

SPEECH BY JAMES CORNFORD
Co-Chairman, Campaign for Freedom of Information
FREEDOM OF INFORMATION AWARDS
7 JUNE 1999

INTRODUCTION

With a draft bill before us, and actual legislation presumably imminent, we would expect to be celebrating this evening. This is when we should announce that our goal is nearly achieved, thank supporters, congratulate ministers and plan our retirement. Instead, we find ourselves deeply disappointed, indeed shocked, at the proposed legislation.

Campaign for Freedom of Information Press release: Monday May 24 1999 "Deeply disappointing" information bill "weaker than Conservatives' openness code"

Our response to the bill has been no secret. Indeed, it's not even exempt. So we are all the more grateful to the Home Secretary for entering the lion's den to be with us tonight.

He is a straightforward and robust minister, who is not afraid of vigorous argument. These qualities may be called on this evening.

CLASS EXEMPTIONS

The Campaign is not given to sweeping condemnation. So what has prompted us to speak out so harshly?

I am not going to say much about the move from a "substantial harm" test to a lower test of "prejudice". That is a significant weakening of the proposals in the government's white paper. But we have far more fundamental concerns.

The basic principle of any FoI law is that: **information must be public unless government can show that disclosure would be harmful.**

The bill rejects up this principle. In vital areas, it allows wide classes of information to be withheld, without any test of harm, even the lower test of "prejudice". Harmless information that people may urgently need, will be secret under this bill.

INVESTIGATIONS

What has taken us by surprise, and shocked us, is that the bill applies this principle to safety information.

"Information...is exempt ... if it has at any time been held by the authority for the purposes of...any investigation...for the purpose of ascertaining the cause of an accident" Clause 25(2)(a)(iii)

No information obtained during an accident investigation will be available under the bill. There will be no right to know about the cause of road, rail, air or ferry accidents or those

involving dangerous consumer products. This is a staggering provision, not found in any other country's FoI bill. The right to know about safety is one of the things people assume FoI is for.

Speaking to us in 1996 Tony Blair said:

"when a health scare like BSE occurs, the public want to know the facts, people want to know what the scientific advice is in full, and they need to be sure that the public interest has always come first. They want to know if there was any relaxation of regulations which resulted in public safety being compromised....
The only way to begin to restore people's trust is therefore to be completely open about what the risks are..."
Tony Blair, FoI Awards, March 1996

What has happened to this principle?

Unsafe industrial premises are protected from scrutiny under a separate provision.

"Information...is exempt information if it has at any time been held by the authority for the purposes of...any investigation...for the purpose of securing the health, safety and welfare of persons at work...or protecting persons other than persons at work"
Clause 25(2)(a)(vii) and (viii)

If your safety is directly threatened, you already have rights to information under the Health and Safety at Work Act. But a journalist who wants to draw the public's attention to the problem, has no legal right to information at present. Nor does a national trade union officer. The bill will still leave them in the dark.

Of course, if a prosecution is being considered, authorities may need to withhold some information for the time being. But the bill's exclusions are permanent: they apply whether or not enforcement action is pending.

It gets worse. None of the regulatory bodies we rely on to protect us as citizens or consumers will have to reveal anything that they have obtained during any investigation. No FoI Act anywhere in the world does this.

"Information...is exempt...if it has at any time been held by the authority for the purposes of...any investigation...for the purposes of ascertaining whether any person has failed to comply with the law or is responsible for any other improper conduct"
- Clause 25(2)(a)(i)

So there will be no right to see information obtained about possible breaches of legal requirements on:

Trading standards
Environmental health
Food safety
Animal welfare
Race and sex discrimination
Planning
Licensing (TV stations, vehicles, pubs...)
Agricultural subsidies
Competition policy

And many other similar matters.

Introducing the bill in the Commons two weeks ago, the Home Secretary said:

“The proposals are not merely about abstract rights, to the benefit of academics, historians or constitutional theorists alone, important though all those are. The proposals will benefit everyone and provide access to the sort of information that people really want to know” Jack Straw, 24.5.99

With the greatest respect to the Home Secretary, we believe he is *withholding* from people the kind of information they really want.

Finally, an authority will not even have to say *whether it holds* information about any of these matters. The bill says:

“The duty to confirm or deny [the existence of information] does not arise in relation to information which is exempt information by virtue of...this section” Clause 25(4)
--

We can only assume that the security services – who are always keen to expand into new fields – are keen to try their hand at consumer protection.

It is a cliché, but true nevertheless, that much information about British products which is secret here can be obtained under the US Freedom of Information Act. It seems that after a British FOI Act is passed, we will still have to turn to Washington for such information.

What applies to regulatory authorities will also apply to the police. The Macpherson report into the Stephen Lawrence inquiry recommended:

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

But the government has rejected this recommendation. No information obtained during police investigations will be available as a right under the bill. The Lawrences will not be able to ask for basic information, such as when the police first learnt the names of the suspects, and by how many different sources those names were mentioned.

POLICY ADVICE

In this room, three years ago, Tony Blair told us:

"The very fact of [an FoI Act's] introduction will signal a new relationship between government and people: a relationship which sees the public as legitimate stakeholders in the running of the country and sees election to serve the public as being given on trust."

But the draft bill makes the running of the country an exempt class.

"Information held by a government department is exempt information if it relates to...the formulation or development of government policy" Clause 28(1)(a)

All FoI laws provide some exemption for policy advice. Not one of them exempts information in these absolute and indiscriminating terms. The exemption is not limited to policy advice or even to expressions of opinions. It covers anything relating to developing policy, including:

factual information
surveys
descriptions of current practice
scientific analysis eg on BSE or genetically modified food
reasons for old decisions

Most other countries require government to show that disclosure of policy advice would cause harm. The equivalent exemption in Ireland's Act, which has been in force for just over a year, puts our bill to shame

- must relate to the “deliberative processes” of an authority
 - exempt only if contrary to the public interest
 - analysis of factual information not exempt
 - scientific or technical advice not exempt
- Ireland’s FoI Act 1997, section 20

Even the UK open government code introduced by the Conservatives in 1994 provides better access than the bill. The government can only withhold information if it would

- be harmful to frankness
- and there is no overriding public interest in disclosure

Labour’s bill would therefore remove rights which we presently enjoy under the Tory openness code of practice.

Under the bill government departments would not even have to confirm or deny whether they hold particular information about policy – another restriction not found in the code. Even the Home Office’s own consultation document cannot grasp how restrictive the bill is. It cites examples of information which the government releases voluntarily at present, but would have to disclose under the bill.

- Papers relating to the work of the Advisory Group on Openness in the Public Sector....
- “The Bill...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”

But this Advisory Group exists to advise the Home Secretary on how to generate a culture of openness in the public sector. Its work relates to the development of government policy. Its papers would all be exempt.

PUBLIC INTEREST

Finally, most FoI laws incorporate a public interest test. The enforcing body can rule that even exempt information must be disclosed if the public interest in openness outweighs any harm that could be done. Under the UK code, the Parliamentary Ombudsman can do this too.

In a case brought by the Campaign, there was a suggestion that the public had been deliberately misled in an official consultation paper. The underlying information was held to be commercially confidential.

The Ombudsman investigated and reported that the public 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"
Parliamentary Ombudsman, Case A.29/95

This is a powerful principle. If you deliberately mislead the public, you are likely to be held accountable. But under the bill, the new Information Commissioner will be prohibited from *ordering* disclosure on public interest grounds.

Authorities will be required to consider the release of exempt information in the public interest. The Commissioner's role is limited to ensuring that they have *considered* it.

An authority which is guilty of misconduct, such as squandering public funds, will be asked to decide for itself how to balance the need to protect exempt information against the public interest in holding itself accountable.

If an Irish authority opts for a cover up in such circumstances, Ireland's Commissioner can force disclosure. Britain's Commissioner will only be able to rebuke an authority –not overrule it. In this respect too, we would be relaxing the standards that can already be applied under the existing code.

DISCRETIONARY DISCLOSURES

The bill places great weight on a duty requiring authorities to consider the *discretionary* release of information in the public interest.

If a request for exempt information is made:

"The public authority shall consider...whether to communicate the information to the applicant in the exercise of the authority's discretion"
Clause 14(2)

But before doing so, the bill allows the authority to insist on knowing why the applicant wants the information and what he or she intends to do with it.

"The ... authority may refuse to make a decision...unless it is supplied with...such further information as it may reasonably require as to the applicant's reasons for requesting the information and as to any use which he proposes to make of the information."
Clause 14(4)(b)

The authority can then disclose the information on condition the applicant agrees not to make it public.

"A public authority...may 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.”
 Clause 14(6)

This is unacceptable. It is all the more so, given that much exempt information will be *harmless* and exempt only because it falls into a class exemption which should not be there in the first place. It proposes a return to the “need to know” culture in which information is disclosed only if you can persuade an authority of your need to have it. It should be a right. That’s what freedom of information means.

CONCLUSION

The dropping of the substantial harm and public interest tests proposed in the white paper have knock-on effects, throughout the bill. It will be much easier to withhold information on grounds that it would prejudice commercial interests, or because the information has been given to government in confidence.

Some catch-all exemptions, will permit a wide range of other information to be withheld without showing harm.

The Secretary of State will have the power to create new exemptions, by parliamentary order, to deal with requests that have already been received but can’t otherwise be stopped.

There is no time to go into all these points, though they are described in the Campaign’s initial response to the proposals which can be obtained from us.

The Campaign has not been alone in its concerns about the bill. Without exception, the press has shared them.

“A few paper’s verdicts on the Freedom of Information Bill”

This is only a draft Bill, and it is issued for consultation.

Home Office
 FREEDOM OF INFORMATION
 Consultation on Draft Legislation
 Cm 4355

It is in many ways an extremely good consultation document, with substantial supporting material. The public’s views have been invited by July 20th. It will also go before the Public Administration select committee, which will start hearing evidence on it in two weeks time.

We hope the government will listen to the responses that are being made, and reconsider this bill, so that it becomes the kind of measure the Prime Minister speaking in this room promised us three years ago.

"it is not some isolated constitutional reform that we are proposing with a Freedom of Information Act. It is a change that is absolutely fundamental to how we see politics developing in this country over the next few years."
Tony Blair, Fol Awards, March 1996

I want to add a personal observation: I believe that if this bill is enacted in anything like its present form it will become as notorious and disreputable as the Official Secrets Act 1911. That measure was passed through Parliament at the end of a hot summer session in the midst of a spy scare. It remained as a reproach and an embarrassment for 80 years. This bill could do the same. With a large majority, getting it through Parliament may be relatively easy.

The trouble will start thereafter – and go on and on.
