The Campaign for Freedom of Information

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Further views on

The Government's draft Freedom of Information Bill

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1. Introduction

The Campaign for Freedom of Information's views on the government's draft Freedom of Information bill were set out in an earlier paper, submitted to the Public Administration select committee.[1] This paper deals with a number of additional points, not previously covered.

2. Unrecorded information

Under the bill, only *recorded* information will be available. Clause 1(1) states:

> 'In this Act, unless the context otherwise requires, "information" means information recorded in any form'.

This is a weakening of the white paper's proposal that both records and *unrecorded* information would be accessible.[2]

It would mean that authorities could refuse to provide information which was known to officials, but not recorded. Typically, this might include the factors considered when reaching a decision, or the reasons why no action on a particular matter was taken.

This provision would give officials an incentive to *not* record sensitive information, so ensuring it fell outside the Act's scope. The Home Secretary has stressed that he does not want FoI to detract from full record keeping:

> "In other administrations much decision making is done orally without proper record keeping, which again means that, far from the executive becoming more accountable, it is less accountable...one of the impressive things about the British public administration is that a huge amount of it is recorded, it is committed to writing. Every night when I go through my box I commit to writing all sorts of decisions and instructions and comments that I make, and even though they are within what amounts to an exemption at the moment, if there is the equivalent of a BSE inquiry, all that becomes disclosable. Sometimes they become disclosable in court but, because of the way the system works at the moment, I am expected and required to commit them to writing and it makes our accountability better."[3]

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[1] "The Government's draft Freedom of Information Bill", Campaign for Freedom of Information, Submission to the Public Administration Committee, June 22 1999

[2] The white paper stated that the Act would apply "to records or information" [para 2.6]

[3] Evidence of the Home Secretary, 22 June 1999, Q.24

There is no reason to suppose that a right to unrecorded information would be impractical. A similar right exists under New Zealand's FOI law.[4] The courts have confirmed that this right *"is not confined to the written word but embraces any knowledge, however gained or held, by the named bodies in their official capacities"*.[5] Nor is there any reason to consider that it would be unenforceable. The British legal system depends on witnesses testifying in court, about matters of which they have direct knowledge – in effect supplying unrecorded information.

Such a right would be feasible, as long as it was subject to a "reasonableness" test, and only applied where those who had been directly involved were still employed by the authority, and the matters referred to were relatively recent.

3. Information and the Commissioner's powers

The above definition of "information" may also weaken the Commissioner's ability to obtain information by issuing an information notice.[6] The information sought in a notice appears to be limited by the definition in clause 1(1). Officials could not be required to supply unrecorded information – that is, to answer questions - even if it was known to them.

The Commissioner would therefore be in a far weaker position than the Parliamentary Ombudsman, who can require any information, including unrecorded information, to be supplied to him,[7] and can if necessary demand information under oath.[8]

The Commissioner will also be in a weaker position than her overseas counterparts. Ireland's Commissioner can require any person to supply *any information* or record which is in his possession, power or control.[9] Canada's Information Commissioner can compel witnesses "to give oral or written evidence on oath".[10]

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[4] The right of access applies to "any information held" by public authorities. Official Information Act 1982, section 2.
[5] Jeffries, J. Commissioner of Police v Ombudsman [1985] 1 N.Z.L.R., 578; [1988] 1 N.Z..L.R, 385.
[6] Clause 44(1)
[7] Parliamentary Commissioner Act 1967, section 8(1)
[8] Parliamentary Commissioner Act 1967, section 8(2)
[9] Freedom of Information Act 19976 [Ireland] section 37(1)
[10] Access to Information Act 1982 [Canada], section 36(1)(a)

4. Charges for information released in the "public interest"

In our earlier response, we welcomed the proposal that applicants could be required to pay no more than 10% of the costs of locating and retrieving requested information, subject to a cap of £50 (ie 10% of £500).

However, we are concerned at the possibility that much higher charges may be made for information disclosed under the discretionary provisions of clause 14. The background material to the draft bill envisages that applicants could be required to pay the *full* costs of obtaining such material, up to a £500 limit.[11]

The logic of allowing higher charges for disclosures which are in the "public interest" is not clear. It reverses the white paper's proposal that normal fees should be *waived* where disclosure was in the public interest[12] – as happens under the US FoI Act. Under the draft bill, fees would be increased for information needed in the public interest.

It would lead to the paradoxical situation where:

- someone who seeks non-exempt information for *commercial purposes*, would obtain it at the 10% rate

- someone who seeks exempt information in order to expose *serious misconduct* by a public authority would pay the 100% rate.

The provisions underline the unsatisfactory nature of clause 14, in which the disclosure of information which acknowledged to be "in the public interest" is treated as a privilege. Because of the class exemptions, such information may be exempt even though its disclosure would not cause harm. Where a public interest in disclosure was acknowledged, it might nevertheless be subject to higher charges, longer delays[13] and greater restrictions on its use than information sought for private or commercial purposes.

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[11] 'Freedom of Information. Preparation of Draft Legislation. Background Material', Home Office, July 1999, page 17, para. 12
[12] 'Your Right to Know. The Government's Proposals for a Freedom of Information Act', Cm 3818, para. 5.12
[13] Clause 14(5)

5. Capped charges

The bill permits an authority to refuse to disclose information where the cost of doing so would exceed the appropriate limit.[14] In our view, where a request exceeds this limit, but the applicant is prepared to pay the higher cost, the authority should not be permitted to refuse access.

6. Indemnity against legal proceedings

Overseas FoI laws normally provide that disclosures which are made in good faith under the Act cannot form the basis for legal proceedings against the authority or the official responsible for the disclosure, on grounds of defamation, breach of confidence, breach of copyright or breach of any statutory prohibition on disclosure.[15] The draft bill currently lacks any such provision. Without it, the operation of the Act is likely to be impeded. Authorities are likely to be deterred from releasing information which might imply criticism of a company, for fear that this might expose it to defamation proceedings. Similar considerations might deter them from releasing information which they considered might involve action for breach of confidence or copyright.

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[14] Clause 12(1)

[15] Section 48 of New Zealand's Official Information Act 1982 states:
"*48 (1) Where any official information is made available in good faith pursuant to this Act,--*
(a) No proceedings, civil or criminal, shall lie against the Crown or any other person in respect of the making available of that information, or for any consequences that follow from the making available of that information; and
(b) No proceedings, civil or criminal, in respect of any publication involved in, or resulting from, the making available of that information shall lie against the author of the information or any other person by reason of that author or other person having supplied the information to a Department or Minister of the Crown or organisation.
(2) The making available of, or the giving of access to, any official information in consequence of a request made under this Act shall not be taken, for the purposes of the law relating to defamation or breach of confidence or infringement of copyright, to constitute an authorisation or approval of the publication of the document or of its contents by the person to whom the information is made available or the access is given."
Section 91(1) of Australia's FoI Act states that where access was given in the *bona fide* belief that it was required under the Act *"no action for defamation, breach of confidence or infringement of copyright lies against the Commonwealth, an agency, a Minister or an officer by reason of the authorizing or giving of the access, and no action for defamation or breach of confidence in respect of any publication involved in, or resulting from, the giving of access lies against the author of the document or any other person by reason of that author or other person having supplied the document to an agency or Minister."*

7. Information supplied in confidence by public bodies

The wide exemption for information provided in confidence[16] applies to information supplied to an authority by any other person, *including* another public authority. We question why public authorities should be caught by this exemption at all.

Communications between authorities are already *overprotected* by clause 28 which covers “the free and frank exchange of views for the purposes of deliberation”, disclosures likely to “prejudice the maintenance of the convention of collective responsibility of Ministers” and disclosures likely to “prejudice the effective conduct of public affairs”. In all cases, authorities’ decisions are protected from review, so long as they are not irrational - an excessive provision in its own right. Further exemption for confidential communications between authorities is redundant.

8. Information supplied in confidence by private bodies

The exemption for information supplied in confidence by other persons is likely to protect the lobbying of government by commercial and other vested interests from scrutiny.

The exemption contains no harm test. A private body (unlike a public authority) would not have to show that disclosure of information would cause “detriment” to succeed in an action for breach of confidence. Information supplied to public bodies by private bodies would be protected even though its disclosure would cause no harm either to the authority holding it or the person who supplied it. All that would be needed would be for the authority and third party to agree between themselves that their communications should be private. This may be done merely to prevent embarrassment or inconvenient scrutiny of matters of public interest.

We understand from earlier discussions with officials that it was intended that the Secretary of State’s code of practice would require authorities to take steps to ensure that they did not create unnecessary obligations of confidentiality. However, we note with surprise that this is not amongst the matters that the code “must, in particular” address.[17]

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[16] Clause 32
[17] Clause 38(2)

We have doubts about how effective such steps can be, even if specified under the code. How is an official to know, before accepting the information, whether it is information of a kind which merits an undertaking of confidentiality? The official will normally be asked to give an assurance of confidentiality before seeing the information. Having given the undertaking, nothing can be done if the nature of the information is later found not to merit that protection.

This exemption could be improved by:

- making it subject to a statutory public interest test, as has been done for the corresponding provision in Ireland's FoI Act.[18] This permits a wider definition of the public interest to be taken into account than the public interest test inherent in the common law of confidence, which relates primarily to "iniquity" or danger to the public

- making the exemption subject to a statutory harm test. This might permit information to be withheld only where (a) it was supplied and accepted in confidence, and (b) it is information which is "necessary" for the authority to have for the effective discharge of its functions, and (c) its disclosure would be likely to prejudice the future supply of such information. If necessary, these requirements could apply only to information supplied to the authority after the FoI Act's commencement, leaving the status of earlier information untouched, although there are plenty of examples of obligations of confidentiality which have been changed retrospectively by statute.[19]

- Permitting the Commissioner to order disclosure of information accepted in confidence where the authority had accepted it in circumstances which did not comply with any relevant provisions of the clause 38 code of practice .

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[18] Freedom of Information Act 1997 [Ireland], section 26(3)

[19] These include the Data Protection Act 1984, which established a right for individuals to see information held about themselves on computer, including information supplied in confidence prior to the Act's commencement. The Public Interest Disclosure Act 1998, which protects workers from victimisation for disclosing information about malpractice, explicitly sets aside any previous obligation of confidentiality which purports to prevent a protected disclosure from being made [sections 1 and 43]

9. Designated private bodies

The Secretary of State may designate as a public authority for the purposes of the Act a person who does not meet "either" of the two conditions in clauses 2(2) and 2(3). However, if the body concerned meets *neither* of the two conditions (e.g. a purely private body undertaking a contract for a public authority) it may technically not be possible to designate it. It may be worth considering whether clause 2(1)(b) should be amended to apply to:

> "any person who is not described in Schedule 1 and as respects whom either or both of those conditions is not satisfied"

10. Substantially similar requests

We find it hard to see why authorities should be permitted to refuse a person's request for information which is "identical or substantially similar" to information which he or she has previously obtained, unless "a reasonable interval" has elapsed.[20]

If the information is *identical*, the cost to the authority of recopying information which it has previously disclosed will be minimal and will not justify a refusal (If the repeated request is made for vexatious purposes, it can in any case be refused on that ground.[21]) Requests for *substantially similar* information may involve information such as minutes of a series of meetings of the same body, or statistics from the same series. It is hard to see why it should be presumed that such requests, if made within a short period of time, are likely to be unreasonable. This provision would prevent the FoI Act being used to regularly monitor a series of documents as they are generated, or to follow up a significant disclosure by seeking earlier documents from the same series.

11.Policy formulation and Parliament

Our views on the bill's exemption for policy formulation are set out in detail in our initial evidence. A further perspective on the issue, from a select committee's point of view, can be seen from a series of reports by the House of Commons defence committee.

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[20] Clause 13(2)
[21] Clause 13(1)

In 1989, Mr Michael Mates MP the defence committee's then chairman referred to the government's "unnecessarily restrictive" approach to revealing the contribution of different departments to government policy:

> "Many decisions affecting defence expenditure also involve considerations of economic, industrial, employment, and, most often, foreign policy. When the Government takes a decision other than one which is right from the purely defence point of view, it may be incumbent upon us to find out the reasons for that decision; but witnesses at Ministerial as well as official level have in the past often sought to refuse us answers. I believe this is rarely justified. If the MOD wants to do something, but the Treasury thinks it is too expensive, this is part of a responsible way of arriving at a decision of the Government as a whole. It does not spell the end of collective responsibility to tell a Select Committee that was the reason for the decision..."[22]

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

> "witnesses would give us no information about the progress made by the Ministry in considering the future of the Brigade. They would not tell us, for example, whether the Brigade's own study had been completed, nor what progress had been made with the Ministry's study, nor whether the Chiefs of staff had yet considered the question, nor even whether matters had yet been considered at a senior level in the Ministry of Defence. There is no element of national security involved in this; and even if there were, we would, as always, be prepared to take classified evidence.
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> The Ministry's refusal to answer on policy options caused us greater difficulty. We were told that the conventions of giving evidence to Select Committees prevented our being given information about policy options, and the Ministry was prepared to answer only 'in respect of factual material and where there is an existing Government policy'.
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> We recognise no 'convention' that Select Committees should not be told about options for future policy. We emphasize that in our inquiry we were not seeking to know the advice which officials give to Ministers, but to discover the financial, administrative and policy implications of options for the future of the Brigade of Gurkhas. We do not accept that the Government should attempt to shield matters from Parliamentary scrutiny merely because Ministers may later require advice on those matters, or because decisions have yet to be taken.
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> ...There is clear advantage to the House and to the taxpayer in an inquiry which explores all the options open to the Government before those options are closed off."[23]

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

> "In the course of our current inquiry into defence medical services, MoD have refused the Committee access to a report on the operational capability of the medical services on the grounds not of security classification but that it constitutes advice to ministers. This type of factual study, while in the end it

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[22] Select Committee on Procedure, 'The Working of the Select Committee System', Session 1989-90, Vol. II, Minutes of Evidence, page 97. Evidence of Michael Mates MP.

[23] Defence Committee, First Report, Session 1988-89, 'The Future of the Brigade of Gurkhas', HC 68

> may influence Ministers to change policy, is unlikely to be a classic piece of civil service advice whose integrity must be maintained."[24]

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

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

The Committee concluded with an angry denunciation of the government's approach to the disclosure of advice, in terms which may be equally applicable to the corresponding provisions of the draft bill:

> "We do not find the use of the 'advice to Ministers' proviso at all satisfactory. It is a catch-all category redolent of the worst excesses of the abuse of the old Official Secrets Act. Its application is arbitrary and unchallengeable."[25]

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[24] Michael Colvin MP, Chairman of the Defence Committee, in: Liaison Committee. 'The Work of Select Committees', 1st report, Session 1996-97, HC 323-I, February 1997, paras 22-24

[25] Defence Select Committee, First Special Report HC 273, Annual Report of the Committee for Session 1997-98, 10 March 1999