

**Submission to the
Public Administration Committee**

June 22, 1999

The Government's draft Freedom of Information Bill



Campaign for Freedom of Information

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1. INTRODUCTION

This is a preliminary response to the government's draft Freedom of Information (FoI) bill, which deals with several of the main issues which concern us. A further response may be produced.

Although we are pleased to see the prospect of a Freedom of Information (FoI) Act for Britain drawing closer, we are deeply disappointed with the substance of the draft bill. It represents an astonishing retreat from the government's own white paper published only 17 months ago, with the backing of the whole cabinet and a preface from the Prime Minister.¹

The white paper had been warmly received, both domestically and internationally. The Information Commissioner who supervises Canada's FoI Act wrote that it "*has left Canada trailing in the dust*"². While the white paper was seen as a yardstick for best practice, the draft

¹ 'Your Right to Know. The Government's Proposals for a Freedom of Information Act', Cm 3818, December 1997

² In his annual report, he wrote: "These reports have usually resisted temptations to compare Canada's Access to Information Act with similar legislation in other countries. Not only are such comparisons mostly irrelevant, if not invidious, the Canadian statute has been rightly seen as being in the forefront of enlightened right-to-know laws. Over the years delegations from abroad have come to the Information Commissioner's office to learn the sometimes arcane arts of access at first hand. Parliament has reason to be proud of what it created some 15 years ago.

Parliament should know this year, however, that Canada's once brave, state-of-the-art Access to Information Act is being left behind by Britain, of all countries, the mother not only of parliaments but the culture of bureaucratic secrecy. To be by-passed by some recent provincial access regimes in Canada is one thing. But by the nation that raised secrecy to an art form, that produced Yes Minister and Sir Humphrey's law? That is the cruellest cut of all.

bill is already cited in the opposite context. Commenting on Japan's recent FoI Act, Britain's former Ambassador to Tokyo wondered whether it "*will be of any more value to the Japanese citizen than the British illiberal freedom of information bill*".³

The white paper indicated a commitment to go beyond the openness code of practice introduced by the Conservative government.⁴ Not only does it fail to do this, but in key respects it is *weaker* than the code. It would allow government departments to withhold some kinds of information which at present they are expected to disclose under the code. The relevant provisions are summarised at the end of this paper.

In numerous areas the white paper's commitments have been weakened. The "substantial harm" test has been replaced by the lower test of "prejudice". The "simple harm" test for policy advice has been replaced by an absolute exemption. The binding public interest test has been replaced by one that is unenforceable, and also permits authorities to insist on knowing why the applicant wants the information and to control what they do with it. The proposed right of access to unrecorded information has been dropped. New catch-all exemptions unlike those found in any other FoI law have been devised.

While authorities' rights to withhold information have been systematically strengthened, modest rights which would help the citizen have been weakened. Three valuable provisions which appear on the face of many FoI laws have been relegated to unenforceable codes of practice or 'publication schemes'. Authorities will not be legally obliged to assist applicants; they will not have to give reasons for decisions; and they will not be required to publish their

It was flattering that the Cabinet Minister responsible for the British labour government's blueprint for a freedom of information law, David Clark, made Canada and the Information Commissioner's office his first port of call. But he has left Canada trailing in the dust." Information Commissioner of Canada, Annual Report 1997-98.

³ Sir Hugh Cortazzi, "Disclosure Laws Fall Short". The Japan Times, 6/6/99

⁴ The Code of Practice on Access to Government Information ("the openness code") introduced in 1994 requires central government bodies to release information on request, subject to various exemptions. A parallel 1995 code applies to the NHS. Complaints about non-compliance are investigated by the Parliamentary and NHS Ombudsman respectively. Although the codes are not legally binding, the Ombudsman's rulings are invariably accepted. The codes were originally criticised because they only required authorities to release "information" not copies of actual documents. However, in his first ruling under the code, the Parliamentary Ombudsman said that unless some of the information in a document was exempt, he would expect an authority to release all the information in it, which could best be done by releasing the document itself. The codes are still in

internal manuals and guidance. Under the bill authorities will only be encouraged, not required, to comply with these provisions.

Only in two areas does the bill adopt a conspicuously more positive approach than the white paper. Charges for information will be low: authorities will be permitted to charge no more than 10% of the costs of locating requested records.⁵ The deliberate destruction or alteration of a requested records will be an offence.⁶ But whereas the code normally allows authorities 20 days to reply to a request, the bill extends this to 40 working days⁷ – which would make it the slowest and most unresponsive FoI Act in the world.

That is not to say that the bill will make no difference. It would lead to more openness on the part of bodies not currently subject to either the central government or the NHS codes. Bodies such as universities, schools, publicly owned corporations, and certain functions of the police, courts and perhaps Parliament itself will be most affected.⁸ It will make less difference in the National Health Service. NHS bodies are already subject to an openness code,⁹ and patients have well-established legal rights to see their own medical records.¹⁰

But the bill will allow central government to operate in *greater* secrecy than it does now. Existing provisions of the openness code would be replaced by provisions allowing more information to be withheld. In 1996, Tony Blair argued that the Scott report “has made the case for a Freedom of Information Act absolutely unanswerable”. But if another arms-to-Iraq affair occurred, nothing in the bill would be capable of shedding light on it.

place but will be replaced when the FoI Act comes into force.

⁵ No charge for the time spent assessing the records can be made. ‘Freedom of Information. Consultation on Draft Legislation’, Home Office, May 1999, Cm 4355, para. 58

⁶ Clause 66(1)

⁷ Clause 10(1)

⁸ See para. 28 of the consultation document

⁹ Code of Practice on Openness in the NHS, introduced in 1995

¹⁰ Manually held medical records are available under the Access to Health Records Act 1990, and computerised medical records have been accessible under the Data Protection Act since 1987.

2. CONCERNS

More specifically, our main concerns about the bill are that:

- a class exemption applies to all information relating to the development of policy, including factual information, regardless of whether disclosure would harm decision-making. This represents a retreat from existing standards of disclosure under the code.
- class exemptions apply to information obtaining during investigations by the police and all regulatory bodies, including those dealing with safety. Information whose disclosure could not harm law enforcement or regulatory functions is exempt
- authorities will be able to refuse to confirm whether they hold information in the above categories, even where to do so could not cause harm
- authorities would be able to withhold information indicating that they are guilty of an offence
- it replaces the white paper's enforceable public interest test with one that is discretionary and unenforceable and would allow authorities to withhold evidence of their own misconduct
- in many cases authorities will be entitled to insist on knowing the applicant's motives for seeking information and to release information subject to a 'gagging' provision
- the white paper's "substantial harm" test has been replaced by the weaker test of "prejudice"
- an inexplicable "catch-all" exemption allows authorities to withhold harmless information if, together with any other information *including confidential information which authorities have no intention of disclosing*, the combined information could cause harm
- new exemptions could be created by Parliamentary order at short notice to deal with requests already received which cannot otherwise be refused
- the time allowed for responding to requests is increased from the code's 20 days to 40 working days.

3. CLASS EXEMPTIONS

The basic FoI principle is that information should be disclosed unless an authority can demonstrate that to do so would cause harm. In cases of dispute, an independent appeals body – not the authority – has the final word on whether disclosure would in fact be harmful.

The bill fundamentally rejects this principle. It allows entire classes of information to be withheld, regardless of harm.

The main class exemptions relate to the formulation and development of government policy¹¹ and investigations by law enforcement and regulatory authorities.¹² However, other class exemptions apply to communications between ministers;¹³ the work of ministers' private offices;¹⁴ law officers' advice;¹⁵ information covered by legal professional privilege;¹⁶ the security services, their complaints bodies and bodies such as the National Criminal Intelligence Service;¹⁷ communications with the Royal Household,¹⁸ and the awarding of honours;¹⁹

¹¹ Clause 28(1)(a)

¹² Clauses 25(1) and(2)

¹³ Clause 28(1)(b)

¹⁴ Clause 28(1)(d)

¹⁵ Clause 28(1)(c)

¹⁶ Clause 33

¹⁷ Clause 18(1)

¹⁸ Clause 29(1)(a)

¹⁹ Clause 29(1)(b)

4. POLICY DEVELOPMENT ²⁰

All FoI laws contain some protection for ‘policy advice’. This is generally defined as material relating to the development of government policy which consists of opinion, recommendation, the exchange of views or similar material. However, none of the main overseas laws exempts material in the comprehensive and absolute terms of clause 28(1)(a):

“Information held by a government department is exempt information if it relates to...the formulation or development of government policy”

The government would not even have to acknowledge whether information within this substantial class existed at all.²¹

There are no exceptions to this all-embracing exemption and no attempt is made to discriminate between disclosures that are likely to be harmful and those that are innocuous or perhaps beneficial. *All* material which has been considered during the development of policy will be exempt. This would apply not just to advice, opinion and exchange of views but to factual information and its analysis, statistics, technical and scientific advice, and purely descriptive accounts (for example, of the existing practices of departments). Information supplied by third parties would also be exempt, whether it came from consultants, lobbyists representing vested interests or merely from those responding to public consultation documents.

The exemption would absolve government of the need to answer even the simplest questions about the basis for its decisions. Even information which would currently have to be disclosed under the openness code could be withheld. The exemption would apply not just while the policy was being drawn up, but for years after it had been implemented, indeed until the records reached their 30-year release date.

²⁰ For a further account of the Campaign’s views on access to policy advice see two earlier publications (i) ‘Response to the Freedom of Information White Paper’, March 1998, pages 19-24; and (ii) ‘Freedom of Information: Key Issues’, December 1997. Both are available on the Campaign’s web site: <http://www.cfoi.org.uk>

²¹ Clause 28(4)(a)

The Home Office consultation paper itself seems to have had difficulty grasping just how restrictive these provisions are. It cites examples of information which the government has released voluntarily, including:

“the economic analysis behind the policies set out in the [DTI’s] White Paper ‘Our Competitive Future’”

“the Government response to consultation on the Green Paper “A Fair Deal for Consumers” [which] contained analysis of the policy decisions”

“the White Paper ‘Conclusions of the Review of Energy Sources for Power Generation’ [which] contained facts and analysis behind a policy decision on consents for gas fired power stations...including summaries of four consultancy studies commissioned by the Government”

“Papers relating to the work of the Advisory Group on Openness in the Public Sector”

The consultation paper comments:

“The Bill, if enacted, will give the public the right to this kind of information. No longer will information be provided only at the discretion of a public authority”²²

This is highly misleading. All these examples fall squarely within the policy formulation exemption. There would be no right to any of them under the bill.

Clause 28(1)(b) extends the class exemption to communications between ministers which do *not* involve policy. A letter from a minister to his colleagues reminding them that new regulations affecting their departments’ work are due to come into force would be exempt, even if the minister had announced the letter’s existence in a press release. All references to it by officials could also be withheld.²³

Clause 28(1)(d) widens the class to include all references to a minister’s private office.²⁴ Someone using the FoI Act to discover whether his or her urgent correspondence had been

²² Home Office. ‘Freedom of Information. Consultation on Draft Legislation’, Paragraphs 5-6

²³ The exemption is not restricted to ministerial communications themselves, but extends to anything which “relates to” such communications. Clause 28(1)(b)

ignored or simply lost would have no right to know whether it had reached the minister's private office. The number of staff employed in the private office could itself be a secret.²⁵

Clause 28(3) contains a set of additional exemptions, which apply both to government departments and to any other public authority. Nominally, these incorporate harm tests. But the harm in each case is established by "the reasonable opinion" of a minister or public authority. Giving legal weight to the authority's opinion means the decision can only be challenged on the limited grounds used by the courts in judicial review cases. The Commissioner would not be able to overrule a decision merely because it was wrong, involved an exaggerated view of the harm or was "*founded on a grave error of judgement*".²⁶ Only if the decision was "*irrational*" or "*outrageous in its defiance of logic*"²⁷ or involved "*unreasonableness verging on an absurdity*"²⁸ could it be overturned.

Two of the provisions in clause 28(3) are particularly notable. The first exempts information which in the authority's opinion would "inhibit...the free and frank provision of advice".²⁹ This provision applies to advice on *any* matter, not just the development of policy. It could allow the real reasons for routine administrative decisions to be withheld, as these are likely to be based on advice as to whether particular criteria have been met.

The second permits information to be withheld where in the authority's opinion disclosure would "prejudice...the effective conduct of public affairs".³⁰ This is a substantial catch-all. It is apparently based on a provision in New Zealand's FoI law. But the New Zealand exemption contains no less than four separate safeguards all of which have been omitted here. In the New Zealand exemption: (a) the prejudice is limited to two specified types of harm – it is not open ended as under the bill; (b) withholding the information must be "necessary" to avoid the prejudice – a strict test not found in the bill; (c) the prejudice must be determined objectively – the authority's "opinion" is not relevant; and (d) even where prejudice is

²⁴ Clause 28(1)(d)

²⁵ Clause 28(4)(a)

²⁶ Halsbury's Laws of England Vol 1(1), 4th ed. 1989, para 77

²⁷ Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

²⁸ Lord Brightman in *R v Hillingdon LBC ex p. Puhlhofer* [1986] 1. AC 484 at 518

²⁹ Clause 28(3)(b)(i)

³⁰ Clause 28(3)(b)(iii)

established, the information must be disclosed if there is an overriding public interest.³¹

For government departments, the cumulative effect of all these exemptions will be a blanket of secrecy well beyond anything found in other countries' laws. Any disclosure will depend solely on ministerial discretion. This may also have knock-on effects for the level of information provided to Parliament.³²

POLICY ADVICE AND THE CODE

The bill's provisions on policy formulation are weaker than those of the existing code in three respects:

- The corresponding code exemption, Exemption 2, only allows information to be withheld if disclosure would "harm the frankness and candour of internal discussion".³³ Even then, the Parliamentary Ombudsman, who supervises it, can hold that it should be released if there is an overriding public interest in openness.³⁴ Neither of these provisions is found in the bill.
- Under the bill, the government can refuse to even confirm whether it holds particular information, again regardless of whether to do so would cause harm.³⁵ This is not permitted under the code.
- The code requires government to publish "the facts and analysis of the facts" which have

³¹ Section 9(2)(g) of the Official Information Act 1982 [New Zealand], permits information to be withheld where this is "necessary to...maintain the effective conduct of public affairs through (i) the free and frank expression of opinion by or between or to Ministers of the Crown or officers and employees of any Department or organisation in the course of their duty; or (ii) the protection of such Ministers, officers, and employees from improper pressure or harassment". Under section 9(1) such information must nevertheless be released if "the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available".

³² Since 1996, the government has agreed that information which could be disclosed to the public under the openness code, should not be withheld when responding to MPs' questions. (See HC (1996-97) 67, pp xv-xvi). However, the bill would remove some existing rights to internal advice under the code, making it easier for such information to be withheld in Parliamentary answers.

³³ Exemption 2, Internal discussion and advice

³⁴ Code of Practice on Access to Government Information, Part II, Reasons for confidentiality.

³⁵ Clause 28(4)(a)

led to policy proposals or decisions. The white paper promised to repeat this provision.³⁶
The draft bill fails to.

The Parliamentary Ombudsman has reported:

"Policy documents or submissions to Ministers may contain sensitive material which is caught by the exemptions in Part II of the Code, but I have seen documents obtained as a result of investigations by my staff which contained facts and analysis of the facts, which I saw no reason to withhold under a blanket refusal."³⁷

In several cases, the harm test has prevented the withholding of information whose main elements were already publicly known³⁸ or which related to issues decided several years ago.³⁹ Such rulings could not be made under the bill.

Another Ombudsman report dealt with the refusal by Companies House (CH) to give reasons for a policy decision that the 'electronic signatures' required to authenticate the identities of company directors must incorporate personal information such as the individual's national insurance number. The Ombudsman referred to the code requirement (omitted from the bill) to publish the facts and analysis behind decisions:

"the Code commits...bodies...to publish the facts and analysis of the facts which lie behind major policy decisions...it appears to me that CH have failed to act in accordance with that principle. They have argued that they can withhold the information...because it falls under Exemption 2...[but]...any harm which might arise from disclosure needs to be weighed against the public interest there might be in making the information available. I do not think CH have considered this aspect. The matter of the electronic authentication of documents is clearly, in my view, an area of public interest affecting a wide range of companies and individuals. It is therefore incumbent upon CH to explain to those with an interest in the matter why, as in this case, particular choices have been made and others

³⁶ Cm 3818, para.2.18

³⁷ Parliamentary Ombudsman. Selected Cases, April-October 1998, Vol 2, Access to Official Information, 2nd report session 1998-99, HC 5, page 3.

³⁸ In one case, the Ombudsman held that board minutes should be disclosed, because "they record only actions taken and decisions reached...knowledge of most, if not all, of the decisions and action...was in the public domain...I could not see how disclosure of information which had already been made public would harm the frankness and candour of internal discussion." Parliamentary Ombudsman, 4th Report, 1997-98, Vol 1, Case A.43/96, para 2.20

³⁹In another case the Ombudsman reported: "I do not believe that it would [harm the frankness of internal discussion] given that the report itself is now nearly three years old and that the essential factual details it contains are already matters of public record. Events have moved on...I do not consider, therefore, that Exemption 2 applies in this case." Parliamentary Ombudsman, 4th Report, 1997-98, Vol 1, Case A32/96, para 3.10

not...I do not believe that Exemption 2 applies."⁴⁰

This ruling too, would not be repeated under the bill.

The final case involved the Home Office. The Ombudsman recently criticised the Prison Service for withholding information from a prisoner partly because it included small amounts of legal advice and advice to Ministers. The Prison Service privately acknowledged that apart from this material "*there was nothing on the file which they would particularly wish to withhold*". The request was nevertheless refused partly because it was considered "*a fishing expedition*" and partly on the remarkable grounds that policy on disclosure "*was in a state of development*" because of "*the forthcoming Freedom of Information legislation*". The memo added:

"to change our stance at this point and allow fuller access to the documents on file...could set an unwelcome precedent for other cases while policy remains in a state of flux".

The Ombudsman pointed out⁴¹ that these were not acceptable reasons for withholding information under the code, adding that:

"It is not apparent to me that the Prison Service considered what harm might arise from disclosure of the advice...as is required by Exemption 2. My view is that no harm could now be caused by disclosure."

This is an outcome that could not occur under the bill.

⁴⁰ Parliamentary Ombudsman, 5th Report 1997-98, HC 438, Case A.21/99

⁴¹He commented: "First, if the Prison Service's view was that the file contained nothing untoward how could they then justify withholding the information from Mr G under the Code?...Second...I was concerned at the implication that the Prison Service should withhold information until the proposed legislation on 'Freedom of Information' has been passed. While the Code continues to be in operation the Ombudsman expects departments and bodies within his jurisdiction to act in accordance with its principles. Third, it may be reasonable, in principle, to advise a Minister that the legal advice and advice to Ministers should not be released, as the Prison Service did in this case, because that is in accordance with the Code...but they went on to say that all other information on the file should be withheld because Mr G's request amounted to a 'fishing expedition' and because disclosure would set an unwelcome precedent for other cases. Those are not acceptable reasons for refusing to release information as far as the Code is concerned".

policy advice in Ireland

Under the Irish FoI Act of 1997 (as under the New Zealand and Australian laws) policy advice can only be withheld if disclosure is shown to be contrary to the public interest. Ireland's exemption involves a double test:

- only matters relating to “*the deliberative processes*” of the authority⁴², are exempt under this provision; and
- disclosure must be “*contrary to the public interest*”⁴³.

Several types of information are defined as not falling within this exemption: factual and statistical material and its analysis; scientific and technical advice; internal rules and guidelines used in taking decisions affecting individuals; the reasons for a decision taken by an authority; any report dealing with the effectiveness of a public authority. Cabinet papers and minutes are covered by a separate exemption – but only until they are 5 years old.⁴⁴ The scope of the corresponding UK exemption is not limited in any of these ways.

One case involving several records illustrates how these provisions have been applied. One record was the agenda for a cabinet meeting. The Commissioner upheld the refusal to disclose, confirming that the record fell within the cabinet documents exemption and was not yet 5 years old.

The next was a list of provisional dates for future cabinet meetings. The Commissioner held that this did not fall within the cabinet records exemption, did not contain “deliberative” material either and that even if it did there was no evidence that its disclosure would harm the public interest. The record was disclosed.

⁴² This refers to the processes of “examining the merits of various courses, advising, weighing up or evaluating competing arguments or considerations” ‘FOI Manual: A Guide to the Freedom of Information Act’, FOI Central Policy Unit, Department of Finance, Dublin, April 1998

⁴³ Freedom of Information Act 1997 [Ireland], section 20(1)

⁴⁴ Freedom of Information Act 1997 [Ireland], section 19(3)

Another dealt with the arrangements for a proposed visit and speech to the senate by the European Commission president Jacques Santer which, at the time of the request, had not been confirmed. The Commissioner again found that the document was not deliberative, and that even if it was he would not be persuaded that its disclosure would be contrary to the public interest:

"I can envisage that it might sometimes be against the public interest to release all the details of a proposed visit by a foreign dignitary - for example, if disclosure might endanger the security of the person concerned or if a foreign government would find disclosure objectionable. No such considerations have been advanced in this case and I am satisfied that the Department has not justified its refusal"

A further record dealt with the prime minister's (then) proposed visit to China, which had since taken place. The Commissioner pointed out that the only 'deliberative' element was

"a very brief discussion of the relative merits of using the Government jet or using commercial transport for the proposed visit."⁴⁵

Here too he ordered disclosure, pointing out that that no argument of harm to the public interest had been advanced.

A more far-reaching decision involved a request by a journalist for the monthly budgetary reports which health boards submitted to the Department of Health and for the related correspondence. The Commissioner reported that the bulk of the reports consisted of information about expenditure incurred, the reasons for increases and steps taken to remain within budget – all of which was factual, and not covered by the exemption. Where the reports contained details of proposals, the Commissioner held that the crucial factor was whether these were still under consideration (or might be reconsidered in the future) – in which case he accepted that there was a strong case for withholding them - or whether decisions had already been reached, in which case they should be disclosed.⁴⁶

⁴⁵ Information Commissioner of Ireland. Decision No 9840, 13/11/98

⁴⁶ The Commissioner's ruling reads, in part: "The Department has taken a narrow view of the public interest...The primary aim of the health care services is to meet the health needs of the community. While this must be done in a planned and cost efficient manner, the public interest is not limited to matters of cost efficiency alone. Where cutbacks of major importance to the provision of health care services are being made, there is also a public interest in the community knowing what these may be. The Department and the health agencies are administering the health services on behalf of the

These grounds for ordering disclosure do not exist under the draft bill.

the justification for a class exemption

The white paper explicitly rejected a class exemption for policy material and proposed that the test for access to policy advice would be “*would disclosure of this information cause harm?*”⁴⁷

community. There is a public interest in the community knowing as much about how the services are being administered as is consistent with the provision of an efficient and effective service. This does not mean that the public has the right to know every proposal that is made. Indeed, there is a strong argument in favour of protecting proposals from release at an early stage in order to allow the public body to properly consider the matter. However, once the decision to proceed with any proposed action is taken, the need to withhold the release of the information weakens. Furthermore the argument advanced that the information once released will be used (or abused) in some particular way or misinterpreted or will not be properly understood reflects an attitude more akin to that which prevailed in an era dominated by the Official Secrets Act rather than one governed by the FOI Act. The motives of requesters for seeking information have to be disregarded in dealing with a request (section 7(4) of the Act)...

“...the Department believes that release of the factual information in these records is not in the public interest. I wish to make it clear that I do not accept this argument. Of course, the release of factual information may not be without consequences. In the case of an informed reader, some of the information in these records is bound to give an insight into specific problems facing particular health boards or hospitals. This may prompt questions as to how these problems are being tackled. One can sympathise with the desire of managers to do their jobs without, as they might see it, the “distraction” of dealing with enquiries from the media or other sources. However, a commitment to greater openness carries with it the burden of dealing with the increased scrutiny that openness may invite. It follows that the possibility of such a burden arising is not a factor which might indicate that the public interest is not served by release in this case...”

“In some other cases I have found that information may have qualified for exemption...at the time the record was created. However, with the passage of time the record can no longer be exempt. The records in question contain details of possible revision to the agency’s service plan, the possible abandonment of progressive practices, possible curtailment of elective work and industrial relations problems that might occur. Other records refer to possible inability to continue funding for Year 2000 IT conversion systems, a possible extension of curtailment in services and possible bed closures. I find that at this time the information is no longer exempt.

“In considering whether with the passage of time a record can no longer be treated as exempt, I have assumed that proposals which clearly related to temporary action during 1998, such as proposals to close wards for a specific period no longer apply and accordingly the record no longer needs to be withheld. Some records contain other proposals which may not have been implemented during the year but which may be considered again in the future. I accept that the passage of time has not removed the grounds for exemption in respect of such matters.” Information Commissioner of Ireland, Case 98078, dated 31/3/98

⁴⁷ It said: “We do not propose a restrictive approach along these lines. Indeed, unlike previous UK Administrations, we are prepared to expose government information at all levels to FOI legislation” Paragraph 3.12

Little explanation has been given for the decision to reject this approach. The Home Secretary has suggested that the disclosure of policy materials overseas has sometimes been evaded, and that it would be more honest not to impose the requirement at all.⁴⁸ This is rather like suggesting that because a law is broken, the offending behaviour should be legalised. An effective FoI Act is bound to make government uncomfortable: if all requirements which authorities might be tempted to evade were removed, there would be little point in legislating at all.

The Home Secretary has also suggested that there is little need for public access to policy material since: *“the product of such private deliberations is almost always a public announcement of policy”*⁴⁹

But the public account of a policy may not describe the reality. This was the issue at the heart of the arms-to-Iraq affair, where the government concealed from Parliament the fact that it had changed its policy on arms sales to Iran and Iraq. This led Sir Richard Scott to report:

“Throughout the period that the Inquiry has to examine...there is to be found, in my opinion, a consistent undervaluing by Government of the public interest that full information should be made available to Parliament. In circumstances where disclosure might be politically or administratively inconvenient, the balance struck by the Government comes down, time and time again, against full disclosure.”⁵⁰

That comment may be equally applicable to the balance struck in the draft bill. Should the public and Parliament be misled about a government policy in future, there would be no prospect of this being revealed under these proposals.

⁴⁸Introducing the draft bill in the House of Commons, Mr Straw said: “Some countries with freedom of information regimes have not given proper protection to policy formulation and advice. The paradox of their situation is that, far from that leading to an increase in the accountability of Ministers and decision makers, it has reduced accountability because it has cut the audit trail. Officials and Ministers have gone in for Post-it notes and oral decisions which should have been properly recorded, or for devices for ordaining all sorts of documents which have nothing to do with the Cabinet or Cabinet Committees as Cabinet documents. We want a straightforward and honest regime which recognises that we are dealing with three competing rights--the right to know, the right to privacy and the right to confidentiality. Getting the balance right is difficult, but I think we have achieved it.” House of Commons debates, 24.5.99, col. 31

⁴⁹ Hansard, House of Commons Debates, 24 May 1999, col. 22

⁵⁰ Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions, chaired by the Rt Hon Sir Richard, Volume 1, HC 115, 1996, page 211

Earlier this year, the Home Secretary said:

“if what officials were saying to ministers was going to be immediately available, then it would very seriously constrain what they could say and actually undermine the responsibility of ministers for their decisions. It would place officials in a political arena and make for much less efficient government.”⁵¹

However, the proposals for greater access to advice do not involve making it “immediately” available. Some internal discussions may require confidentiality, particularly where they involve the discussion of untested ideas, whose feasibility or desirability had not been considered, or assessments of how key players are likely to react to proposals, and the tactics for handling them.

However, once decisions have been taken, the case for access is much greater. This would allow the public and Parliament to judge whether the implications of the policy have been properly considered; whether the potential objections have been addressed; and whether the likely results are those which ministers have promised.

The anticipation of such scrutiny would itself improve the quality of analysis, encouraging greater rigour. It would help to counter any tendency to accede to powerful lobby groups advancing weak arguments, or to brush aside problems in the hope that no-one will notice. Exposing the true complexity of an issue may also lead to greater public understanding of the difficulties faced by government, and the real constraints within which ministers operate.

There is support for this approach in New Zealand’s experience, where the post-decisional disclosure of advice has become common.⁵² According to the former New Zealand Ombudsman:

⁵¹ Interview with the Home Secretary in *The Stakeholder*, January/February 1999, vol. 2 No 6

⁵² The New Zealand Law Commission has reported that: “Since 1982 [when FoI was introduced] there has been a fundamental change in attitudes to the availability of official information. Ministers and officials have learned to live with much greater openness. The assumption that policy advice will eventually be released under the Act has in our view improved the quality and transparency of that advice.” Law Commission, ‘Review of the Official Information Act 1982’, October 1997, Wellington, New Zealand, page 5

"The way in which [the exemption provisions] have been developed in practice has been to recognise that at certain stages of the policy making process information must be protected for the sake of the process. These withholding provisions protect the process rather than the information; other provisions...protect information by virtue of its content. But once the process has been completed it no longer requires confidentiality; then the emphasis frequently changes in favour of disclosure...

"Once the policy making process is completed then the harm flowing from disclosure will be limited. Information can then be released showing the development of the policy, because it can be judged against the policy itself; this is quite different from the case where, for example, internal discussion papers are released prematurely with the risk of being wrongly identified as settled policy.

The act also ensures that where especially sensitive advice has been needed, or especially frank opinions have been expressed, these are protected on an ongoing basis to ensure that the process continues to function effectively in future." (emphasis in the original) ⁵³

5. INVESTIGATIONS

One of the bill's most startling feature is the exemption of information obtained by regulatory authorities. All information obtained during an investigation into compliance with any legal requirement is exempt, regardless of whether prejudice to law enforcement, legal proceedings or regulatory functions might be caused.⁵⁴

As far as we know, no FoI law anywhere in the world adopts this approach. (The consultation document is mistaken in suggesting that the American Act does so.⁵⁵)

No regulatory body would even be required to admit whether it holds information obtained during an investigation.⁵⁶ Even the most basic question, such as whether particular premises has been inspected, would not have to be answered.

The rationale for this approach is impossible to understand. *Any disclosure which might*

⁵³ Nadja Tollemache, Paper at Institute of Policy Studies Seminar on the Official Information Act 1982, held 16/5/89

⁵⁴ Clause 25(2)(a)

⁵⁵ Table 2 on page 16 of the consultation document states that the US Act contains class exemptions for investigatory and law enforcement records. In fact the relevant provision, Exemption 7, is based on a series of harm tests. This table contains several other inaccurate references to the US Act.

“prejudice” an authority’s law enforcement or regulatory functions is in any case protected under a different exemption.⁵⁷ The class exemption must be designed to suppress information which does not prejudice these functions. It should have no place in this legislation.

The extent to which the rights the public might expect have been – almost wilfully - disregarded can be seen from the provisions on safety information. No less than three separate provisions bar access to this information. Separate exemptions cover:

- Information obtained during accident investigations,⁵⁸ including those into road, rail, air, or ferry accidents and those involving fires, industrial explosions or unsafe consumer products;
- information obtained by bodies responsible for protecting the health and safety of workers⁵⁹;
- information obtained by authorities protecting the public from industrial or workplace hazards (eg those caused by asbestos stripping or dangerous scaffolding).⁶⁰

Most people would assume that providing access to safety information is one of the prime functions of an FoI Act. To find it explicitly excluded is profoundly shocking.

Employees, or members of the public whose safety is directly at risk, already have some rights to information under health and safety legislation.⁶¹ However, a journalist who wants to draw the public’s attention to the problem has no legal right to information: indeed disclosing information about a specific premises to such a person may be an offence.⁶² Trade union

⁵⁶ Clause 25(4)

⁵⁷ Clause 26

⁵⁸ Clause 25(2)(a)(iii) states: “Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of...any investigation...which is conducted by or on behalf of the authority...by virtue of powers conferred by or under an enactment...for the purpose of ascertaining the cause of an accident”.

⁵⁹ Clause 25(2)(a)(vii)

⁶⁰ Clause 25(2)(a)(viii)

⁶¹ Health & Safety at Work Act 1974, section 28(8)

⁶² The Health & Safety Executive considers that such disclosures are prohibited by sections 28(2), 28(7) and 33(i)(j) of the Health & Safety at Work Act 1974

officers seeking information about action taken by the Health & Safety Executive at a national level also have no rights under the existing legislation. They would remain in the dark under this bill.

In fact the exemption goes well beyond safety. None of the regulatory bodies we rely on to protect our rights as citizens and consumers would have to disclose under this bill what it had found during any routine inspection, complaint investigation or major inquiry. This would apply to regulators dealing with matters such as trading standards, environmental health, food safety, child protection, animal welfare, race and sex discrimination, planning, broadcasting standards, competition policy, utility regulation, higher education standards, the misselling of pensions, and licensing of all kinds.

The US FoI Act has been used to obtain inspection reports on meat plants, abattoirs and food companies exporting to the US; on cruise ships travelling between the two countries; and on British safety testing laboratories whose data is submitted to US agencies. The British versions of these reports would continue to be secret under the proposed UK FoI Act. Yet British enquirers will still have to rely on America's law to make good the deficiencies in our own FoI legislation.

Investigations by authorities which enforce the citizen's obligations would also be exempt. Where disclosure would prejudice an investigation or prosecution, or deter informants from coming forward, the case for an exemption is clear. But the exemption would allow information to be withheld even where an investigation by bodies such as the Child Support Agency or Inland Revenue had found nothing amiss.

6. THE POLICE

The government has rejected the recommendation of the Macpherson report, into the Stephen Lawrence murder inquiry, that there should be no class exemption for any kind of police information.⁶³ The bill exempts all information obtained by the police during investigations,

⁶³ The Macpherson report concluded "we consider it an important matter of principle that the Police

even where its disclosure would not be harmful.

In his evidence to the Public Administration Committee in April 1998 the Home Secretary justified the proposed class exemption by suggesting the police would be damaged by the white paper's proposed "substantial harm" test:

"If you have a simple harm test, then it is possible to have more things testable in the courts. If you go for a substantial harm test, then as far as I am concerned the public interest requires that matters relating to law enforcement, investigations and prosecutions have to be exempted altogether."⁶⁴

The committee responded by proposing a compromise, that law enforcement information should be subject to the lower test of "harm" and be subject to the Act in full.⁶⁵ The lower harm test has been introduced, but the class exemption – although slightly narrower than originally proposed - is retained.

The police (and other law enforcement bodies) will not even have to confirm or deny whether they hold particular information⁶⁶ – though they may do so voluntarily. The victims of a theft will not be *entitled* to know whether fingerprints have been found in their home, and if so whether they have led to an identification. The victim of a road accident will not be entitled to know whether all the witnesses have been interviewed or what description has been obtained of the car which hit them. A person who claims to have been assaulted by a police officer will not be able to know whether the officer involved has been identified. Someone wrongly arrested by the police will not be entitled to see the description of the suspect which had been circulated. The parents of Stephen Lawrence would not be able to know when the police first learnt the names of the murder suspects, or how many different informants identified those suspects.

The former police officer responsible for handling FoI requests to the South Australian Police

Services should be open to the full provisions of a Freedom of Information Act. We see no logical grounds for a class exemption for the police in any area" [para. 46.32] It recommended that: "that a Freedom of Information Act should apply to all areas of policing, both operational and administrative, subject only to the 'substantial harm' test for withholding disclosure." [Recommendation 9]

⁶⁴ HC 398-1, Q.508

⁶⁵ HC 398-1, para. 30

⁶⁶ Clause 25(4)

Force, has acknowledged the benefits of the legislation.

“The majority of our applicants were victims of crime, seeking information in order to make formal claims. Victims were given every assistance by our staff, as most applicants did not know exactly what they wanted. Similarly there was an increasing number of solicitors who specialised in Fol but who had little or no understanding of our record keeping systems, and an even poorer understanding of the [Fol] Act...

We have had other occasions in which victims have asked for full information on the police investigation only to find that information that they were aware of but failed to pass on to investigators had not been included. In these cases Fol was responsible for finalising several cases and arrests were eventually made. It is vital that people are able to communicate properly and do not just assume that police are aware of something known to the victim.

Although our department strongly upholds the aims of the act, in ensuring that as much information as possible is released, there will always be occasions that involve a refusal. There are very good reasons for refusing documents, and careful consideration is given. However, in most cases the information relates to a third party and the rights of that person must be considered. The identity of suspects for example is generally not revealed unless that person has been charged with an offence...

I am happy to say that on my retirement, I can see a big improvement in file management, accountability and record keeping by police officers as a result of the impact of Fol. There is always going to be some pain in the process, but the awareness, which Fol has generated over the last eight years, has made for better policing, file management and public relations.”⁶⁷

7. CONFIDENTIAL SOURCES

Another class exemption applies to information obtained or recorded for the purposes of an investigation which “relates to the obtaining of information from confidential sources”.⁶⁸ This provision is not limited to information which would reveal the *identity* of an informant, but would also cover procedural matters. A potential whistleblower might for example be unable to discover what safeguards, if any, existed to restrict the circulation of his or her name within the regulatory body, or in what if any circumstances it might be disclosed outside the authority.

⁶⁷ Geoff Rawson, Freedom of Information Review (Monash University, Australia), No 76, August 1998.

⁶⁸ Clause 25(3)(b)

8. THE 'JIGSAW' EXEMPTION

An astonishing “catch-all” allows harmless information to be withheld if, in combination with other unspecified and even secret information, its disclosure could cause harm. The exemption would apply if the requested information, together with -

“any other information (whether or not held by the public authority and whether or not accessible, or likely to become accessible, to members of the public)”⁶⁹

would be harmful. This is not intended to protect national security. It applies where the combined information would prejudice interests such as defence, international relations, the frankness of advice, relations between the Westminster and Scottish or Welsh assemblies, and commercial confidentiality.

Where a ‘jigsaw’ of 5 pieces of information put together might be harmful, and 4 were in the public domain already, an argument for withholding the 5th could exist. But the exemption is not directed at this situation.

Harmless information could be refused even if the 4 other jigsaw pieces are confidential and unlikely ever to be released. It would apply whenever the harmless information could add to the harm done by some other information, *whether or not that information is held by the authority and whether or not there is any prospect of ever becoming public*. It is therefore capable of undermining almost any request that could be made. For example, if someone wanted background information about a commercial transaction, and made a point of *not* asking for the price (because they assumed this would be regarded as commercially sensitive) their request could be refused on the grounds that *should they happen to discover the price* the combined information could harm commercial interests.

9. INCRIMINATING EVIDENCE

Authorities will be allowed to withhold information from the Commissioner which could lead to them being prosecuted for an offence.⁷⁰ This remarkable provision gives public authorities

⁶⁹ Clause 37(1)(a)

⁷⁰ Clause 44(7)

the right, normally enjoyed only by individuals or private bodies, to refuse to incriminate themselves. This type of provision is meant to protect the individual against the state: here it protects the state against the individual. This is clearly inappropriate in legislation whose purpose includes helping to expose misconduct.

The only conceivable argument for this provision may be that European law requires this privilege to be available in the case of individuals (eg general practitioners) who may be defined as “public authorities” under the Act. In this case, the provision should be redrafted so that the privilege was not available to other authorities.

10. NEW EXEMPTIONS

New exemptions could be created at short notice to block requests already received. The exemption would be created by Parliamentary order and, although it requires the approval both Houses of Parliament, this is unlikely to be a great obstacle to a government with a substantial majority.

The white paper had ruled out any form of veto, saying:

“a government veto would undermine the authority of the Information Commissioner and erode public confidence in the Act”.⁷¹

11. PUBLIC INTEREST DISCLOSURE

The bill requires authorities to consider the *discretionary* release of exempt information in the public interest.⁷² The same applies to information whose disclosure is refused because of the cost. We would welcome any *requirement* to disclose in the public interest.⁷³ However, the Information Commissioner is specifically prohibited from ordering disclosure on these grounds.⁷⁴ Only the *authority* can decide where the public interest lies. The Commissioner’s

⁷¹ Paragraph 5.18

⁷² Clause 14

⁷³ See two Campaign for Freedom of Information publications: (i) ‘Response to the Freedom of Information White Paper’, March 1998, pages 25-35; and (ii) ‘Freedom of Information: Key Issues’, December 1997. Both are available on the Campaign’s web site: <http://www.cfoi.org.uk>

⁷⁴ Clause 45(2)

role is limited to ensuring that the authority has *considered* the public interest. If it has not, he or she can only send the decision back for reconsideration.

This is a retreat from the white paper which envisaged that the Commissioner would have this power.⁷⁵ It is a weaker arrangement than exists under the Australian, New Zealand and Irish FoI laws where the enforcing body can make decisions on public interest grounds. It will even provide a lower standard of disclosure than now exists under the open government code, where the Parliamentary Ombudsman can hold that exempt information should be disclosed in the public interest.⁷⁶

In a complaint by the Campaign for Freedom of Information, involving information claimed to be commercially confidential, there was a suggestion that the public may have been deliberately misled in an official consultation paper.⁷⁷ However, the Ombudsman found no evidence of this, reporting that the published statements were consistent with the internal material. Crucially, he added:

“Had I found that it was not, I should have concluded that the public interest in disclosing at least some, and possibly all, of the information was greater than any harm which might result”⁷⁸

This is a powerful principle. An authority which misleads the public, will be held accountable. But the new Information Commissioner will be unable to make such rulings.

A proper public interest test would operate in two ways. First, it would ensure that the interests of openness and accountability were considered alongside the case for withholding.

⁷⁵ The white paper stated: “cases involving the disclosure of information are often complex and sometimes require fine judgements to be made on whether the public interest in disclosing information should or should not prevail over a competing public interest in withholding information. There is a clear need for an expert review body to exercise such judgements.” Cm 3818, para 5.1

⁷⁶ The code states: “In those categories [of exemption] 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.” [Part II, Reasons for confidentiality]

⁷⁷ This related to the economic implications of the BNFL THORP plant

⁷⁸ Parliamentary Commissioner for Administration, 4th Report Session 1997-98, HC 804, Case A.29/95

This is particularly important given that the thresholds for exempt information are so much lower than the white paper proposed. Second, it would ensure that an authority would not be able to conceal its own malpractice. This is the basis for the long standing principle, that “there is no confidence in iniquity” applied by the courts in breach of confidence cases. It cannot be right that an authority which may be denying its actual responsibility for serious misconduct should also be charged with determining whether the public interest requires it to disclose that information.

In these circumstances, Ireland’s Information Commissioner would be able to *compel* disclosure. The UK’s Commissioner would be limited to asking the authority to reconsider.

Cases may follow the pattern of a maladministration case reported by the Parliamentary Ombudsman. The MOD had failed to disclose to the complainant the truth about her son’s death during the Falklands conflict in 1982 and withheld information from the inquest. She later succeeded in obtaining a second inquest, which reached a different verdict, but the MOD twice rejected her claims for reimbursement of the legal costs. The Ombudsman reported:

“While it was a discretionary decision for MOD whether or not to make an ex gratia payment to Mrs A the Ombudsman was not persuaded that in reaching their decision they had taken into account all the relevant factors and no irrelevant ones. He put it to the Permanent Secretary that MOD should consider afresh Mrs A's compensation claim. The Permanent Secretary accepted that there had been failings in the handling of the conclusions on the cause of the son's death and that MOD had been unacceptably slow in correcting the record. He regretted the distress caused to Mrs A as a result. The record had, however, eventually been corrected publicly at a very high level. MOD reconsidered the position in the light of the Ombudsman's report but still decided not to make an ex gratia payment. The Ombudsman sympathised with Mrs A, but as MOD had reconsidered their decision in the light of the factors he saw as relevant, he considered he could take matters no further.”⁷⁹

The Ombudsman, having urged that the original decision be reconsidered, had exhausted what he could do. The Commissioner is likely to be in the same position in relation to the public interest.

How, for example, would the bill help someone trying to investigate the appalling waste of

⁷⁹ Parliamentary Commissioner for Administration, Annual Report 1997-98, page 39. The Ombudsman reported that following the 1997 election the new government decided to reconsider the request and agreed to pay Mrs A £10,000 compensation.

public funds by the West Midlands Regional Health Authority which, in the words of the Public Accounts Committee, had been responsible for “*a waste of at least £10 million, at the expense of health care for sick people in the West Midlands*”? The committee reported:

“The essence of this mismanagement was that the responsible official, new to the National Health Service, was able to follow his own path, making a bonfire of the rules in the process, uncontrolled either by the Regional Health Authority or regional senior management. These were very serious failings at all levels of management, and the Chairman and members of the Regional Health Authority had seriously neglected their duty to secure the accountability of regional management”.⁸⁰

An FoI requester would certainly have been told that much of the information was “commercially confidential”. Any decision on a public interest disclosure would be made not by the Commissioner but by the senior managers whose own negligence had caused the problem. The outcome would be entirely predictable.

MOTIVES OF THE REQUESTER

The discretionary disclosure arrangements include some wholly unacceptable features. Before considering such a disclosure, an authority would be entitled to insist that the applicant reveal his:

“reasons for requesting the information and...any use which he proposes to make of the information⁸¹

This violates the basic FoI principle, that access to information is a right which everyone enjoys regardless of their purpose. The white paper stated:

“Applicants will not need to demonstrate or state their purpose in applying for information. All requests will be considered equally on their contents, not on the stated or presumed intentions of the applicant.”⁸²

All applicants could routinely be asked to declare why they are seeking information and what

⁸⁰ Public Accounts Committee, 8th Report, Session 1993-94, ‘The Proper Conduct of Public Business’, HC 154, January 1994, page xii

⁸¹ Clause 14(4)(b)

⁸² Cm 3818, para. 2.7

they intend to do with it. This is likely because authorities will be required to consider a discretionary disclosure *every time* a request involves even a fragment of exempt information. The majority of applications are likely to fall into this category. Authorities may even find it convenient to build questions about the requester's motives into their FoI application forms. Questioning applicants about their motives will cause resentment and suspicion. It will also encourage authorities to discriminate between requesters, disclosing to those they believe will use information 'responsibly' but withholding it from critics or complainants.

gagging provisions

Even worse follows. An authority which releases information under these provisions can:

"impose such conditions as are reasonable in the circumstances restricting the use or disclosure of the information by the person to whom it is disclosed"⁸³

We cannot see why applicants should be prevented from publishing, or using as they see fit, information which has been disclosed to them "in the public interest".⁸⁴ This provision is fundamentally at odds with the purposes of an FoI Act.

None of the examples which have been cited to explain this provision appear relevant. They refer to disclosures which in other countries would be made to the public at large, or to limited disclosures for research purposes (eg of patient records to medical researchers) for which well-established protocols already exist.

Much information will be "exempt" merely because it falls into a class exemption, even though disclosure would not cause harm. To obtain this harmless information, applicants face the deeply unappetising prospect of having to demonstrate their 'need to know', and then agreeing only to use the information in accordance with an authority's instructions. These provisions have no place in a Freedom of Information Act.

Some safeguard may be provided by the requirement that the restrictions must be "reasonable

⁸³ Clause 14(6)

⁸⁴ Clause 14(3)

in the circumstances”,⁸⁵ implying that unreasonable restrictions can be challenged by complaint to the Commissioner. However, many applicants will accept unjustified restrictions, either because they do not realise that they could be challenged or because they need the information quickly. Moreover, the Commissioner’s powers in this area are restricted by clause 45(2). If the Commissioner holds that a restriction is unreasonable, he or she cannot set it aside and oblige the authority to disclose the information without conditions.

In making such a discretionary disclosure, authorities will be allowed to exceed the normal 40 day response period⁸⁶ and regulations may permit higher than normal fees to be.⁸⁷

12. SUBSTANTIAL HARM

The white paper proposed that authorities wishing to withhold information must show that disclosure would cause “substantial harm”. This has been replaced with the lower test of “prejudice”, allowing considerably more information to be withheld.

“Prejudice” is the test currently found in the code’s exemptions, though many exemptions use what may be the slightly tougher test of “harm”. The effect is that the level of disclosure will be no better than that now found under the code.

However, the white paper had been critical of the code’s harm tests, which it described as “*insufficient*”⁸⁸ and proposed that the bill’s tests should be “*set in specific and demanding terms*”.⁸⁹

The substantial harm test was also seen as analogous to the revised public interest immunity (PII) test adopted by the last government in 1996, in response to the Scott report.⁹⁰ The

⁸⁵ Clause 14(6)

⁸⁶ Clause 14(5). The explanatory notes on the draft bill confirm that authorities will have to reach a decision “within a reasonable period but not within a specified time limit” [para. 62]

⁸⁷ Clause 14(7)

⁸⁸ Cm 3818, para. 3.6

⁸⁹ Cm 3818, para. 3.7

⁹⁰ This provided that in seeking a court’s agreement to withhold information that was relevant to legal proceedings, the government would have to show that its disclosure would cause “serious

background papers to the white paper noted that substantial harm:

“would clearly be more stringent (and so provide greater openness) than the Code of Practice on Access to Government Information (which normally exempts on the basis of simple “harm” or “prejudice”) and would be closer to the “real damage” test of PII. Practical experience of applying a “real damage” test in litigation indicates that it results in a substantial reduction in the volume of material which would be withheld.”⁹¹

Introducing the draft bill, the Home Secretary indicated that the term “prejudice” was frequently used in other contexts⁹² and that in practice it would mean that:

“the prejudice has to be real, actual or of ‘substance’”⁹³

However, these words do not appear on the face of bill. Mr Straw explained that the government intended ‘prejudice’ to be read in this way, and had made this statement so that the courts would, in cases of doubt, take account of what he had said, in line with the House of Lords decision in *Pepper v Hart*.⁹⁴

In normal circumstances, the courts will take no notice of what a minister has said in Parliament. However, the *Pepper v Hart* ruling made clear that a minister’s explanation in Parliament could be considered, but only in interpreting a provision that was “*ambiguous or*

harm”. The then Attorney-General stated: “The new emphasis on the test of serious harm means that Ministers will not, for example, claim PII to protect either internal advice or national security material merely by pointing to the general nature of the document. The only basis for claiming PII will be a belief that disclosure will cause real harm...a document will not attract PII simply because it falls into a pre-defined category.” Sir Nicholas Lyell, Hansard, Commons Debates, 18.12.96, col 950

⁹¹ “Your Right to Know – Background Material”, Cabinet Office, January 1998, paragraph 100

⁹² Mr Straw said: “We have looked at the use of the word “prejudice” a good deal. One of the reasons that it was chosen by parliamentary counsel was that it is in greater use than the word “harm”. The House will be fully familiar with the fact that it crops up in paragraph (4) of part II of schedule 12A of the Local Government Act 1972. The point about that--it is, of course, an Act that was passed under a previous Administration--is that it talks about information whose publication would prejudice the authority. The use of the word “prejudice” crops up again in the Contempt of Court Act 1981. More important, it has been the subject of much judicial definition under the European convention on human rights, so its use is appropriate. Of course, that could be the subject of more consideration. Hansard, Debates, 24/5/99, cols 27-28.

⁹³ Hansard, House of Commons Debates, 24/5/99, col 22

⁹⁴ Mr Straw said: “following the *Pepper v. Hart* judgment by the Appellate Committee of the House of Lords, if an issue relating to the interpretation of the Bill and of prejudice comes to court, their Lordships in the Appellate Committee take account of what Ministers have said in explanation. I am sure that any court will take account of the definition that I have used--“real, actual or of substance”--whether or not it is possible to write it into the Bill. That is one of the reasons why I have put it on the record Hansard, House of Commons Debates, 24/5/99, col 26

obscure or the literal meaning of which leads to an absurdity”, and then only if the minister’s statement directly addresses the question at issue.⁹⁵

There is no reason why the courts should find any ambiguity in the meaning of “prejudice”. They could decide that prejudice which is *less* than “real, actual or of substance” has occurred. If so, they would take no account of the Home Secretary’s statement to the contrary. If his intention is that information should only be withheld when the prejudice is “of substance”, the only way to ensure it is to insert those words into the legislation.

The bill’s approach indicates not merely a retreat from the objective on improving on the code’s tests, but a readiness to adopt a *lower* standard than the code’s. This is the result of simultaneously (a) lowering the bill’s harm test to (or even slightly below) the code’s and (b) replacing the code’ substantive public interest test, with one that is purely discretionary. The effects of this can be seen in relation to issues such as commercial confidentiality.

13. COMMERCIAL CONFIDENTIALITY

Information would be exempt if “constitutes a trade secret” or if its disclosure:

“would be likely to prejudice the commercial interests of any person (including the public authority holding it)”⁹⁶

The term “trade secret” is not defined. To the ordinary person, it may imply a secret manufacturing process, whose disclosure would enable rivals to secure a significant unfair competitive advantage, at the expense of the trade secret’s owner. But the courts could adopt a far weaker interpretation, in line with that proposed by Law Commission:

“We think the term should apply to information (i) which is not generally known, (ii) which derives its value from that fact, and (iii) as to which its ‘owner’ has indicated (expressly or impliedly) his or her wish to preserve its quality of secrecy.”⁹⁷

⁹⁵ Lord Browne-Wilkinson, *Pepper v Hart* [1993] 1 All ER 42, at 64

⁹⁶ Clause 34

⁹⁷ Law Commission, ‘Legislating the criminal code: Misuse of trade secrets’. Consultation paper no 150, 1997, para. 1.29

Under such a definition, ‘trade secret’ might refer to nothing more than information which has some value and which the owner does not want to disclose. It could be exempt from access even if the value is insignificant, or would not be diminished by disclosure.

The second limb of the exemption is equally unsatisfactory. It would apply to information which may not even have come from the company or business involved, and does not in any sense belong to them. It may not even be confidential. A report showing that a company was supplying substandard or dangerous products would be exempt if its disclosure would lead customers to switch to alternative products. Recent reports about the hazards of Belgian Coca Cola or dioxin contaminated products could be withheld on the grounds that alerting the public might “prejudice” the interests of the overseas manufacturers, importers or even UK shops with large stocks on their hands.

The bill’s test is weaker than the corresponding provisions in:

- the Environmental Protection Act 1990, where “commercially confidential” refers to information whose disclosure “would prejudice *to an unreasonable degree* the commercial interests” of the person concerned.⁹⁸
- the US Freedom of Information Act, which applies to a disclosure *which “would cause substantial harm to the competitive position of the person from whom the information was obtained”*.⁹⁹ (This contains three features absent from the draft bill’s exemption: it (a) uses the “substantial harm” test originally proposed in the white paper (b) applies only where the harm is to a person’s “competitive position” which can only apply where there is competition, and (c) applies only if the harm is to the person who supplied the information.)
- Ireland’s FoI Act which exempts trade secrets and information whose disclosure would cause a “*material financial loss*” or “*prejudice the competitive position*”¹⁰⁰ of the person

⁹⁸ Environmental Protection Act 1990, section 22(11)

⁹⁹ This is the test set out by the Court Appeals for the District of Columbia Circuit in what is considered the leading case on the issue: *National Parks and Conservation Association v Morton* (1) 498 F.2d 765 (D.C. Cir. 1974).

¹⁰⁰ Freedom of Information Act 1997 [Ireland], Section 27(1)(b)

concerned. Even if such harm is caused, the information must be released where (a) *“disclosure...is necessary in order to avoid a serious and imminent danger to the life or health of an individual or to the environment”* or (b) *“the public interest would, on balance, be better served by granting than by refusing to grant the request”*¹⁰¹

All these provisions are significantly better than the draft bill’s exemption.

14. TIME LIMITS

To provide consistency with the Data Protection Act (DPA) the draft bill adopts the DPA’s 40-day period for responding to requests.¹⁰² This is double the code of practice period of 20 days, and longer than any overseas FoI law. It would make Britain’s FoI Act the slowest and most unresponsive the world. If consistency with DPA is needed, it should be achieved by reducing the 40-day period, either for all bodies or just for public authorities.

15. DELETED DATA

Another provision adopted from the DPA permits an authority to refuse to disclose information which it holds at the time the request is received but which it would normally amend or destroy within a 40-day period.¹⁰³ Whatever the merits of this provision in relation to DP legislation, it is entirely undesirable here. An authority which deletes unneeded e-mails every 39 days, would never have to disclose such an e-mail to a requester, even where in any particular case the information was readily available. This might even encourage authorities to adopt such cyclical ‘weeding’ policies, specifically to evade the bill’s requirements.

16. THE HONOURS SYSTEM

Another class exemption applies to information which relates to “the conferring by the Crown

¹⁰¹ Freedom of Information Act 1997 [Ireland], Sections 27(2)(b) and (e) and 27(3)

¹⁰² Clause 10(1). This reflects sections 7(8) and (10) of the Data Protection Act 1998.

¹⁰³ Clause 8(6). This reflects section 8(6) of the Data Protection Act 1998.

of any honour".¹⁰⁴ This exemption is not limited to the identities of individuals considered for honours or opinions on their merits – matters already comprehensively protected under exemptions relating to personal privacy,¹⁰⁵ the frank exchange of views¹⁰⁶ and the effective conduct of public affairs.¹⁰⁷ This class exemption would also protect background material, for example, the criteria to be applied or the procedures to be followed in seeking or assessing nominations. In this respect also the bill provides less access than the openness code of practice, where the corresponding exemption is limited to information about individuals recommended for honours.¹⁰⁸

17. DUTY TO ASSIST

The bill does not require authorities to assist applicants. Instead, they will be encouraged to do so in a code of practice issued by the Secretary of State.¹⁰⁹ The code would not be enforceable.¹¹⁰ The government has previously accepted that there should be an statutory duty to assist,¹¹¹ as there is under several countries' laws.

This is not a satisfactory solution. Authorities will have statutory powers which could be exercised in an unhelpful or even oppressive manner. Reducing the duty to assist to a non-statutory recommendation only underlines the unequal status of the two parties:

¹⁰⁴ Clause 29(1)(b)

¹⁰⁵ Clause 31

¹⁰⁶ Clause 28(3)(b)

¹⁰⁷ Clause 28(3)(c)

¹⁰⁸ Exemption 8(c) of the code applies to "Information, opinions and assessments given in relation to recommendations for honours".

¹⁰⁹ Clause 38(2)(a)

¹¹⁰ The Commissioner's only remedy to non-compliance would be to issue a non-binding "practice recommendation" under Clause 41(1)

¹¹¹ The Government's Response to the Public Administration Select Committee's Report on Freedom of Information (21 July 1998) stated: "The statute will also require public authorities to assist enquirers in certain circumstances to define the information they are seeking."

- An authority can refuse to process a request if the applicant does not supply it with “such further information as it may reasonably require in order to identify and locate the information requested”,¹¹² but there is no duty on the authority to help the applicant identify what information it holds;
- Authorities are not required to comply with requests where to do so would exceed the appropriate cost limit,¹¹³ but they are not required to suggest to applicants ways in which the request could be reformulated to reduce the cost.
- An authority can refuse to release information under their discretionary powers if applicants refuse to answer intrusive questions about their motives¹¹⁴
- Authorities are not required to confirm or deny whether they hold information falling within a ‘class exemption’ even when to do so would cause no harm;¹¹⁵
- Authorities can refuse to respond to “vexatious” requests¹¹⁶, even where the “vexatious” behaviour is a response to an authority’s own obstructiveness in previous contacts – as sometimes occurs.

A statutory duty to assist applicants, would provide some modest counterbalance to these provisions. Helpful precedents can be found in the Australian¹¹⁷ and Irish¹¹⁸ FoI Acts. Providing this duty on the face of the bill would:

- (a) prevent authorities exercising certain powers until they had provided or offered assistance to the applicant;
- (b) help to ensure that applicants were aware of the authority’s responsibility to offer assistance;

¹¹² Clauses 8(3) and Clause 14(4)(a)

¹¹³ Clause 12(1)

¹¹⁴ Clause 14(4)(b)

¹¹⁵ Clauses 25(4), Clause 27(2); Clause 28(4)(a); Clause 29(2).

¹¹⁶ Clause 13(1)

¹¹⁷ Freedom of Information Act 1982 [Australia], Sections 15(3)(b), 15(4)

¹¹⁸ Section 6(2) of the Irish FoI Act states: “It shall be the duty of a public body to give reasonable assistance to a person who is seeking a record under this Act (a) in relation to the making of the request ...for access to the record, and (b) if the person has a disability, so as to facilitate the exercise by the person of his or her rights under this Act.” Section 10(2) prevents an authority from refusing a request which is so voluminous as to be disruptive unless it “has assisted, or offered to

- (c) give the Commissioner powers to issue enforcement notices over a failure to assist, for example by requiring an authority to make available published guidance setting out information that other applicants might require.

18. REASONS

The openness code explicitly requires authorities “to give reasons for administrative decisions to those affected”¹¹⁹, as do several overseas FoI laws.¹²⁰ The white paper stated the FoI Act would establish a similar duty.¹²¹ The bill contains no direct duty.

Instead, this provision is relegated to an unenforceable aspect of the “publication schemes” which authorities are required to adopt. In these schemes, authorities must set out the classes of information which they publish or intend to publish, and in doing so must:

“have regard to the public interest...in the publication of reasons for decisions”¹²².

This is doubly unenforceable. An authority cannot be forced to include a commitment to give reasons in its scheme. Where it does provide such a commitment, the authority cannot be forced to comply with it in any particular case. In either case, the Commissioner’s only remedy would be to issue a “practice recommendation”¹²³ but an authority could not be compelled to comply with such a recommendation. The applicant could try to make an FoI request, asking for the reasons – but the answer might well prove to fall within any of several of the unacceptably broad exemptions.

19. MANUALS

The same pattern applies to administrative manuals. The code requires authorities to publish:

“explanatory material...including such rules, procedures, internal guidance to officials and

assist, the requester concerned in an endeavour so to amend the request” to make it manageable.

¹¹⁹ Code of Practice on Access to Government Information, Part I, paragraph 3(iii)

¹²⁰ See section 18(1)(a) of Ireland’s Freedom of Information Act 1982 and section 23 of New Zealand’s Official Information Act 1982

¹²¹ Cm 3818, para. 2.18

¹²² Clause 6(3)(b)

¹²³ Clause 41(1)(b)

similar administrative manuals as will assist better understanding of departmental action in dealing with the public”¹²⁴

All the main FoI laws contain a similar provision. The white paper proposed to follow suit, but the bill fails to do so. It is possible that authorities may be advised to consider including manuals in their “publication schemes”, but compliance will not be obligatory.

20. CODE OF PRACTICE

In a number of important aspects the draft bill is weaker than the non-statutory openness code introduced by the last government in 1994. In these areas, the introduction of this bill would remove existing rights to information and would permit *greater* secrecy on the part of central government.

Draft Bill	Openness code
Exempts all information relating to the “formulation or development of government policy”. ¹²⁵	Information about policy formulation is available so long as disclosure does not “harm the frankness and candour of internal discussion” ¹²⁶ .
Exempts the analysis underlying new government decisions or policy proposals is exempt ¹²⁷	“the facts and analysis of the facts” leading to decisions or proposals must be published once the decision or proposal is announced ¹²⁸
Prohibits the Commissioner from ordering disclosure of exempt information on public interest grounds. ¹²⁹	The Parliamentary Ombudsman can recommend that exempt information should be disclosed in the public interest ¹³⁰

¹²⁴ Code of Practice on Access to Government Information, Part I, paragraph 3(ii)

¹²⁵ Clause 28(1)

¹²⁶ Code of Practice on Access to Government Information, Exemption 2

¹²⁷ Clause 28(1)

¹²⁸ Code of Practice on Access to Government Information, Part 1, paragraph 3(i)

¹²⁹ Clause 45(2)

¹³⁰ Code of Practice on Access to Government Information, Part II, ‘Reasons for confidentiality’

<p>Does not require authorities to give individuals reasons for decisions affecting them.</p> <p>Authorities must draw up ‘publication schemes’ explaining what they will publish and these must “have regard to the public interest...in the publication of reasons for decisions”.¹³¹ However, compliance with a publication scheme cannot be enforced.</p> <p>People seeking reasons for decisions would have to make a specific FoI request for them.</p>	<p>Requires authorities “to give reasons for administrative decisions to those affected”.¹³²</p>
<p>No duty to publish internal guidance used by an authority in its dealings with the public.</p>	<p>Requires authorities to publish such internal guidance¹³³</p>
<p>No duty to give reasons for administrative decisions. Authorities will be encouraged to do so in when issuing “publication schemes”, non-enforceable guides to the information they will make available¹³⁴</p>	<p>Requires authorities to give reasons for administrative decisions</p>
<p>Information must be supplied within 40 days¹³⁵</p>	<p>Information must be supplied within 20 working days</p>

¹³¹ Clause 6(3)(b)

¹³² Code of Practice on Access to Government Information, Part I, paragraph 3(iii)

¹³³ Code of Practice on Access to Government Information, Part I, paragraph 3(ii)

¹³⁴ Clause 6(3)(b)

¹³⁵ Clause 10(1)

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Further views on

The Government's draft

Freedom of Information Bill

July 23, 1999

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

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

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 1997 [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 interest¹² – 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 delays¹³ and greater restrictions on its use than information sought for private or commercial purposes.

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.

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 confidence¹⁶ 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

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 .

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.

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.

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'.

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.

...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

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

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