The Campaign for Freedom of Information

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The Rt Hon Lord Falconer of Thoroton
Secretary of State for Constitutional Affairs
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I am writing to express my concern at the revised code of practice issued under section 45 of the Freedom of Information Act which advises authorities on the discharge of their functions under the Act. The revised code was presented to Parliament last week but as it was not available for public consultation beforehand we have had no opportunity to comment on it until now.

In two areas the revised code, unlike the original, contravenes explicit ministerial commitments made to Parliament during the passage of the Freedom of Information Act. These involve the time limit for responding to requests involving the public interest test and the circumstances in which authorities should accept information in confidence.

1. Time limit for responding to requests

The Act normally requires public authorities to respond to requests for information promptly and in any event within 20 working days. However, where a decision on disclosure involves the public interest test this time limit does not apply and responses can be made within such time as is "reasonable in the circumstances".

The fact that the public interest test has to be considered does not mean that some complex issue, requiring prolonged consideration, is necessarily involved. Any straightforward factual request about the formulation of government policy - such as a request to be told how many responses were received to a government consultation document - would involve the public interest test and could exceed the 20 day limit. A high proportion of all requests, many of them simple, will now be answered without the discipline of a fixed time limit. This is bound to encourage unnecessary delays.

This issue was debated in Parliament during the passage of the FOI Act. It was pointed out that under the existing Open Government code more than 90% of all requests were handled within the code's 20 working day target or the shorter period adopted by some departments. Concern about unnecessary delays prompted the Home Office minister Lord Bassam of Brighton, to give the following commitment:

> "the Government remain of the view that wherever possible all information should be disclosed within a 20-day time period. That too - I give a commitment - will be reflected in the Secretary of State's code."[1]

During the same debate, Lord Bach, then a government whip, said that the code would refer to the desirability of:

> "making all decisions within the 20 working days wherever possible."[2]

The first edition of the code published in November 2002 did indeed reflect this commitment. It stated

> "Public authorities should aim to make all decisions within 20 working days, including in cases where a public authority needs to consider where the public interest lies in respect of an application for exempt information. However, it is recognised there will be some instances where it will not be possible to deal with such an application within 20 working days."[3]

This passage has been omitted from the 2nd edition of the code published last week.[4] There is now no suggestion that authorities should attempt to deal with such requests within 20 working days where possible. Nor is this point reflected in the DCA's guidance on requests, which merely states that where the public interest test is involved the 20 day limit is "is extended by a 'reasonable period'."[5]

The first edition of the code was subject to public consultation and we saw several drafts of it. At one stage this commitment which had initially been included was left out, apparently through oversight. It was reinstated after we drew attention to the ministerial commitment.[6] The same thing has now happened again. I hope the commitment will once more be restored.

2. Accepting information in confidence

The first edition of the code contained several passages which discouraged authorities from unnecessarily agreeing to accept information in confidence. Some of these provisions have now been weakened or omitted altogether. As a result, the code no longer reflects a specific commitment which you yourself gave in the House of Lords during the Act's passage.

During the report stage a number of peers expressed concerns that authorities might unnecessarily agree to accept information in confidence. It was suggested that some might even do so deliberately, to ensure that the information which might expose them to criticism could be withheld under the section 41 confidentiality exemption. If the information itself was not in the public domain, the authority's agreement to accept it in confidence would probably be enough to establish an enforceable obligation of confidence, exempting it from access.

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[1] Lords Hansard 14.11.2000, col 190
[2] Lords Hansard 14.11.2000, col 250
[3] Lord Chancellor's Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000, Issued under section 45 of the Act November 2002, paragraph 18
[4] Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000, Issued under section 45 of the Act. November 2004
[5] DCA, Freedom of Information, Procedural Guidance, Chapter 6, Time and Fees Procedures. http://www.dca.gov.uk/foi/guidance/proguide/index.htm
[6] Campaign for Freedom of Information, 'Further Comments on the Draft 'Good Practice' Code. March 2002, http://www.cfoi.org.uk/pdf/s45furthercomments.pdf

In response to these concerns you undertook to amend the draft section 45 code to specifically address these points. You said:

> "We shall return with an amended code of practice aimed at dealing with the area of accepting information in confidence only if it is necessary to obtain that information and it is appropriate so to do."[7]

You later repeated this:

> "we recognise that the code of practice must be so constructed that information is genuinely obtained in confidence only when it is necessary to obtain the information and that that is appropriate."[8]

The first edition of the code contained such a statement. It said:

> "A public authority should only accept information from third parties in confidence if it is necessary to obtain that information in connection with the exercise of any of the authority's functions and it would not otherwise be provided."[9]

This passage, which expressly reflected your commitment in Parliament, has now been dropped from the code.

The two tests contained in that passage - that the information should be necessary to for the authority's functions and would not be provided without confidentiality - discourage authorities from entering into casual commitments of confidentiality. They are helpful, reflect the spirit of the Act and encourage a more rigorous approach to confidentiality.

A number of other changes have been made which also seem to relax the approach to confidentiality set out in the code's first edition. For example, the previous version stated:

> "When entering into contracts with non-public authority contractors, public authorities may be under pressure to accept confidentiality clauses so that information relating to the terms of the contract, its value and performance will be exempt from disclosure. *Public authorities should reject such clauses wherever possible."*[10] (my emphasis)

The second edition says:

> "When entering into contracts with non-public authority contractors, public authorities may be asked to accept confidentiality clauses, for example to the effect that information relating to the terms of the contract, its value and performance will not be disclosed. *Public authorities should carefully consider the compatibility of such terms with their obligations under the Act.* (my emphasis) It is important that both the public authority and the contractor are aware of the limits placed by the Act on the enforceability of such confidentiality clauses."

It seems entirely proper to advise authorities wherever possible to reject confidentiality clauses which seek to prevent the release of information about, say, the performance of a contract because of the importance of this information to public accountability. The revised advice no longer does so. Instead, it advises authorities not to enter into *unenforceable* confidentiality agreements - an entirely different point. There may be circumstances in which a which a clause

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[7] Hansard, Lords, 14.11.2000 col 176
[8] Hansard, Lords, 14.11.2000 col 177
[9] Paragraph 47
[10] Paragraph 42

attempting to prevent the release of information about a contract might be unenforceable either because the information was not confidential in nature or for public interest reasons. But neither point automatically follows and an authority may well enter into an *enforceable* agreement to suppress such details, even where this information is needed for the purposes of accountability.

The first edition of the code also said that any confidentiality agreements *"must be for good reasons and capable of being justified to the Commissioner"*.[11] That provision too has been omitted from the new edition.

Only last month the DCA published its guidance on the exemption for breach of confidence, which draws specific attention to the points made in the first edition of the section 45 code but now deleted:

> "The Lord Chancellor has issued a Code of Practice under section 45 of the FOI Act. Paragraph 47 deals with the circumstances in which a public authority should accept information in confidence:
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> - public authorities should only accept information from third parties in confidence if it is necessary to obtain that information in connection with the exercise of any of the authority's functions and it would not otherwise be provided;
> - public authorities should not agree to hold information received from third parties "in confidence" if it is not confidential in nature;
> - acceptance of any confidentiality provisions must be capable of justification to the Commissioner.
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> This code has considerable force: it is one of the duties of the Information Commissioner to promote its observance and there is a legitimate expectation that public authorities will adhere to it. It is also likely that a court would take its provisions into account when determining whether a public authority has complied with the FOI Act."[12]

The provisions referred to in each of the three bullet points above have now been removed from the code, though it is hard to see why any of them could be thought to be objectionable. Why has this last minute change been made to advice which the DCA itself repeated only a month ago and which authorities have been urged to follow for two years? The significance of the change is emphasised by the extract's final paragraph which states that the code's provisions would be taken account by the courts in enforcing the Act.

I hope the code will now be amended so that it once again reflects the two important ministerial commitments made during the FOI Act's passage and does not unnecessarily weaken the previous approach to confidentiality.

Yours sincerely,

Maurice Frankel
Director

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[11] Paragraph 44
[12] DCA, Freedom of Information: Guidance on Procedures and Exemptions, Section 41, Chapter 6, http://www.dca.gov.uk/foi/guidance/exguide/sec41/chap06.htm