistics or carrying out research, or for surveillance for health and safety purposes (including food safety), and which relates to individuals, companies or products which will not be identified in reports of that research or in published statistics.***

- 11.1 In general, analysis, research information and statistics should be available under the Code. Indeed, such information will often be volunteered with major policy announcements.
- 11.2 These exemptions, however, recognise the difficulties of releasing incomplete information, particularly when it could give a misleading impression. They also recognise that some information, though gathered in the course of research, should not be released at all, because it might reveal facts about individuals, companies or products which could be interpreted as being damaging to them.

### ***Information relating to incomplete analysis, research or statistics***

- 11.3 Departments may withhold information relating to incomplete analysis, research or statistics, but only where incompleteness could produce a misleading impression (see below).

#### ***... where disclosure could be misleading***

- 11.4 Departments may withhold information which could be misleading for reasons which could include the following:
- the information would give a one-sided version of the case (for example the results of tests on one product might give a misleading impression where other similar products had not also been tested); or
  - because the research had been carried out in an unconventional way. For example, unexpected results of a survey might have revealed flaws in the questions used or the sample interviewed.
- 11.5 Departments may, however, release information of this type on a discretionary basis where it is possible for the information to be accompanied by an explanatory statement explaining in what ways it is defective.
- 11.6 Departments need not do this if they consider that even with an explanatory statement, the information could still be misinterpreted in a way which would be against the public interest.

11.7 It is reasonable that access to the documents and data should await the completion of the study or report so that analysis and interpretation can proceed unhindered. (Exemption 9 on diversion of resources may also be relevant.) If a study is aborted, interim reports and completed data sets should be releasable.

11.8 There is a relevant passage in the DoE Guidance on the Environmental Information Regulations:

"The test as to what constitutes a completed data set is problematic. If a study depends on a scientifically selected sample of cases, then the data set is not complete until a satisfactory level of responses has been achieved. The satisfactory level of response will normally have been specified as part of the study requirement, or is the level at which data collection is closed down on grounds of cost or practicality. If a study depends on making a series of tests until a hypothesis is accepted or rejected, so that the number of items tested cannot be specified in advance, then the data set is completed once sufficient items have been tested to confirm or reject the hypothesis. In the case of a longitudinal survey, each individual stage of the survey should normally be regarded as released at the end of each stage. Data which are part of regular routine monitoring should not be regarded as part of an unfinished set but should normally be released as soon as practicable after it is collected, or according to a planned and published timetable. For example, if readings are taken on an hourly or daily basis, it might be reasonable to release them at least once a month." (DoE Guidance on the implementation of the Environmental Information Regulations, SI 1992/3240, paragraph 54)

***... where disclosure could ... deprive the holder of priority of publication***

11.9 The concept of priority of publication is intended to protect:

- information due to be published by a public body, where the body wishes to retain copyright; and
- information to be published which is the result of scientific, technical or other research, where importance would be attached to the particular individual or institution publishing it first.

***... where disclosure could ... deprive the holder ... of commercial value***

11.10 This exemption is related to Exemption 7, and is designed to protect information held by public bodies which act in a commercial manner and where revealing the information would damage the body's commercial position. This more narrow exemption should only be invoked when disclosure would affect a planned use of the information at issue for commercial gain. For example, gaining access to a public body's research work could prejudice a plan to sell the information to customers or to use it in a consultancy capacity.

11.11 Information which it is planned to publish directly and where the risk is of "prior publication" should be protected under that part of the exemption.

***Information held only for preparing statistics or carrying out research, or for surveillance for health and safety purposes (including food safety), and which relates to individuals, companies or products which will not be identified in reports of that research or in published statistics.***

- 11.12 This part of the exemption does not depend on the information being incomplete or misleading. It is designed to protect information which is collected for the purposes of a report or study, but which would not be released in its raw form.
- 11.13 One example of this type would be information collected for the Census. This would, however, also be exempt as personal information (Exemption 12) and because there is a statutory prohibition on disclosure (Exemption 15). The exemption is designed to ensure the continuance of government surveys of products (including food, or services) where disclosure of the information gathered in the course of completing them might reveal sensitive commercial or personal information. The argument is that it is in the public interest to collect this information, which may be used in anonymised form to inform policy making or in reports for the public, and nothing should be done which might put at risk the willingness of those surveyed to take part.
- 11.14 It may sometimes be appropriate for the Government to choose to identify particular individuals, companies or products in a final report, or where surveillance leads to public health warnings or action. These decisions, however, need to be taken on their own merits and such specific information should not be released in response to a Code request without very careful consideration.

## 12. Privacy of an individual

***Unwarranted disclosure to a third party of personal information about any person (including a deceased person) or any other disclosure which would constitute or could facilitate an unwarranted invasion of privacy.***

- 12.1 This exemption relates to individual privacy. While this may extend to information about whether an individual does or does not belong to a particular group, it is separate from considerations of confidentiality (commercial or otherwise) of firms, institutions and organisations.
- 12.2 Information may be provided where the subject of the information has given consent to its disclosure.

### **Information about the deceased**

- 12.3 The extent to which disclosure of personal information about the deceased would count as a breach of privacy will naturally diminish with time. This can only be judged on a case by case basis depending on the nature of the information, but subject to the need for care where a statutory guarantee of confidentiality applies, as for example the 100 year rule relating to the confidentiality of Census returns.

### Subject access

- 12.4 The exemption does not apply where the person seeking access is the sole subject of the information (but insofar as it relates to subject access, the exemption should read in conjunction with paragraph 9 of Part I of the Code about the relationship with statutory access rights).
- 12.5 There are exceptional circumstances where personal information should not be disclosed even to the subject but these are covered by other exemptions, for example Exemptions 4 and 14(c).
- 12.6 Under the protective marking system, originators of documents may use the marking NOT FOR DISCLOSURE where they consider that the information in question should not be made available to the subject, although the presence or absence of such a marking should not be treated as definitive and decisions about disclosure should be taken on a case by case basis, the marking may be a useful guide as to whether there are sensitivities concerning subject access to the material in question.

### Definitions of "privacy" and "personal information"

- 12.7 Although the exemption is simple to state, it contains a number of terms which are notoriously difficult to define. The concept of "privacy" does not have a statutory definition as such in English or Scots law. There is nonetheless (or perhaps because of this) a substantial literature on the subject and many attempts at definition.

- 12.8 Although it does not attempt a definition, the concept of privacy is enshrined as a right in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Article 8 states:
- "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
  2. There shall be no interference by a public authority with the exercise of this right except as such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, or for the protection of the rights and freedoms of others."
- 12.9 The Calcutt Committee Report on Press Freedom and Privacy (Cmnd 1102, June 1990), like a number of Committees before it, concluded that "nowhere have we found a wholly satisfactory definition of privacy". Calcutt did not, however see this as an insurmountable problem to defining a statutory tort of infringement of privacy (if that were thought desirable) and concluded, again as have other Committees looking into the subject, that there was nonetheless an area of private matters about which at any given time there would be a large measure of agreement.
- 12.10 The concept of privacy is also discussed in some detail in the Consultation Paper "Infringement of Privacy" published jointly by the Lord Chancellor's Department and the Scottish Office in July 1993. The main purpose of this document is to discuss, and invite comment on, the possible introduction of a statutory civil remedy for infringement of privacy (in the context of press freedom, but also more widely). Much of the discussion is equally relevant, however, to the operation of this exemption under the Code of Practice. See also the Government's response (Cm 2918) to the National Heritage Select Committee report on Privacy and Media Intrusion. Responses to the 1993 consultation exercise were included in the Government's response.
- 12.11 While it may be difficult to provide a satisfactory definition of privacy or of personal information, the following list provides a guide to those areas that would normally be considered as "personal information". The list is intended to be illustrative rather than exhaustive.
- 12.12 It is important to note that this list gives an indication of what counts as personal information. It does not follow that providing such information to a third party would necessarily constitute a substantive invasion of privacy. It would normally be accepted that to give someone's age, for example, would not be an invasion of privacy to anything like the same degree as would, for example, providing details of their financial affairs.
- 12.13 Personal information, disclosure of which to a third party may be an invasion of privacy includes:
- (a) the age, address or marital status of the individual;
  - (b) information relating to the national, ethnic origin or religion of the individual;

- (c) information relating to the sexual preferences, life-style and activities or personal relationships of the individual;
- (d) information relating to the education or employment history of the individual;
- (e) information relating to an individual's financial affairs;
- (f) information relating to an individual's criminal record (but see also the White Paper, Cm 3308, *On the Record: The Government's Proposals for Access to Criminal Records for Employment and Related purposes in England and Wales* and the exemptions detailed in the following Scottish Office Circulars - Police (cc) Circular No 4/1989; SEC Circular 5/1989; NHS Circular 1989 (GEN)22; and SWSG Circular SW9/1989);
- (g) information relating to the health or medical history of the individual;
- (h) personal physical data such as fingerprints, blood type or genetic information;
- (i) correspondence from the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence;
- (j) the personal opinions or views of the individual; and
- (k) the views or opinions of another individual about the individual.

#### Factors to be considered

12.14 In operating this exemption, there are a number of factors to be considered and a number of individual judgements to be made:

- (a) does the information in question amount to personal information that would normally, or in the particular circumstances of the case, be regarded as "private"?
- (b) was the information provided to Government on the understanding, explicit or implicit, that it would be kept confidential?
- (c) are there, nonetheless, public interest arguments which could be taken as overriding considerations of privacy?
- (d) if so, who is best placed to decide where the balance of public interest lies and, in particular, what weight should be placed on the views of the subject of the personal information?
- (e) should the motives (e.g. possible financial gain) of any third party seeking the personal information be taken into account, or should these be discounted?

- (a) "Private" information

12.15 The exemption relates to any information held by departments concerning the personal affairs of an individual whether that information was obtained from the subject or from any other source.

12.16 It only applies to information which identifies an individual or can readily be associated with a particular individual. The exemption does not apply to information which is kept in statistical or other anonymous form.

(b) Assumptions of confidentiality

12.17 The exemption relates not only to information which was provided on an explicit condition of confidentiality, but also to information provided in circumstances where there was a reasonable expectation or assumption of confidentiality.

(c) Overriding public interest arguments

12.18 Article 8 of the ECHR (see paragraph 12.8 above) allows the possibility of certain considerations of national or public interest to override considerations of privacy.

12.19 Careful consideration will obviously be needed before the public interest override is brought into play where personal privacy is at stake. Legal advice should be sought where there is any doubt about the legal implications of providing access to the information in question.

(d) Consultation with the subject of the information

12.20 There is no requirement as such under the Code of Practice for the subject of the information to be consulted before a decision on disclosure is made.

12.21 In many cases, however, it will sensible and fair to do this where it is practicable, particularly in borderline cases:

- if the subject gives consent, and no other exemptions come into play, then there should be no bar to releasing the information;
- if, on the other hand, the subject objects to the release of the information, this need not necessarily be conclusive if other public interest arguments out-weigh the subjects wishes.

(e) Applicants' motives in seeking information

12.22 These should generally be discounted, unless there is any reason to believe that disclosure could lead to a possible threat to the safety of the subject (see note on Exemption 4). The criterion should be the nature of the information and whether its disclosure would amount to an unwarranted invasion of privacy.

- 12.23 That is not to say however, that information is often regarded as private information precisely because of the uses to which third parties could put it. An individual's personal financial circumstances, for example, could come within this category. The test is not so much whether the third party gains a benefit, but whether the subject would suffer disadvantage from the information being disclosed.

### 13. Third Party's Commercial Confidences

***Information including commercial confidences, trade secrets or intellectual property whose unwarranted disclosure would harm the competitive position of a third party.***

- 13.1 This exemption applies to third parties' confidences. Guidance on the commercial interests of government comes under Exemption 7 above; prejudice to the future supply of information comes under Exemption 14.
- 13.2 Particular care is needed in the treatment of commercially confidential information because the Code does not set aside statutory and other restrictions on disclosure. Departments will need to ensure that disclosure would not be an offence, and would not found an action for breach of confidence. Applications for information covered under the Environmental Information Regulations should be assessed according to the requirements of those regulations. The Government intends, in due course and subject to Parliamentary approval, to introduce a similar statutory framework for access to health and safety information.
- 13.3 This exemption concerns the need to protect sensitive commercial information from disclosure which would adversely affect those to whom the information relates (see paragraphs 3.28 to 3.31, Cm 2290). This applies regardless of whether the information was provided under a statutory obligation or voluntarily. Companies will need to be confident that the Government will apply its general commitment to openness in a way which does not damage their legitimate interests or undermine the trust they have placed in Government.

#### Tests of confidentiality

- 13.4 The scope of this exemption is defined in terms of the effect of disclosure. The shortest way of expressing the intention is to ask "would this information be useful to a competitor, and otherwise unobtainable by them?" Three questions are relevant:
- (a) Is this information of the relevant type, i.e. a trade secret, a commercial confidence or intellectual property? and
  - (b) Would its disclosure be likely to harm the competitive position of the subject or source of the information?
  - (c) If not, would its disclosure be likely to prejudice the future supply of information to the Government organisation in question? In this case, see the discussion under exemption 14 (Information given in confidence).

If the answer to both (a) and (b) is yes, disclosure will normally be unwarranted, unless the answer to the following question is also affirmative:

- (d) Might there nonetheless be an overriding public interest in disclosure?

## Definitions

13.5 The following broad definitions may be useful. Legal advice may be needed in difficult cases.

### *Trade secrets*

13.6 Trade secrets include information (including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism) which:

- (i) is or may be used in a trade or business;
- (ii) is not generally known in that trade or business;
- (iii) has economic value from not being generally known; and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>5</sup>

### *Commercial confidences*

13.7 This category goes wider than trade secrets since the information does not need to be capable of industrial or commercial application or use. It applies regardless of whether or not information was provided to Government pursuant to a statutory obligation or on a voluntary basis.

13.8 There are two basic types of commercial information:

- information which has an intrinsic commercial value where that value depends upon the ability of the person to whom the information relates to maintain its confidentiality; and
- information which might not have intrinsic commercial value but whose disclosure might unreasonably disadvantage the person to whom it relates in the conduct of their lawful business, commercial, financial or professional affairs.

13.9 The essential criteria for the first category are that the information is both commercial (including financial, scientific and technical information), and confidential (i.e. it has been consistently treated as such by the provider). The following considerations apply:

- the information is of value to its original possessor;
- it was entrusted to the Government in circumstances which made its confidentiality clear, whether be express or implied understanding; and

---

<sup>5</sup> This definition is based on one used by the Ontario Information Commissioner, based on the Trade Secret Protection Act, Alberta 1986.

- so far as the department is aware, the information must be treated consistently in a confidential manner by the third party.
- 13.10 The sort of information which has been withheld overseas in this category includes information on proposed projects, tenders, details of an organisation's decision-making processes, its cost structures, and its development plans.
- 13.11 The second category identified in paragraph 13.6 above is information which is not intrinsically of commercial value, but whose disclosure might disadvantage the person or organisation to which it relates in the conduct of their business, commercial or financial affairs, or, in the case of a person practising a profession, in respect of his professional affairs.

### *Intellectual Property*

- 13.12 In disclosing whether disclosure of information would harm the competitive position of a third party, it should also be borne in mind that disclosure of an invention before an application for a patent has been filed may prevent the owner obtaining a patent. Similarly, premature disclosure of a design may prevent it being registered. The copyright implications of disclosing information are dealt with in paragraph 94 above.

### Public Interest override

- 13.13 In accordance with the preamble to the exemptions, and where no statutory restriction or legal obligation prevents disclosure, the exemption may be set aside where there is a clear public interest in making information available which outweighs considerations of commercial confidentiality.
- 13.14 For example, while the public interest will rarely justify disclosure of a trade secret, there will be circumstances where commercial sensitivity is not a sufficient justification for non-disclosure. Where disclosure is necessary or conducive to the protection of public health, public safety or the environment, such considerations may clearly outweigh financial loss or prejudice to the competitive position of a third party.
- 13.15 The third party whose interests may be adversely affected should normally be consulted in advance of such disclosure, although this may not be practicable where a public health or other warning must be issued as a matter of urgency. Disclosure without consent will usually be appropriate only where the risk to public health, public safety or the environment is substantial and specific, and the public interest in disclosure clearly overrides the interest in preserving confidentiality.
- 13.16 A decision to refuse requested information may be made without consultation with the supplier of information where the case for confidentiality is obvious and overwhelming.
- 13.17 Where a request is received for information which includes commercial material provided by a third party, and there is a case in favour of disclosure, the following steps should be considered:

- if the information was received via another department or agency, they should be contacted for initial advice;
- the information provider should be informed of the request and told what information the department or agency is minded to release in response, unless:
  - it is obvious that the information provider would not need or want to be consulted;
  - it is not reasonable, practicable or possible to consult them (e.g. they have gone out of business or cannot be traced); or
  - there is an overwhelming and urgent public interest which overrides the obligation to consult (e.g. a public health emergency).

13.18 It will not normally be appropriate to disclose who is making the request for information. The identity of requesters is not a relevant consideration in requests under the Code, and decisions on what to release are in any case made as if the information was to be released to a competitor. A commercial competitor may in any case be likely to make a request through an intermediary.

13.19 Businesses which are consulted about a proposed release will obviously need to be given a reasonable amount of time to consider their response. This will largely be dependent on the size of the request. We suggest that in most cases, businesses should be asked to respond within 20 working days, but this may need to be extended in the case of complex requests.

13.20 The applicant for information should normally be informed that the company concerned is being consulted and told roughly how long this is likely to add to the normal time for responding to a request (20 working days).

#### Giving reasons for refusal

13.21 On rare occasions prejudice to commercial confidentiality could arise from confirming that information relevant to a request existed. In these cases, responses to requests may say that if the information sought were held, it would be exempt under the Code. The justification for non-disclosure, specifying the harm or risk of harm arising from disclosure, will nevertheless need to be explained to the Ombudsman in the event of a complaint.

14. Information given in Confidence

- (a) **Information held in consequence of having been supplied in confidence by a person who:**
- ***gave the information under a statutory guarantee that its confidentiality would be protected; or***
  - ***was not under any legal obligation, whether actual or implied, to supply it, and has not consented to its disclosure.***
- (b) **Information whose disclosure without the consent of the supplier would prejudice the future supply of such information.**
- (c) **Medical information provided in confidence if disclosure to the subject would harm their physical or mental health, or should only be made by a medical practitioner.**

14.1 Many government organisations are in possession of information which has been given to them by members of the public - whether individuals, companies or organisations - in the expectation that the information so supplied will be kept confidential. Much of this will be personal information or commercially sensitive material, in which case the relevant exemptions will apply (see Exemptions 12 and 13 respectively).

14.2 There may, however, be other circumstances where an obligation of confidentiality exists. For example, a funding body considering the merits of an application for a research grant might seek the views of outside experts, who would normally only oblige on the understanding that their views are kept confidential. It is no less important in these cases that the public can have confidence that the Government will apply its general commitment to openness in a way which does not damage their legitimate interests or undermine the trust they have placed in Government.

14.3 References to information are intended to be read as including references to the giving of opinion or advice.

Information supplied in accordance with statute

14.4 The most straightforward cases are those where the information is supplied under the provisions of a statute which guarantees that it will be kept confidential. Unless the supplier consents, the material must be exempted from disclosure.

Information supplied voluntarily

14.5 This part of the exemption applies to information which could only have been volunteered, not cases where information was disclosed without formal compulsion but on the implied understanding that a power to compel could have been invoked if necessary. In the latter case, the rules on disclosure are set by the legislation which could have been invoked.

- 14.6 Since the Government has no powers to compel the supply of volunteered information,<sup>6</sup> such information is in effect the private property of the supplier. Where it has been supplied in confidence, it will therefore not be proper to disclose it without permission. This is aside from any harm or embarrassment that may be caused to the supplier by the disclosure. Breach of confidence is also a tort or delict in English and Scottish law respectively.
- 14.7 For information to have been supplied in confidence, it must be understood on both sides that the information is being supplied and received on the understanding that it will be kept confidential. It is therefore not enough for a supplier of information to ask that it be kept confidential if the recipient makes clear that it is not being received on that basis.
- 14.8 This mutual understanding may be explicit, particularly where a contract is involved. Often it will be implied from the circumstances, without either party expressly referring to the matter. Examples of situations where confidence may often be implied are:
- Particular relationships. A professional relationship may often imply confidentiality, for example those between doctors and patients, lawyers and clients, and social workers and clients; or
  - Information communicated for a particular purpose. Where information is communicated by a member of the public for a particular purpose (i.e. a one-off situation as opposed to routine collection of regulatory or monitoring information), a duty of confidence will often be implied. This will usually arise in situations where the Government takes the initiative in seeking information on a particular matter.
- 14.9 Problems will be minimised if, as far as possible, the basis of supply of the information is explicit at the time it is supplied.
- 14.10 The exemption cannot be used where the information is in fact generally known, or where it is contained in a public register or other document open to inspection by the public. Likewise a duty of confidence will cease to exist where information originally confidential has since become generally known.

#### Prejudice to future supply of information

- 14.11 This part of the exemption could be used to protect information where it can be shown that the effective operation of the department's business depends on the opinions or assessments of others, which would not be given without the assurance of confidentiality. Such information is a valuable supplement to compulsory information gathering powers, and may be indispensable in areas where no such powers exist. The exemption could apply either to the information itself or to its source.

---

<sup>6</sup> In a few cases, the Government has "reserve powers" which give a Secretary of State the power to require disclosure of almost any information related to a particular topic. These powers do not count as normal powers to compel disclosure for the purposes of this exemption.

- 14.12 It would be unusual for the confidential basis of information in this category not to be explicit, but in cases of doubt, the criteria outlined in paragraph 14.8 above should be applied. Where departments seek information, as for example in a consultation exercise, it may be good practice to make it clear that information will be made public unless confidentiality is specifically requested (see paragraph 6 in Part I).
- 14.13 Care will be needed in cases where the information was provided in connection with some benefit to the provider, for example in connection with a grant, permit or concession or to plead a special interest in consultation on a matter of public interest. It is unlikely that disclosure in such circumstances would prejudice future supply, because of the provider's interest in making the information available. Other exemptions, for example Exemption 13 (relating to commercial confidences) may be relevant.

### ***Medical information***

- 14.14 Government organisations will from time to time seek views on a person's medical condition to assess their fitness for a particular job or for some other purpose. The Access to Medical Reports Act 1988 gives the subject of a report made by a medical practitioner for employment (or insurance) purposes a right to see the report in question.
- 14.15 One of the two exceptions allowed by the Act is that information can be withheld if its disclosure would harm the health or welfare of the subject of the report. Such information can legitimately be provided in confidence. The Code adopts the same standard.
- 14.16 The author of a medical report may sometimes be reluctant for it to be provided direct to the subject of the report, not because the content is intrinsically injurious but because there is a risk that it might be misunderstood if offered without supporting medical explanation or advice. Departments are reminded of two points:
- they are not obliged by the Code to provide the original report, and can therefore have the report recast in a more accessible way;
  - reports can be made available to the subject through a third person, perhaps their GP, with relevant medical expertise who can interpret it properly to the subject.

### **Public Interest override**

- 14.17 There may sometimes be a public interest in disclosure which clearly outweighs the potential detriment to the supplier of the information. The existence of such an interest is the only consideration other than the consent of the supplier which would warrant the release of information disclosed in confidence.
- 14.18 It is important to stress that the public interest in disclosure must clearly override the interest in preserving confidentiality. Situations where this might be envisaged would be where disclosure would reveal some breach of the law or other wrong-doing, or would expose a significant risk to public health or safety or to the environment.

- 14.19 If time permits, the person or body concerned should be consulted, or at least informed.
- 14.20 The issues here are similar to those arising under the exemption for commercially confidential material. See paragraphs 13.13 to 13.20 above.

15. *Statutory and other restrictions*

- (a) ***Information whose disclosure is prohibited by or under any enactment, regulation, European Community law or international agreement.***
- (b) ***Information whose release would constitute a breach of Parliamentary Privilege.***

- 15.1 The White Paper on Open Government identified some 200 Acts which contain statutory restrictions on the disclosure of official information. Departments will be aware when information which they hold is caught by such restrictions, but when information has been supplied by a third party, it will be wise to check whether it is covered by a statutory restriction before it is released.
- 15.2 Where a refusal is made on the grounds of a statutory prohibition, it should be explained to the enquirer what enactment, regulation etc. prevents disclosure and how it is applicable in the case.
- 15.3 It is for the courts, not the Ombudsman, to give interpretations of the law and its applicability in individual cases. The Ombudsman's role will be limited to confirming that a department was not falsely claiming that the information requested comes within the area covered by the statutory prohibition. Applicants should be informed at the time of the refusal on the grounds of statutory prohibition that an appeal to the Ombudsman is unlikely to succeed because the law takes precedence over the Code.
- 15.4 Many of the statutory provisions mentioned above, especially the more recent, contain harm tests which allow the release of otherwise protected information where that release would not have any detrimental effect. In the Open Government White Paper, the Government undertook to insert harm tests into provisions restricting the release of information where appropriate and as the opportunity arises. Where harm tests apply, it will be necessary to assess the likely effects of the release of information before access is given and, equally, to ensure that any decision to withhold information is justifiable in the light of the relevant test.

***Information whose release would constitute a breach of Parliamentary Privilege.***

- 15.5 Parliamentary privilege may be a consideration when a request for disclosure anticipates an announcement or publication about to be made or laid before Parliament. Care is also needed where information has been given to a Parliamentary Committee in a memorandum or evidence, but the Committee has not yet published its report. In general there should be no difficulty about disclosing the substance of the memorandum if this is properly in the public domain, but it may be a breach of privilege to publish the report or evidence given in full before the Committee has published it.

## CODE OF PRACTICE ON ACCESS TO GOVERNMENT INFORMATION GUIDANCE ON INTERPRETATION

### PART III - FEES AND CHARGES

1. The White Paper on Open Government states that:

"where requests for information involve significant additional work for a public authority, the Government's view is that charges should cover reasonable costs." (Cm 2290, paragraph 7.7)

Not only do charges offset costs, they also act as an important reminder to the public that providing information costs money. The general presumption should therefore be that requests under the Code should be charged for when they cause additional work. There is a considerable diversity of cost and operational structure across the range of bodies covered by the Code, and departments, agencies and public bodies have discretion to devise their own scales of charges to suit their situation.

2. An illustrative scheme of charges is set out in Annex A, but departments are not obliged to follow it.

#### Distinguishing Code requests

3. An important issue in considering charges is distinguishing the requests to which they should apply from present information flows. Departments already provide a considerable amount of information on an informal basis and this will continue. Many answers to Treat Officially correspondence will fall into this category. Charges will generally only apply where a request is novel or requires a department to undertake work which it would not have undertaken if the request had not been made.
4. The illustrative charging scheme identifies specific areas where departments should normally provide information free as part of the fair and accountable discharge of their functions.

#### General issues on applying charges

5. Given the scope for diversity, it will be important for departments and agencies to publish, or at least make available on request, the schedule of charges which they apply.
6. The scale of charges will have to strike a balance between two competing principles. On the one hand there is a public interest in citizens being able to have access at a reasonable cost to information held by departments, either to increase the level of public knowledge of issues or because it concerns individuals themselves. On the other hand, there is equally a public interest in not having public resources diverted to processing requests which may in some cases be trivial or undertaken for private or commercial interests. The aim is to strike an appropriate balance whilst keeping the administration

as straightforward as possible. The two-tier model outlined in the draft scheme is one way to achieve this balance.

7. In applying their respective charging schemes, it will be important for departments to keep applicants informed at all stages, not only of the likely charge they face, but also of matters such as whether fees are refundable and what rights of appeal are available.
8. Guidance on the exemption for voluminous requests is given in the notes on Exemption 9.

#### Internal review

9. In view of the importance which the Citizen's Charter attaches to ready access to complaints procedures, organisations should not charge for access to their internal review procedures.

#### Treatment of receipts

10. Departments will wish to retain any fee income received from the public in order to use the funds to offset the cost of providing the information. In order to do this, the receipts must be classified as **negative public expenditure** so that they can be appropriated in aid. To qualify as negative public expenditure, the following criteria must be satisfied:
  - there must be a clear and direct link between payment of the charge and the acquisition of the specific service involved; and
  - charges should be related to cost and any particular charge should be set so that the resulting income should not exceed the cost of providing the service to the requester of information.
11. The additional costs will generally fall on running costs. Where departments' running costs are controlled net, running costs-related receipts can automatically offset the increased expenditure.
12. However, where running costs are controlled gross it will not be possible to offset fee income automatically. The following options are available:
  - (a) if the volume can be reasonably predicted for forward years (so the resource costs and receipts can be calculated), departments are free to apply to make full use of receipts under the terms of the "Luce" scheme (see Annex B); or
  - (b) where the costs and receipts cannot be forecast in advance, departments can make use of the in-year scheme outlined at Annex C. This scheme is subject to the usual Parliamentary controls and the receipt must be appropriated in aid in Supplementary Estimates.

13. If this proves insufficient, and to the extent that no claim is required on the Reserve, the Treasury is prepared to consider sympathetically requests for additional running costs provision, balanced by additional receipts, through Supplementary Estimates.

#### Legal authority to charge

14. The Code of Practice is not statutory. In common law, the Crown may do anything that a natural person may do, including trade. However, it does require statutory authority to levy money for and to its own use. Organisations will therefore need to ensure that their arrangements do not resemble a levy. This should be possible provided:
  - the service in question is not supplied under a duty;
  - the charge does not significantly exceed the recovery of costs;
  - the organisation is not under an existing legal duty to provide a service free of charge; and
  - the department has not obtained the information in the exercise of a statutory power.

#### VAT

15. Charges for the provision of information under the Code of practice will not be liable to VAT. The VAT Administration Directorate of HM Customs and Excise has ruled that the provision of information by Government departments and non-departmental public bodies under the Code of Practice is a non-business supply and is thus outside the scope of VAT.

## ANNEX A

**Illustrative scheme of charges****[ LCD NOTE: CONSULT LCD'S GUIDANCE FOR DETAILS OF LCD'S CHARGING SCHEME ]**

*[Departments will produce their own schemes of charges to suit their circumstances, and the nature of their work. They need not follow this scheme, and may vary or omit particular provisions.]*

**Information provided free of charge:**

1. There is no charge where provision of information is necessary to the fair and accountable performance of the Department's functions. This includes information explaining:
  - benefits, grants, rights and entitlements;
  - the standards, and availability of services;
  - the reasons for administrative decisions concerning the applicant;
  - rights to appeal or complain about a decision;
  - regulatory requirements affecting the affairs or interests of the applicant; and
  - the main points of existing Departmental policies or initiatives.
2. There may be a charge if a request for information does not come within one of these categories, and causes additional work: that is work which it would not have been necessary for the Department to undertake if the request had not been made.

**Flat rate charge for simple requests**

*[For departments which have chosen to operate a flat rate charge]*

3. A flat rate charge will be payable for simple requests. The charge set from [date] is [£ ]. Payment should be made by cheque or postal order, payable to: [Name of Department or account].
4. The charge is intended to cover the cost of processing the request for information, and is payable whether or not the information requested can be supplied in full.
5. If in doubt whether a charge is payable, the applicant can either specify the information requested without sending any payment and ask the Department for advice, or send a

payment for the amount of the Department's standard charge which the Department will return if no charge is due.

#### Higher charges for more complex requests

6. If the information requested will take several hours to prepare, an additional charge may be payable.
7. This charge should not exceed the cost of providing the information requested. The cost will depend on the nature of the request, and the time spent retrieving the information and removing any part which is exempt from disclosure under the Code.
8. Applicants will be given an estimated charge, which is normally payable before further work is undertaken.
9. It may not always be apparent at the start that a request will require a lot of work. If this becomes clear after some work has already been done, but the applicant is unwilling to meet the costs of the further work, they should receive any work which has been done to date and which has been paid for.
10. Charges will normally be based on the cost of the extra work directly related to the request, i.e. the time of the officials doing the retrieval and decision work, and other direct costs such as copying or computer processing time. Charges will exclude fixed costs such as accommodation and other overheads. Higher rates may be charged where the application requires expert attention, for example to decide whether technical information is commercially confidential or otherwise exempt from disclosure.
11. Charges for staff time are based on an hourly rate. The hourly rates chargeable by this Department at present are:
  - Retrieval and photocopying time - £[ ], based on ready reckoner for an Administrative Assistant;
  - Decision time - £[ ], based on the ready reckoner costs for a Higher Executive Officer; and
  - Expert assessment time - £[ ], based on the ready reckoner costs of an Inspector.
12. In addition a charge may be made for photocopies, not exceeding £[ ] per 10 pages; or for copies of tapes or discs.
13. The form in which information is given will normally be the most cost-effective from the Department's point of view. This should help to restrict costs to the applicant. Those wishing to have information in a particular form should inquire when they make an application.
14. Charges will not be made to cover:

- time spent by senior management in deciding policy on particular disclosures;
- excessive time spent retrieving information when the difficulty is due to errors in record keeping; or
- excessive time spent on the preparation of new material when it would have been practicable within the policy set out in the Code, and more cost effective, to provide edited copies of a pre-existing document.

#### Consistent application of charges

15. Subject to paragraph 19 below, and the Department's discretion to waive charges where it appears that a disclosure in response to a request for information remedies a failure to provide information which should have been volunteered under the Code, the policy on charging will be applied consistently and equitably, and in a manner which does not unfairly discriminate between applicants.

#### Responding by preparing a new publication

16. When the Department has received several requests for information relating to a particular matter, it may decide to respond by preparing a note for general publication as soon as possible. This will usually be less expensive for the applicant than charging the work in full to a single requester. The Department will keep requesters in touch with what is going on, and avoid undue delay.

#### Review of charges

17. Applicants may ask the Department to review a proposed or actual charge if they think it is unreasonable. If they are still not satisfied with the explanation of the basis of the charge, unreasonable charges are one of the matters on which complaints may be made through a Member of Parliament, to the Ombudsman.

#### Priced publications and charged information services

18. The Code does not entitle applicants to free copies of priced government publications, or free use of information services for which there is normally a charge. It does not require departments to introduce charges for information that would normally be provided free of charge, for example through an information service or press office.

#### VAT

19. Charges for the provision of information under the Code by Government departments or other public bodies and authorities are not subject to VAT.

## ANNEX B

**Marginal Extra Receipts ("Luce" scheme)**

This scheme applies during the Survey and allows marginal bids for increased gross running costs provision to resource activities which would be **wholly financed from increased receipts**. The conditions for the procedure are as follows:

- (i) it can be invoked only as part of an expenditure Survey. It does not provide a mechanism for changing running costs provision between Surveys or in-year;
- (ii) it is available only for departments who, in that survey, secure three-year running costs settlements backed by management plans accepted by the Chief Secretary. A department anticipating a settlement may bid under the procedure, but the bid will automatically lapse if a settlement is not reached;
- (iii) there must be an expectation of additional income over and above existing trends and forecasts; the increases must be attributable to management action or substantial increases in demand and not, for example, to price indexation;
- (iv) the receipts must be suitable for appropriation in aid, i.e. they can be classified as negative public expenditure;
- (v) if the extra receipts do not materialise, there can be no related bid on the Reserve. The gross running costs addition will be relinquished from the department's provision for later years in the next Survey;
- (vi) "Marginal" normally means an amount not increasing a department's total gross running costs baseline by more than about 1%;
- (vii) the department should submit to the Treasury an account of expenditure and receipts under successful bids as soon as possible after the end of the financial year or years to which they relate;
- (viii) in considering such bids, account is taken of the overall running costs position of bidding departments and of the effects of such bids in total on growth in aggregate running costs. There is no presumption of automatic agreement; and
- (ix) additional receipts from interdepartmental transactions are eligible only if the transactions occur in a market which is both "untied" and genuinely competitive.

**ANNEX C****In-year Marginal Extra Receipts Scheme**

1. Under this scheme, departments and agencies will be allowed to retain 50 per cent of any margin extra receipts related to running costs they generate in-year to help achieve their objectives without increasing permanent staffing. This arrangement applies to receipts greater than forecast in the Public Expenditure Survey.
2. This scheme is subject to the usual Parliamentary controls. The use made of retained receipts must be consistent with the department's legislative authority. The receipts must be appropriated in aid in Estimates. Policy on selling services into wider markets (set out in PFO(91)1) continues to apply.
3. Departments wishing to use the scheme should present draft Supplementaries in the Winter or Spring Supplementary round (preferably grouped with any supplementary for running costs EYF).

## CODE OF PRACTICE ON ACCESS TO GOVERNMENT INFORMATION GUIDANCE ON INTERPRETATION

### PART IV -FUNCTIONS DELIVERED BY CONTRACTORS

#### Introduction

1. Functions performed by contractors on behalf of departments, agencies or public bodies within the scope of the Code are not excluded from the commitments to provide information or to protect confidences.
2. The White Paper on Open Government says:  
  
"Departments will ensure that where services are being delivered by contractors, the Government's policies both on openness and the protection of private and sensitive third party information will be strictly observed, and contractors will abide by relevant provisions of the Code." (CM 2290, paragraph 4.15)
3. Departments should consider reflecting in contract terms the contractor's obligations to provide information either directly to the public or to the department. Contractors should automatically be under a duty to protect confidential information which they receive (see paragraphs 14 and 15 below).
4. Ministers remain accountable to Parliament and the public for the functions provided by contractors. There should be no loss of transparency as to the quality and effectiveness of services delivered. Departments should always ensure that they are in a position to provide information in accordance with the provisions of the Code. In cases where contractors have direct dealings with the public the provision of information directly to the public may be among the obligations of the contract. In other cases it will be for the department to provide information concerning the contracted functions, and departments will need to ensure that necessary information is available from contractors.
5. There are some situations where contractors may properly protect information about themselves because it is commercially confidential. But commercial sensitivity should not extend to the concealment of the sort of information about performance or service standards which the public would have if a service were delivered directly by a Department.

#### Information about Contracted Functions provided to the Public

6. The Code involves commitments both to volunteering information and to responding positively to requests for information about policies, actions or decisions. Departments must ensure that these obligations can be met in respect of contracted functions in a way which involves no loss of accountability.

7. The Citizen's Charter already requires the publication of a considerable amount of information, particularly on targets and performance against targets. The fact that a function is delivered through contractors should not affect this commitment. Where a contractor has direct dealings with the public any guidance to the contractor's staff should be made available as it would be were the service delivered by civil servants. Where requests for information are received about a contracted service, there should be arrangements to ensure that they can be answered in a full and timely way, either through the department or directly by the contractor.
8. When a contracted function involves an area of work which is likely to attract requests for information, departments will need to ensure that it is clear between them and their contractors how requests from the public are to be handled. The department may prefer to handle all such requests itself. It may alternatively make more sense for the contractor to deal with routine requests about operational matters, while the contracting department deals with broader questions of policy. The exact approach required will depend on the particular circumstances.
9. Charges made for such information should be consistent with any general charging practice adopted by the department concerned, which should in turn be consistent with any general guidance issued from time to time in connection with the Code.
10. As with all Government services, the guiding principle in responding to requests is that information should be regarded as disclosable unless there is a public interest in withholding it under one of the exemptions.

### Services to the Government

11. Not all contracted services are provided directly to the public. Many are departmental support services such as typing, cleaning, information technology, audit, or expert advice. The information content of such services varies considerably.
12. Where consultants are used to provide advice, including analysis and reports on policy and management issues, the information in the reports may be of general public interest. Since copyright will as a rule be owned by the department it will generally be possible to treat the factual and analytical content of such reports like any other part of the department's information base, and decide disclosure issues in accordance with the Code in much the same way as for internally generated information.
13. As now, contracts should continue to specify the ownership of the completed work, and the terms on which, where appropriate, it may be published independently by the authors. It is difficult to generalise about disclosure of such reports. In some cases it will be possible to be open about consultants' reports, because considerations weighing in favour of confidentiality, for example those concerning advice given by civil servants, will be absent. In other cases there will be justification for confidentiality because of the subject matter of the report - for example commercial confidentiality, or management and negotiation considerations. In others the consultants' own commercial interest in limited circulation may be relevant - for example where there is an element of

intellectual property involved. Disclosure decisions will need to be made case by case, in accordance with the Code.

### Protection of Confidentiality by Contractors

14. Contractors handling confidential material, for example concerning private individuals, will owe the same duty of care to protect it from inappropriate disclosure as would civil servants. In many cases criminal sanctions will apply to unauthorised disclosure. In fields such as defence there is already extensive experience of private contractors handling highly confidential and secret material, and the Code introduces no new factors.
15. The Deregulation and Contracting Out Act created the possibility of confidential handling of information by contractors in some areas where access is otherwise restricted by law to Ministers and civil servants. The Act enables contractors to receive confidential material to carry out a function. It also ensures they are bound by all existing restrictions on further disclosure, whether arising from statute or from any other obligation of confidentiality. A duty of care for the information will be an implied term of any contract.

### Information about Contractual Processes and Prices

16. This section deals with information about the contractual process itself - including competitive tendering and the letting of contracts - as opposed to the treatment of information handled by contractors or arising from their activities. There are clearly tensions between the need to promote openness and transparency on the part of the department or agency in tendering exercises, and the need to acknowledge commercial sensitivities both for the department and the contractor. Given this position, how much should be disclosed about the tendering process and about the contract itself?
17. There should be a general presumption of openness and transparency on the part of the department or agency conducting the tendering process. Increased openness will reinforce the effects of wider public sector reforms in encouraging better internal management, making departments more accountable, and raising the profile of competitive tendering within government. But commercial best practice, whilst welcoming openness, demands some commercial confidentiality to:
  - preserve the business interests of competing companies; and
  - protect the position of departments in current or future tendering activities.
18. Nothing in the Code, therefore, requires departments to prejudice the legitimate commercial confidences of tenderers and contractors. A contractor will be a competitive commercial agent, and can reasonably expect not to have information disclosed which would put it at a disadvantage either in its other business activities or when the contract is retendered.

19. Care must therefore be taken in disclosing commercially sensitive information in case this might harm the Government's reputation as a client and, ultimately, the taxpayer's interests. The exemption for information containing third party commercial confidences will apply in this area as to all other areas of government-held information. The definition of commercial confidentiality and the scope of the exemption are discussed in Part II (see the note on exemption 13).
20. The principles set out here should apply to all competitive tendering processes regardless of whether an outside contractor or in-house team is successful, or whether contracts or service level agreements are used. To maintain a level playing field all tenders (whether an in-house team or external) should be treated equally. The aim is to devise arrangements which preserve accountability.
21. Competitive tendering should not lead to any loss of public accountability for public service or loss of transparency in the spending of public money. Indeed, one of its aims is to increase accountability and transparency where possible. At least the following information should normally be made public:
  - the identity of the successful tenderer;
  - the nature of the job, service or goods to be supplied;
  - the performance standards set (which should be output based);
  - the criteria for award of contract; and
  - the winning tender price, or range of prices (minimum/maximum) paid.
22. The EC public procurement directives provide a checklist of information for publication in contract award notices in the EC Official Journal. But the directives also make it clear that any of the information may be omitted in cases where its publication would prejudice the legitimate commercial interests of any person, or might prejudice fair competition between contractors.
23. Departments may be reluctant to disclose the winning tender price on the grounds that it might prejudice future tendering exercises. Disclosure will tend to set a target price against which tenderers will submit future bids, which could compromise value for money. It may also prompt unsuccessful tenderers who bid a lower figure to ask why they were not chosen. In these cases, the distinction between the lowest bid and best value for money can be explored in the debriefing of unsuccessful tenderers which is now recommended practice.
24. Where a risk of prejudice has been identified as likely to arise from disclosure of any of the items listed in paragraph 21 above, the likely damage from disclosure must clearly outweigh the benefits of openness identified in paragraph 17 above. There is a strong presumption that tender prices should be disclosed and it would be unwise for departments to give assurances to potential contractors that the price or range of prices in the tender evaluation will not or will never be disclosed since this may not prove to be a sustainable assurance. Departments may wish to consider inserting a disclosure clause

in contracts reserving the right to disclose details of contractual processes and prices in accordance with the Code of Practice, perhaps with a time delay of 6 months to diminish commercial sensitivity.

25. Whether details are announced at the time an individual contract is let, assembled in periodic reports (such as a department's annual report), or released in response to requests depends on the size of and degree of public interest in the contract in question and whether the contract was subject to the EC procurement rules (under which transmission of an award of contract notice to the EC Official Journal must be within 48 days of award of contract). But departments should not usually need to give information identifying unsuccessful tenderers or the details of their bids.
26. Where requests for further information are received, it may be reasonable to disclose, subject to the considerations at paragraph 22 above:
  - the general contract terms and conditions, or sections of service level agreements;
  - how many tenders were received; and
  - the range of tender bids, where three or more were received.

But care must be taken to ensure that additional information cannot be deduced from that being disclosed.

27. There is of course nothing to stop a department disclosing any of the information in the preceding paragraph if they and the contractors or tenderers consent. Ideally, agreement on disclosure should be reached at the outset, where possible as part of the tendering process.
28. If providing information on a competitive tendering exercise would require a department, agency or public body to undertake work which they would not normally undertake for their own internal management purposes or as part of the fair and accountable performance of its duties, it will be reasonable to make an appropriate charge.

#### Review of complaints concerning contractors' information by the Ombudsman

29. Any complaints under the Code of Practice concerning failure to provide information concerning the performance of contracted functions may be investigated in the usual way. Section 5(1) of the Parliamentary Commissioner Act 1967 makes it clear that the Ombudsman can investigate action taken "by or on behalf of" a department or other authority to which the Act applies, being action taken in the exercise of administrative functions where a complaint has been made in accordance with the Act. The Ombudsman's first contact will be with the department, and it will be for him to decide how far direct assistance from the contractor is required, and how far his powers to secure information directly from the contractor should be used.

30. Section 8(1) of the Parliamentary Commissioner Act 1967 gives the Ombudsman power to require information and the production of documents from the department or authority against whom a complaint has been made "or any other person who in his opinion is able to furnish information or produce documents relevant to the investigation". Section 8(2) gives the Ombudsman the same powers as the Court in respect of the attendance and examination of witnesses and the production of documents. Section 8(3) ensures that obligation to maintain secrecy or other restriction on the disclosure of information obtained by or furnished to persons in Her Majesty's service, whether imposed by enactment or the rule of law, shall apply to the disclosure of information for the purposes of an investigation under the 1967 Act. It makes clear that he may investigate complaints concerning action taken by or on behalf of a department.
31. Under schedule 3 of his Act, the Ombudsman may not investigate:
- "Action taken in matters relating to contractual or other commercial transactions, whether in the United Kingdom or elsewhere, being transactions of a Government Department or authority to which this act applies . . . and not being transactions relating to:
- the acquisition of land compulsorily or in circumstances in which it could be acquired compulsorily;
- the disposal as surplus of land acquired compulsorily or in such circumstances as aforesaid."
32. The effect of this restriction on the Ombudsman's powers to investigate information relating to contractual processes is in the first instance a matter for the Ombudsman, who has wide discretion as to his own jurisdiction. It should not impair his ability to investigate complaints about non-disclosure of information relating to the functions delivered through contractors.

## CODE OF PRACTICE ON ACCESS TO GOVERNMENT INFORMATION GUIDANCE ON INTERPRETATION

### PART V - ANSWERING PARLIAMENTARY QUESTIONS

#### Guidance to Officials on Drafting Answers to Parliamentary Questions

1. Never forget Ministers' obligations to Parliament which are set out in "*Questions of Procedure for Ministers*":

"Ministers must not knowingly mislead Parliament and the public and should correct any inadvertent errors at the earliest opportunity. They must be as open as possible with Parliament and the public, withholding information only when disclosure would not be in the public interest, which should be decided in accordance with relevant statute and the *Government's Code of Practice on Access to Government Information*."

"Ministers .... have a duty .... to give Parliament .... and the public as full information as possible about the policies, decisions and actions of the Government, and not to deceive or mislead Parliament and the public."

2. It is a civil servant's responsibility to Ministers to help them fulfil those obligations. It is the Minister's right and responsibility to decide how to do so. Ministers want to explain and present Government policy and actions in a positive light. They will rightly expect a draft answer that does full justice to the Government's position.
3. Approach every question predisposed to give relevant information fully, as concisely as possible and in accordance with guidance on disproportionate cost. If there appears to be a conflict between the requirement to be as open as possible and the requirement to protect information whose disclosure would not be in the public interest, you should check to see whether it should be omitted in accordance with statute (which takes precedence) or the *Code of Practice on Access to Government Information*, about which you should consult your departmental openness liaison officer if necessary.
5. Do not omit information sought merely because disclosure could lead to political embarrassment or administrative inconvenience.
6. Where there is a particularly fine balance between openness and non-disclosure, and when the draft answer takes the latter course, this should be explicitly drawn to the Minister's attention. Similarly, if it is proposed to reveal information of a sort which is not normally disclosed, this should be explicitly drawn to Ministers' attention.
7. If you conclude that material information must be withheld and the PQ cannot be fully answered as a result, draft an answer which makes this clear and which explains the

reasons in equivalent terms to those in the Code of Practice, or because of disproportionate cost or the information not being available. Take care to avoid draft answers which are literally true but likely to give rise to misleading inferences.