

The Campaign for Freedom of Information

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I am writing to question what seems to be your office's view that the Information Commissioner cannot require authorities to include particular classes of information in their publication schemes. We think that the Act itself, and ministers' comments during its passage, make it clear that the Commissioner does have this power and believe that the failure to acknowledge and use it will weaken the legislation. We think this power should initially be used to require authorities to publish the internal guidance used by officials in their dealings with the public.

As you know, we have been concerned about the present non-prescriptive approach to publication schemes. Although the Freedom of Information Act requires every authority to have a publication scheme, approved by the Commissioner,¹ the approach has been to leave it to authorities themselves to decide what to include. Some authorities seem to be making serious efforts to publish significant new information, such as board minutes. But many seem likely merely to 'rebadge' information already on their web sites, adding little to existing information.

An authority will be legally obliged to publish the information covered by its publication scheme.² If publication schemes are constructed largely from information which authorities have always published, this obligation becomes pointless.

Alternatively, authorities may include previously unpublished information, but choose the information they find most convenient to publish - not the information most relevant to the public.

¹ Section 19 of the Freedom of Information Act 2000 requires every public authority to adopt a publication scheme specifying the classes of information which it publishes or intends to publish. In drawing these up, authorities must have regard to the public interest in allowing public access to information held by it and in publishing reasons for decisions made by it.

² Freedom of Information Act 2000, section 19(1)(b)

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Our concerns about this process have been confirmed by the recent advice to local authorities, published jointly by the Information Commissioner and the Local Government Association. Although the paper encourages authorities to include new material in their schemes, greater weight is given to “organising and presenting current information”.³ The specific suggestions of what might be published largely involve background rather than new information, dealing with things like “overview of the council’s structure”, “overview of how information is generally published by the council”, “explanation of the main decision-making processes in the council; where and when they happen”, “complaints process” and so on.⁴ This is unlikely to add much to the “Your Council and What it Does” brochures that most authorities already produce.

From the brief descriptions, many of the local authority pilot schemes seem to consist largely of information that they are already required to publish by law. This is not unique to local government, and our concern is not focussed on it in particular. One of the central government pilots was made up exclusively of information already on the department’s web site.

A scheme which makes relatively inaccessible information widely available (eg by putting on the Internet material that previously had to be inspected in person at the authority’s premises) can certainly be of value. But we cannot see the point in schemes consisting of information moved from one part of the authority’s web site to another. Indeed, we doubt whether such schemes should be regarded as meeting the statutory public interest obligations set out in section 19(3).

It may also be useful for schemes to list an authority’s publications - if so, that should be a *single* class of information within the scheme. There is no point in devoting the bulk of the scheme to class after class of self-evidently public materials such as white papers, annual reports, consultation documents, speeches and press releases as in some of the pilot schemes.

The Commissioner’s guidance, which advises authorities to include in their schemes everything they currently publish and everything they are required by law to publish, may be encouraging this process.⁵ Subsequently the Commissioner has said that in applying for approval authorities will be required to state whether they are making new information available or explain why not - a welcome move.⁶ On the other hand, there is no indication that approval will be withheld from schemes that without good reason fail to make new information available. Indeed, the Commissioner’s guidance says that allowance will be made for the fact that publication schemes are a new requirement both for authorities and the Commissioner.⁷ The implication is that significant progress may be deferred until the initial approvals are renewed in three or four years time.

We think people will expect to see more immediate results. Although the Act is new, these provisions have been known since the draft FOI Bill was published more than three years ago. The Act itself has been on the statute book for 21 months. And while the drafting of the UK provisions is unusual, there is a great deal of relevant overseas experience with

³ Information Commissioner/Local Government Association. ‘Feedback and Observations from Local Authority Pilot Publication Schemes.’ July 2002, paragraph 1.4

⁴ Paragraph 6

⁵ Information Commissioner, ‘Publication Schemes Guidance’, February 2002, paragraph 5.1

⁶ Information Commissioner, ‘Publication Schemes Approval Documentation.’ April 2002, Section C. Approval Questionnaire.

⁷ Information Commissioner, ‘Publication Schemes Guidance’ paragraph 1.4

proactive FOI disclosure.

Publication schemes will be the first visible effect of the FOI Act. Some authorities, who are committed to greater openness, seem likely to produce valuable schemes. But if the others turn out to consist essentially of promises to publish information which is already published, and whose future publication has never been in doubt, this may suggest to the public that this is an Act which makes no difference. The Commissioner's power of approval should be used to prevent this happening.

The Commissioner's powers

As the Act went through Parliament the then Cabinet Office minister Lord Falconer told peers:

*“the requirement for all public authorities to apply a scheme for publication...is probably the most powerful push to openness in the Bill. Authorities will not be able to get away with weak or self-serving publication schemes. They will all have to be approved by the commissioner and she will ensure that they are strong and meaningful”.*⁸

We were therefore disappointed to read the Commissioner's guidance on publication schemes, which says: *“the Commissioner does not intend to be prescriptive with regard to the description of classes of information published by an authority under its scheme”.*⁹

However, the subsequent Information Commissioner/LGA paper adds an entirely different dimension, stating that the Commissioner *cannot* be prescriptive even if he or she wishes to be. It says: *“The Commissioner cannot prescribe the contents of a publication scheme, further than the requirements contained in the Act.”*

Apart from ensuring that the specific statutory requirements are met, the paper says: *“the format and contents of a scheme document are fundamentally for authorities themselves to determine”.*¹⁰

This might explain why the Commissioner's consultation document did not even raise the question of whether authorities should be required to publish particular information - an omission we found remarkable at the time.¹¹

If it is your view that the Commissioner lacks the power to prescribe what should go into a publication scheme this will profoundly limit the value of the whole exercise. You would always have to leave it to authorities to decide what to include.

We think any such view is wrong, and that the Act clearly suggests that the Commissioner *can* require authorities to publish particular information.

First, if Parliament had wanted to prevent the Commissioner determining the contents of

⁸ House of Lords Debates, 20/4/00, col. 826

⁹ Information Commissioner, ‘Publication Schemes Guidance’, para 6.2

¹⁰ Information Commissioner/Local Government Association. ‘Feedback and Observations from Local Authority Pilot Publication Schemes.’ July 2002, paragraph 6.

¹¹ Information Commissioner, ‘Publication Schemes. Public Consultation Exercise’, July 2001.

schemes, it would have said so. The Act does do this in relation to the *form* of publication, stating that an authority is to publish its scheme “*in such manner as it thinks fit*”.¹² This decision is for the authority, not the Commissioner. If Parliament had wanted to prevent the Commissioner prescribing a scheme’s *contents*, it would have made this similarly clear.

Second, what other purpose is there to the approval arrangements? If Parliament merely wanted to ensure that every authority drew up its own publication scheme, taking account of the public interest in disclosure, a straightforward legal requirement would have been sufficient. It would have been enforced by the Commissioner’s power to serve enforcement notices and encouraged by guidance - with no need for approval at all. Approval must be intended to give the Commissioner control over schemes’ specific contents.

Why else would the Commissioner be able not only to *refuse to approve* a scheme (subject only to the duty to give reasons) but even to *revoke an existing approval*?¹³ The Commissioner’s role cannot be limited to checking that the authority adequately considered the public interest in disclosure when drawing up its scheme, since the approval can be revoked later. The explanation must be that approval was intended to permit specific requirements to be laid down, and the revocation power to allow *further* requirements to be imposed later.

Third, the Act’s provisions for model publication schemes clearly involve prescription. An authority which adopts a model scheme approved by the Commissioner does not need its own individual scheme. A model scheme must involve prescription and the Commissioner (who can draw up the models him or herself) can do the prescribing.¹⁴ Parliament is unlikely to have intended to prevent the Commissioner imposing requirements for individual schemes, while giving him or her the explicit power to do so for model schemes.

Moreover, the existence of a model scheme issued by the Commissioner would automatically become a benchmark for individual schemes adopted by authorities of that type. They would know that they could not expect to obtain approval unless they provided an equivalent level of disclosure, albeit by different means. This would permit the Commissioner to specify what were in effect approval requirements.

In both Houses of Parliament, amendments were proposed which would have required authorities to do what we propose, ie publish their internal guidance. Ministers asked both Houses to reject them, on the grounds that the Commissioner would be able to *require* this if she thought it appropriate.

During the Commons committee stage, Mr David Lock, the Parliamentary Secretary to the Lord Chancellor’s Department, said:

“I am sure that the commissioner *will expect to see many of the items that are specified in the amendment referred to in a scheme* for many, but not necessarily all, public authorities.”

¹² Freedom of Information Act 2000, Section 19(4)

¹³ Freedom of Information Act 2000, section 19(7)

¹⁴ Freedom of Information Act 2000, section 20(1)

He added:

“we must leave the matter for agreement between the public authority and the Information Commissioner; *he will have the last word because he must approve the publication scheme.*”¹⁵

Lord Bassam, the Lords Home Office minister told peers:

“The publication schemes can be expected *to require in their detail* the inclusion of information of the kind referred to, no doubt, in the noble Lord’s amendment, particularly where she [the Commissioner] sees that as serving a useful and purposeful end.”¹⁶

But the most explicit confirmation that the Commissioner could impose specific requirements came in response to an amendment at Commons committee stage tabled by Mr John Greenway MP. This would have removed the requirement that each scheme be individually approved, instead requiring schemes to “*meet any reasonable requirements laid down by the Commissioner*”. Mr O’Brien, the Home Office minister, opposed this amendment because it “*would weaken the provision*”. He said:

“As the clause stands, the commissioner must approve publication schemes, but amendment No 114 would mean that the scheme had only to meet the reasonable requirements of the commissioner. That would weaken the provision.”¹⁷

Another minister, Mr David Lock, said this amendment would “*water down*” the existing provision:

“we have resisted the amendment to water down the terms of [the clause] - to make the publication scheme broadly in accordance with the requirements of the Information Commissioner - and specifically required that the commissioner ‘shall approve’ the publication scheme.”

He went on:

“The judgment about what is appropriate in an individual publication scheme is a matter not for the Government but *for the Information Commissioner.*”¹⁸

Partly as a result of these comments, Mr Greenwood withdrew his amendment.

If requiring authorities to meet the Commissioner’s requirements would weaken the existing provisions, these must already allow the Commissioner to impose requirements.

As you know, the House of Lords ruling in *Pepper v. Hart* means that ministerial statements to Parliament during the passage of legislation can be used in interpreting the statute where they directly clarify a point in the legislation which is ambiguous or unclear.

¹⁵ House of Commons, Standing Committee B, Freedom of Information Bill, 20/1/00 (Part 2), cols. 189 and 190

¹⁶ House of Lords Debates, 19/10/00, col. 1238

¹⁷ Standing Committee B, 20/1/00 (Part I), column 182.

¹⁸ Standing Committee B, 20/1/00 (Part 2), col. 189

If there is any uncertainty about the Commissioner's power to prescribe, these statements surely remove it.

Internal guidance

We think the Commissioner should insist that, as a condition of approval, all schemes should make real progress in (a) releasing previously unpublished information of significant value to the public, and (b) providing material that will help users discover what unpublished information exists, such as a guide to the types of records held and a log of information disclosed in response to individual requests.¹⁹

One crucial class of information which authorities should publish is the internal guidance used by officials, particularly in their dealings with the public, organisations and businesses.

The precedents for such a requirement are compelling:

- The UK open government code already requires central government bodies to publish their internal guidance.²⁰ We were extremely surprised that the Commissioner did not take this requirement as the starting point, and make clear that it would continue to apply to central government *and* be extended to other authorities. Fortunately, the Lord Chancellor's Department has advised Whitehall departments and their NDPBs to carry this requirement forward into their publication schemes.²¹
- The white paper, 'Your Right to Know', stated that the FOI Act would require authorities to comply with proactive disclosure provisions "broadly along the lines" of the existing code requirements and that authorities should "pursue active openness - for example publishing internal manuals".²²
- Local authorities should have been publishing this material since 1995, in response to local authority association guidance advising them to adopt disclosure policies which would "indicate that explanatory material on the authority's dealings with the public will be made available (including rules, procedures, internal guidance to

¹⁹ Campaign for Freedom of Information, Response to the Information Commissioner's consultation paper on Publication Schemes, October 2001.

²⁰ The code says: "Subject to the exemptions in Part II, the Code commits departments and public bodies under the jurisdiction of the Parliamentary Commissioner for Administration (the Ombudsman)...to publish or otherwise make available, as soon as practicable after the Code becomes operational, explanatory material on departments' dealings with the public (including such rules, procedures, internal guidance to officials and similar administrative manuals as will assist better understanding of departmental action in dealing with the public)". Code of Practice on Access to Government Information, Part I, paragraph 3(ii).

²¹ "Guidance to staff. It is expected that Publication Schemes will provide access to explanatory material on Departments' and NDPBs' dealings with the public and other organisations. This includes such rules, procedures, internal guidance to officials and similar administrative manuals as will assist better understanding of the organisation's interaction in dealing with the public. It will also include internal guidance to officials on implementing/operating the Code of Practice on Access to Government Information (before 2005), the Freedom of Information Act (after 2005), the Environmental Information Regulations and the Data Protection Act 1998" Lord Chancellor's Department, 'Guidance on Publication Schemes under the Freedom of Information Act 2000 for Central Government and Non Departmental Public Bodies'. July 2002, para 7.1

²² Your Right to Know, December 1997, Cm 3818, para 2.18 and para 7.4

officials and similar administrative manuals)".²³

- The Public Administration select committee recommended that "authorities should be obliged to publish internal manuals and guidance as a matter of statutory duty".²⁴
- The Lord Chancellor himself, announcing the FOI implementation timetable, highlighted several classes of information which should be provided by publication schemes including "access to internal guidance to officials".²⁵

The case for this requirement

Publishing guidance would:

- help to ensure that the guidance itself is procedurally fair and does not unjustly discriminate against particular groups;
- ensure that it does not misrepresent statutory or other requirements;
- ensure that it does not incorporate hidden policy objectives;
- allow people to understand the rules applied to decisions which affect them;
- allow people making representations about such decisions to address the actual criteria that will be applied to them;
- allow people to check that they have been dealt with fairly, in accordance with the authority's own rules, and not arbitrarily penalised;
- directly address the statutory requirement that schemes take account of the public interest in publishing reasons for decisions.²⁶ Publishing guidance could be justified solely by reference to this requirement, since the reasons for decisions may not be comprehensible without access to the internal criteria and guidance on which they are based.

Overseas experience

The importance of publishing internal guidance is widely recognised in FOI legislation. A duty to publish this material proactively features in nearly all English language FOI laws including those of the USA, Canada, Australia, New Zealand, Ireland, Jamaica, Trinidad

²³ Association of County Councils, Association of District Councils, Association of Metropolitan Authorities. "Open Government. A Good Practice Note on Access to Information". June 1995, paragraph 1.1.

²⁴ Public Administration Select Committee, 3rd report, Session 1998-99, 'Freedom of Information Draft Bill', Volume 1, HC 570-I, para 47.

²⁵ The Lord Chancellor said: "In addition to guides to the specific types of records that authorities hold, Publication Schemes should provide access to internal guidance to officials and minutes of meetings, agendas and associated documents for which the authority would not seek to claim an exemption were they requested. We would also expect Schemes to give details of information disclosed as a result of requests for information - initially under the Code of Practice on Access to Government Information, but subsequently under the Act." Lord Chancellor's Department, Press release No: 395/01, 13 November 2001, "Opening Up Access To Public Information - Government Sets Out The Timetable"

²⁶ Freedom of Information Act 2000, Section 19(3)(b)

and Tobago - and in Albania, Portugal, Slovakia and Thailand.²⁷ It also appears in state and provincial laws including those of Alberta, British Columbia, Nunavut, Ontario, Northwest Territories and Saskatchewan; ACT, New South Wales, Queensland, South Australia, Victoria and Western Australia; and Washington, Michigan and Hawaii.²⁸

The Ontario commission whose 1980 report led the province's FOI legislation reported:

“Statutory schemes often confer discretionary powers on public officials...The large volume of decisions required by such schemes, the need to delegate decision-making power to a substantial number of public servants, and the desire to ensure some uniformity in the decisions made in particular cases have led government departments to develop interpretative manuals and guidelines which indicate to the decision maker how the discretion should generally be exercised. Such materials may not be ‘binding’ on the decision maker in the sense that they preclude the exercise of some discretion in their application. However, in many cases the application of these internally developed criteria to the facts at hand will settle the matter in issue...

...the use of secret internal law means that decisions concerning the rights and liabilities of individuals are influenced by standards or policies of which the individuals are completely unaware. The application of these criteria may effectively determine the outcome of a particular decision-making process. A failure to disclose secret law to persons affected is an affront to the basic principles of fairness and due process. Second, the publicity accorded to statutes and regulations ensures that those who are responsible for the enactment of legislation may be held politically accountable for the public policy which they seek to implement. A similar process of evaluation and accountability cannot occur with respect to documents which remain hidden from public view”.²⁹

The parliamentary committee which examined the draft Australian FOI bill said of these provisions that they “need only to be stated for their importance to be appreciated”. It continued:

²⁷ See Freedom of Information Act [USA], 5 USC 552(a)(2)(C); Access to Information Act 1982 [Canada], sections 5(1)(c) and 71(1); Freedom of Information Act 1982 [Australia], section 9(1); Official Information Act 1982 [New Zealand], sections 20(1)(c) and 22(1); Freedom of Information Act 1997 [Ireland], section 16(1); Access to Information Act 2002 [Jamaica], section 4(1) and paragraphs 1(d) and (e) of the 1st Schedule; Freedom of Information Act 1999 [Trinidad & Tobago], section 8; Law No. 8503 of 30.6.1999 On the right to information over the official documents 1999 [Albania], Article 8; Law of Access to Administrative Documents [Portugal], Article 11; Act on Free Access to Information and Amendments of Certain Acts 2000 [Slovakia], Article 5; Official Information Act 1997 [Thailand], Article 9(4).

²⁸ See: Freedom of Information and Protection of Privacy Act 1994 [Alberta], section 89(1); Freedom of Information and Protection of Privacy Act 1992 [British Columbia], section 70(1); Access to Information and Protection of Privacy Act 1994 [Nunavut], section 71(1); Freedom of Information and Protection of Privacy Act 1990 [Ontario], section 33(1)(a); Access to Information and Protection of Privacy Act 1994 [Norwest Territories], section 71(1); Freedom of Information and Protection of Privacy Act [Saskatchewan], section 65(1); Freedom of Information Act 1989 [ACT], section 8; Freedom of Information Act 1989 [New South Wales], section 15(1)(c); Freedom of Information Act 1992 [Queensland], section 19(1); Freedom of Information Act 1991 [South Australia], section 10(1)(c); Freedom of Information Act 1982 [Victoria], section 8; Freedom of Information Act 1992 [Western Australia], section 97; Uniform Information Practices Act (Modified) [Hawaii] Chapter 92F-12; Freedom of Information Act 1976 [Michigan], section 15.241; Revised Code of Washington 42.17.260;

²⁹ ‘Public Government for Private People’. Report of the Commission on Freedom of Information and Individual Privacy, Ontario Government Book Store, 1980, volume 2, pages 254-5.

“...internal interpretation exists; it is a gloss upon, or supplement to, the statute and – whether correct or incorrect, prejudicial or favourable to the subject – it has a potential use....

...this internal *law* - for that is what it is - is hidden. The rights and duties of the public can be affected by laws that are not public. The law may even be a misinterpretation of the statute, but is governing nonetheless. It may correctly interpret, but be misapplied. Its silent existence is unacceptable in a system that exalts the rule of law, rather than the men and women who administer it.”³⁰

According to the official committee whose proposals led to the New Zealand Official Information Act:

"The premise...is that the individual has a right to know the law that does or may affect him personally, and that this applies as much to decisions made by administrative authorities as to those of tribunals and Courts. The Committee does not consider it enough that the individual affected should know after the event the reasons for a decision...He should be able to ascertain in advance the principles and rules according to which his case will be decided.”³¹

Benefits

In practice, these measures have been of significant value to authorities themselves. The Australian provisions have been widely credited with improving the efficiency of decision-making, prompting authorities to consolidate and update their guidance³² and forcing them to “examine ‘the folklore’ upon which they have commonly operated in the past”.³³

The Australian Department of Social Security reported that the manuals and their indexes were “widely used by front-line decision-makers as a means of easily identifying which rules are to be applied” leading to “more consistent decision-making” and making decisions “more readily understood by the people affected.”³⁴ A similar provision in the New South Wales FOI law “has been of enormous assistance to staff”.³⁵ The minister responsible for Ireland’s FOI Act has described the equivalent provision as “a huge step forward for Irish public administration” which “benefits citizens and public servants alike”.³⁶

The benefits to the public can be seen from some of the guidance published by Whitehall departments under the code. Although some departments have published very little, the materials which have been released have included guidance used by officials responsible

³⁰ ‘Freedom of Information’. Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and aspects of the Archives Bill 1978. Australian Government Publishing Service, Canberra 1979, paragraphs 7.3, 7.19 and 7.22

³¹ ‘Towards Open Government’. Committee on Official Information. (The Danks Report), Wellington, 1981, Volume 2, page 76

³² Attorney-General [Australia], 1982-83 Annual Report on the Freedom of Information Act, page 130

³³ Lindsay J. Curtis (Deputy Secretary, Commonwealth Attorney General’s Department) ‘Freedom of Information in Australia’, In: Public Access to Government Information ed. Norman Marsh QC, Stevens, London, 1987, page 180.

³⁴ Attorney-General [Australia] 1983-84 Annual Report on the Freedom of Information Act, pages 137 and 148.

³⁵ Premier’s Department, New South Wales, Freedom of Information Annual Report 1989-90

³⁶ Martin Cullen TD, Minister of State, Department of Finance, “Freedom of Information - One Year On”, Address to a conference at Dublin Castle. 23.4.99

for tax, health and safety, child support, immigration, school inspections and arms licensing.³⁷

We think all publication schemes should include the authority's internal guidance. Depending on its functions, this would include the handling of applications to the authority (eg for benefits, grants, permits as well as requests for information), the provision of services to individuals (including medical, housing and educational), the exercise of regulatory functions (eg to protect public safety) or the enforcement of obligations to which the public is subject (eg payment of various kinds of tax).

Authorities should be able to withhold exempt information, but not the interpretation of any statutory requirements. This would be in line with the New Zealand legislation, which disappplies certain exemptions (including those for legal professional privilege and policy advice) from the corresponding provisions.³⁸

We hope the Commissioner will reassess the current approach and advise authorities that significant progress towards the publication of such guidance will be required as a condition of approval, except where the authorities can show that this is not feasible.

Some authorities are of course now close to their approval deadlines. Central government bodies, whose deadline is nearest, should in any case be publishing guidance as a result of the LCD's advice. We hope you will insist on that advice being fully implemented. Other bodies close to their deadlines could if necessary be given approval on condition that they make significant progress towards publishing their guidance after a further 6 to 12 months. If the present timetable rules out this requirement for any class of authorities, we hope you would indicate that this will be required when approvals are renewed and advise them to anticipate this by beginning to publish such information as soon as possible.

Finally, we think publication schemes should be required to indicate what if any new information they provide and that if schemes make little progress towards this objective that should be readily apparent to users.

We will be making this letter public.

Yours sincerely,

Maurice Frankel
Director

³⁷ Cabinet Office annual reports on the code for 1995, 1996 and 1997.

³⁸ Official Information Act 1982 [New Zealand], section 22(1). The fact that the UK Act's exemption for legal professional privilege is subject to the section 2 public interest balancing test would provide the basis for a similar approach. The public interest in ensuring that the public know the internal rules applied to them will in general justify the disclosure of legal opinions contained in such rules, even if these might otherwise be subject to legal privilege.