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## Freedom of Information Key Issues

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# INTRODUCTION

This paper describes in more detail some of the issues highlighted in the Campaign's *Freedom of Information Checklist*, which is published at the same time.

*Section 1. Policy advice.* This describes the case for a policy advice exemption which might allow internal discussion and advice to be disclosed after decisions have been taken [page 2]

*Section 2 Exemptions and the public interest.* This describes how a public interest override might work and suggests that the right of access under an FOI Act should override existing statutory restrictions on disclosure [page 13]

*Section 3 Ministerial veto.* This sets out the objections to allowing ministers any form of veto over the findings of the appeals body [page 19]

*Section 4 Fees.* This describes the fees charged for requests under the Open Government code of practice [page 20]

*Section 5 Public Records.* This suggests what the relationship between an FOI Act and the Public Records Acts might be [page 24]

*Section 6 Bodies covered by the Act.* This sets out the case for making the following subject to the Act: (a) local authorities (b) private bodies responsible for contracted-out functions and (c) the security and intelligence services [page 27]

## 1. POLICY ADVICE

One of the key provisions of a FOI Act is likely to be the scope of any exemption for civil service advice. Some policy advice and internal discussion may need to be confidential where disclosure may genuinely interfere with the government's ability to develop policy. However, much other internal discussion can be disclosed without harm - and with real benefits to public understanding.

Examples of what may need to be kept private include frank assessments of how key players (eg other ministers or outside bodies) are likely to react to particular proposals and the tactics for handling them. Such assessments are unlikely to be given, at least in writing, if publication is possible. Similarly, early policy discussions may involve raising unformed and untested proposals. The prospect of exposing these to critical public scrutiny, before those involved have decided for themselves whether the proposals are even feasible or desirable, is likely to inhibit new thinking.

But the release of other kinds of internal discussion would be unlikely to undermine policy development. There may be no difficulty in releasing considered assessments of the implications of a particular option, or professional analysis of scientific or technical findings or suggestions for the most efficient way of implementing a publicly announced policy. Disclosure may lead to greater appreciation of the complexity of the government's approach to an issue previously seen in simplistic terms. It may also improve the quality of the advice. The knowledge that officials' analysis may later be exposed to outside scrutiny may encourage a more rigorous and balanced approach, which better anticipates the potential objections to a potential course of action.

In the past, *all* policy advice was regarded as confidential - not merely the specific recommendations made to ministers but all internal discussion between officials, including more formal policy analysis and professional technical assessments. The *nature* of the internal discussion was not considered relevant. It was assumed that the process of policy formulation required absolute confidentiality and that attempting to discriminate between

what could and could not be released would undermine confidence in the privacy of discussions. This approach was summed up in the classic judgement of Lord Reid in the 1968 case of *Conway v Rimmer*, in which he said:

“I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be.”

That applied, he went on, not merely to Cabinet minutes but to:

“all documents concerned with policy making within departments including it may be minutes and the like by quite junior officials and correspondence with outside bodies”<sup>1</sup>

But is it appropriate to regard the entire range of internal discussion as a single class stretching from the most sensitive cabinet minutes to an explanation of the reasons for an uncontentious decision which departments in practice reveal should anyone show interest?

An important move towards a more discriminating approach was taken by the previous government in the Open Government code of practice. The code provides that:

- Internal discussion and advice can only be withheld where disclosure of the information *in question* would be harmful to the frankness and candour of future discussions. This test is applied on a case by case basis, depending on whether disclosure of the information involved would inhibit future frankness<sup>2</sup>.
- Even then, exempt internal discussion may have to be released the public interest in openness outweighs any potential harm.

A parallel change was also introduced for the disclosure of advice during litigation. Previously, public interest immunity (PII) was claimed wherever the possibility of civil service advice or ministerial views being revealed in court arose. Following the Scott report, the last government announced that in future PII would be claimed only where the disclosure of the particular document in question was thought to be harmful, and then only when the

<sup>1</sup> Conway v Rimmer [1968] 1 All E.R. 874 at 888

<sup>2</sup> The former Chancellor of the Duchy of Lancaster, Roger Freeman MP, made this clear when he stated that internal discussion and advice was “subject to a harm test - namely whether public disclosure of the information concerned would harm the frankness and candour of internal discussion” [Conference on access to policy advice, Campaign for FOI/FDA, 5.3.96 (*emphasis added*)]. Elsewhere, referring to the availability of internal analysis, the former government acknowledged that “Each case should be considered on its merits. As with all information, the presumption should be in favour of disclosure but information may be withheld where the harm caused would outweigh the public interest in disclosure”. [Government Response to the 2nd Report from the Select Committee on the Parliamentary Commissioner for Administration, Session 1995-96, Session 1996-97, HC75, para 2 (*Emphasis added*)]

harm was “serious”<sup>3</sup>. The court may nevertheless order disclosure where the interests of justice require it.

An exemption might involve the following four elements:

*Internal discussion and advice may be withheld:*

- (a) where disclosure would damage the authority’s ability to give adequate consideration to a matter on which no decision has so far been taken and which is still under active consideration; or*
- (b) where disclosure would harm the candour of any similar discussion or advice to a degree likely to damage the quality of any resulting decision;*

*But discussion and advice should be disclosed where:*

- (c) the public interest in openness in any case outweighs the damage referred to above; or*
- (d) it consists of (i) the analysis, interpretation or evaluation of factual material or a projection based on factual material; or (ii) expert advice on a scientific, technical, medical, financial, statistical, legal or other matter.*

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<sup>3</sup> Under the new approach, Ministers will focus directly on the damage that disclosure would cause. The former division into class and contents claims will no longer be applied. Ministers will claim public interest immunity only when it is believed that disclosure of a document would cause real damage or harm to the public interest...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 documents. 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, then Attorney General, Hansard, 18/12/96, col 949-950*

Taking these points in turn:

**(a) Advice may be withheld where disclosure would damage the authority's ability to give adequate consideration to a matter on which no decision has so far been taken and which is still under active consideration.**

This recognises that internal discussion and advice may be sensitive until a decision has been taken, but less so afterwards. This is the practice that has developed under New Zealand's Official Information Act. According to the New Zealand Ombudsman the approach is:

*“to recognise that at certain stages of the policy making process information must be protected for the sake of the process. Those withholding provisions protect the process rather than the information ... But once the process has been completed it no longer requires confidentiality; then the emphasis frequently changes in favour of disclosure”<sup>4</sup>*

Releasing advice and discussion *after* a decision has been taken does not mean that it will be too late to be made use of. For example, a decision announced in a white paper may be accompanied by access to the relevant analysis, which would then be available during the following consultation period.

It would not follow that *all* advice and discussion would automatically become available at this time, because an additional test - of whether the disclosure in question would harm frankness to a degree likely to prejudice any decision - would also be available.

The principle of post-decisional disclosure of *analysis* is already government policy. The Open Government code requires departments to publish the analysis behind their decisions once they have been announced, but with the caveat that what will be published is the analysis which the government *itself* considers “relevant and important”<sup>5</sup> The approach proposed here would omit this caveat, and that internal discussion should be disclosed after a decision has been taken unless it can be shown that it still needs to be withheld under the ‘candour’ test.

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<sup>4</sup> Nadja Tollemache, Ombudsman. Paper at a Seminar on 16/5/89 organised by the Institute of Policy Studies on the Official Information Act 1982 (emphasis in the original)

<sup>5</sup> The Code states: “Subject to the exemptions in Part II, the Code commits departments and public bodies...to publish the facts and analysis of the facts which the Government considers relevant and important in framing major policy proposals and decisions; such information will normally be made available when policies and decisions are announced”

The most spectacular example of such disclosure was the last government's decision to publish the minutes of the monthly meetings between the Chancellor of the Exchequer and the Governor of the Bank of England, just *six weeks* after the meeting had taken place. Such disclosures would have been unthinkable only a few years earlier (indeed, when equivalent documents were sought in a 1980 case, the court held that it *was* unthinkable<sup>6</sup>).

When publication of the minutes was announced, in April 1994, many assumed that the disclosures would prove bland and uninformative, and that the processes of government could not withstand the airing of differences at such a high level. The event proved them wrong. The minutes were described in the *Financial Times* as "*remarkable for their candour*".<sup>7</sup> A *Times* leader noted: "*Instead of papering over disagreements with platitudes, the minutes are impressively clear and sharp*".<sup>8</sup> The quality of public debate about the economy has undoubtedly benefited as a result of this initiative, and no-one has suggested that it had been at the expense of the decision-making process. The initiative has been continued by the new Government, in publishing the minutes of the Bank of England monetary committee minutes.<sup>9</sup>

**(b) After a decision had been taken, advice and discussion may be withheld only where disclosure would harm the candour of any similar future discussion to a degree likely to damage the resulting decision;**

This is a two step test, requiring that the prospect of a disclosure would:

- be likely to lead to a significant loss of frankness in similar future circumstances ; *and* that
- this loss is substantial enough to damage the quality of any resulting decision.

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<sup>6</sup> Lord Wilberforce said: 'I am certainly not prepared - against the view of the minister - to discount the need, in the formation of such very controversial policy as that with which we are here involved, for frank and uninhibited advice from the bank to the government, from and between civil servants and between ministers. It does not require much imagination to suppose that some of those concerned took different views as to the right policy and expressed them. The documents indeed show that they did. To remove protection from revelation in court in this case at least could well deter frank and full expression in similar cases in the future.' *Burmah Oil Co v Bank of England [1980], AC 1090*

<sup>7</sup> 'Minutes reveal sharp rift at the top', Graham Bowley & Philip Coggan, *Financial Times*, 14.4.94

<sup>8</sup> 'Minutes of Interest, *The Times*, 14.4.94

<sup>9</sup> Hansard, Written Answers, 18.6.97, cols 229-230

One commentator has summarised the Ombudsman's interpretation of the relevant provision of New Zealand's Official Information Act, as follows:

“There is no presumption that disclosure will inhibit candour. Inhibition must be demonstrated. The fact that a particular communication is free and frank does not prove that the freedom and frankness is due to expectations of non-disclosure. There may have been no such expectation at all. The Ombudsman has, however, accepted the obverse of this argument. If the opinion sought to be withheld is not in fact candid, it is assumed that the prospect of continued non-disclosure will not induce a candour which the opinion giver refused to display on this occasion.”<sup>10</sup>

A judgement of the Information Commissioner who enforces the Freedom of Information Act of Queensland in Australia may also be relevant. The Commissioner held that:

“Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary to the public interest. If the diminution in previous candour and frankness merely means that unnecessarily brusque, colourful or even defamatory remarks are removed from the expression of deliberative process advice, the public interest will not suffer. Advice which is written in temperate and reasoned language and provides justification and substantiation for the points it seeks to make is more likely to benefit the deliberative processes of government. In the absence of clear, specific and credible evidence, I would not be prepared to accept that the substance or quality of advice prepared by professional public servants could be materially altered for the worse, by the threat of disclosure under the FOI Act.

I leave open the possibility that circumstances could occur in which it could be demonstrated that the public interest is likely to be injured by a disclosure of deliberative process advice that would inhibit the candour and frankness of future communications of a like kind. An example of such a possibility is given [in a previously published report which]... relates to a public servant who is responsible for advising the Minister in a particular area, and who needs to be acceptable to a number of parties who have competing interests - preservation of confidentiality of the official's views may be the only way of preserving the relationship of frankness between the official and all parties.”<sup>11</sup>

It has been suggested that damage to frankness could arise not because civil servants would be afraid to expose their assessments to scrutiny, but because they fear how ministers will react if advice warning them of the drawbacks of their proposals are made public, particularly if these are then quoted against the minister by critics of policy. If ministers

<sup>10</sup> Freedom of Information in New Zealand. I Eagles, M Taggart, G Liddell, Oxford University Press, Auckland, 1992, p 376-7

<sup>11</sup> *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60.

react by discouraging the official from giving advice in such terms, in order to avoid future embarrassment, this could bring it within the exemption. However, there would need to be evidence that this was likely to occur, and any countervailing public interest factors would be taken into account.

A report on the impact of the New Zealand legislation's first few years noted:

“Prior to the introduction of the OIA it was felt by some that it could bring about a change in the relationships between Ministers and their Permanent Heads; that the possibility of conflict could arise if it was seen that there was a divergence of views between the department and the Minister. In the perceptions of permanent heads this has not eventuated, and they do not see any substantive changes in their relationships with their Ministers.”<sup>12</sup>

**(c) Internal discussion and advice should be released where the public interest in openness outweighs any harm that may result.**

Both the Australian and New Zealand FOI laws require the public interest *in favour* of disclosure to be weighed against any harm caused by releasing internal advice. The New Zealand Act in particular contains an objectives clauses stating that one of the purposes of the legislation is to promote accountability and this is one of the headings of ‘public interest’ that is taken into account<sup>13</sup>.

According to the New South Wales Premier’s Department:

“The...issue is whether the release of the document would on balance be contrary to the public interest. There should be no assumption that a document is automatically exempt because it fits the class [of internal discussion] and therefore release would on balance be contrary to the public interest. Such documents are available for access unless the public interest would on balance be negatively affected by this disclosure at this time...

Factors favouring release will always include the general public interest in

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<sup>12</sup> Report of the Information Authority, 31/3/86 [The Information Authority was established under New Zealand’s Official Information Act to review the Act’s operation]

<sup>13</sup> Section 4(a) of the NZ Official Information Act provides that its objectives include:

“To increase progressively the availability of official information to the people of New Zealand in order

(i) To enable their more effective participation in the making and administration of laws and policies; and

(ii) To promote the accountability of Ministers of the Crown and officials and thereby enhance respect for the law and to promote the good government of New Zealand”.

disclosure which promotes accountability. Thus an applicant has a right to know what government has done (and perhaps what it intends to do) unless disclosure in this particular instance would result in greater damage to the public interest. The public interest usually will be advanced by discussion debate and criticism of government action...

The general public interest in the openness of administration may also be stronger in particular cases where the integrity of actions of the administration is called into question.”<sup>14</sup>

One of the benefits of disclosure is that it may *improve* the quality of advice, by reminding those offering it that may later have to withstand public scrutiny. In a 1990 case brought by haemophilia sufferers who had contracted Aids from contaminated blood the UK’s Department of Health argued that the candour of internal discussions would be damaged by releasing advice during the proceedings. Lord Justice Bingham stated:

“The weight of this consideration depends very much on the subject matter in question. It does not seem to me to have substantial weight in relation to the subject matter with which this case is concerned; indeed, apprehension that these documents might become public before expiry of the 30-year rule might even have prompted greater candour.”<sup>15</sup>

The former premier of Victoria in Australia has commented:

“FOI is a bit like a compulsory random breath test on our roads. Motorists are aware of its presence and the ever-present likelihood of a check. Governments, likewise, are aware of the prospect of examination of a comprehensive list of documents on which a decision is based. Because of that the Act has had a significant impact on the quality of decision making. It has improved the public sector’s professionalism and the capacity of its officers to develop, analyse, and articulate policy that stands up to scrutiny.”<sup>16</sup>

The New Zealand Law Commission, in a report published in October 1997, concluded:

Since 1982 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.”<sup>17</sup>

Two New Zealand examples indicate how the public interest test has been applied. In the

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<sup>14</sup> New South Wales Premier’s Department. FOI Procedure Manual. 3rd editions 1994.

<sup>15</sup> re HIV Haemophiliac Litigation, Royal Courts of Justice, 20.9.90

<sup>16</sup> *John Cain, Freedom of Information Review*, No 58, August 1995, p 56

<sup>17</sup> Law Commission. Review of the Official Information Act 1982, October 1997, Wellington, New Zealand, page 5

first, a request was made for papers of an independent committee set up to consider the environmental implications of allowing nuclear vessels to enter New Zealand ports. The Ombudsman (who under the NZ legislation makes legally binding determinations) noted that the committee was still deliberating, and was required to report within a relatively tight time scale. He concluded that disclosure at that time could undermine its effectiveness, but noted that the case for withholding the information “might well have passed” once the committee’s report had been published. On the public interest, he commented:

“if information had been withheld which evidenced any...instructions or administrative or other constraints inconsistent with the terms of reference or public announcements of the independence of the...review process, then clearly there would be a particularly strong public interest in disclosure of such information. However, I have not identified any such information...”<sup>18</sup>

In another case, the Ombudsman considered whether a police report on proposals to restrict the import of military style semi-automatic rifles should be disclosed. He concluded that the factual and background material should be disclosed but suggested that there might be a case for withholding the *recommendations*, for the time being, so as to allow “undisturbed Ministerial consideration” of a “sensitive and controversial” issue.

But he went on to note that there were particular public interest reasons for requiring earlier disclosure of the recommendations, because important public safety issues were involved and a decision had been long delayed:

“On matters of particular sensitivity, the constitutional convention protecting confidentiality of advice by officials is there to protect the Minister against premature disclosure which would interfere with his ability to make a sound decision. However...it seemed to me that account should also be taken of the passage of time. The report was nearly one year old. It had awaited consideration by three successive Ministers of Police. In my view that lessened somewhat the strength of the “necessity” to withhold the information.”

Balanced against that are the interests in participation and accountability which are strong in relation to a matter of this nature. The issue of firearms control is one in which the principle of public safety is paramount, and in my opinion that required the greatest possible transparency in the making of laws and policies.

For these reasons I formed the opinion that the withholding of the information was outweighed by other public interest considerations...The

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<sup>18</sup> Tenth Compendium of Case Notes of the Ombudsmen. Office of the Ombudsman. Wellington, April 1993, Case W3621

Police accepted my opinion that this request should not have been refused and agreed to make available the information.”<sup>19</sup>

**(d) The analysis, interpretation or evaluation of factual material or a projection based on factual material; and expert advice on a scientific, technical, medical, financial, statistical, legal or other matter, should not be subject to this exemption.**

These classes of material would normally therefore be disclosed. This was also the approach of the *Right to Information Bill*, introduced by the Labour front bench in 1992 and of Mark Fisher MP’s *1993 Right to Know Bill*.

This approach is common in overseas FOI laws. For example, reports of scientific or technical experts are excluded from the scope of the Australian Act’s internal working documents exemption<sup>20</sup>. Such reports and the analysis of factual or statistical material<sup>21</sup> are excluded from the exemption in Ireland’s 1996 FOI Act. ‘Expert opinion or analysis’<sup>22</sup> is disclosable under Queensland’s FOI law. Feasibility or other technical studies<sup>23</sup>, plans and budgetary estimates relating to government programs<sup>24</sup>, efficiency studies<sup>25</sup>, economic forecasts,<sup>26</sup> and public opinion polls<sup>27</sup> are amongst the other types of material specifically excluded from policy advice exemptions in other jurisdictions.

Factual analysis and expert advice is especially unlikely to be influenced by the prospect of public disclosure. The knowledge of, say, a government scientist that his or her scientific analysis may be seen by professional colleagues outside government is, if anything, likely to lead to greater rigour, for example in ensuring that political considerations are not permitted to influence scientific judgement.

This distinction between general policy advice and technical or scientific advice has also been recognised by the courts. In December 1990 the High Court ruled that the Secretary of State for Health had been wrong to refuse to reveal to the manufacturer of a carcinogenic

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<sup>19</sup> Tenth Compendium of Case Notes of the Ombudsmen. Office of the Ombudsman. Wellington. April 1993. Case W2159

<sup>20</sup> Freedom of Information Act 1982, section 36(6)(a)

<sup>21</sup> Freedom of Information Act 1997, section 20(2)

<sup>22</sup> Section 41(2)(c)

<sup>23</sup> Ontario 13(2)(g); British Columbia 13(2)(i)

<sup>24</sup> Ontario 13(2)(i); British Columbia 13(2)(l)

<sup>25</sup> Ontario 13(2)(f); British Columbia 13(2)(g); Ireland (Bill) 20(2)(d)

<sup>26</sup> British Columbia 13(2)(e)

<sup>27</sup> British Columbia 13(2)(b)

tobacco product (sold as “Skoal Bandits”) the expert advice he had relied on in deciding to ban it. In his judgment Mr Justice Morland said:

"[it was] submitted on behalf of the Secretary of State that it would not be in accordance with good administration to reveal the advice given by the Committee on Carcinogenicity...there were two bases for this, first the risk of disclosure might inhibit candour in the advice given to Ministers and...second ...that the advisory committee might be inhibited in its task because without the assurance that its advice would be secret to the Minister both the presence and active participation of the people on the committee might not be obtained and their advice might be lacking in candour. For my part I regard this submission as having no realistic basis at all. This particular committee consisted of scientific experts. They were carrying out an evaluation and analysis of scientific evidence. They used their own experience and knowledge in doing that task. Their conclusions were the conclusions of scientific experts on primary scientific evidence. I cannot believe that scientists of the quality to be expected to be serving on a committee of this kind would be in any way inhibited if they considered that their conclusions were revealed to interested parties.

In my judgment the advice given by this committee...is wholly different from the sort of advice given by civil servants to a Minister when considering what decision to take in many cases of a political nature; for example the type of advice given to a Minister by his staff in his private office in relation to the overall effects, the pros and cons of a possible course of policy or a possible decision."

Some support for this approach can be found in the government’s guidelines on the use of scientific advice in policy making, published in March 1997. These state:

“Departments should aim to publish all the scientific evidence and analysis underlying policy decisions on the sensitive issues covered by these guidelines and show how the analysis has been taken into account in policy formulation...Openness will stimulate greater critical discussion of the scientific basis of policy proposals bring to bear any conflicting scientific evidence which may have been overlooked. These are good reasons for releasing information, an action which could in itself avoid greater controversy in the longer run.”<sup>28</sup>

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<sup>28</sup> Office of Science and Technology, Department of Trade & Industry. ‘The Use of Scientific Advice in Policy Making. March 1997.

## 2. EXEMPTIONS AND THE PUBLIC INTEREST

### A public interest override

One of the most positive aspects of the Open Government code is that it permits most classes of exempt information - including policy advice, discussed above - to be disclosed where there is an overriding public interest in openness. Indeed, most exemptions only apply where:

- a disclosure can be shown to be potentially harmful; *and*
- there is no overriding public interest in disclosure<sup>29</sup>

This principle applies to some of the code's most sensitive exemptions, including those for national security; defence; international relations; internal discussion and policy advice; law enforcement, the administration of justice; immigration controls; personal privacy, commercial confidentiality and other matters.

The approach permits some balancing between the benefits and disadvantages of disclosure. It prevents exemptions becoming an inflexible barrier to disclosure, regardless of the circumstances. Without such a provision, the possibility of a relatively minor degree of harm to a particular interest could prevent disclosure of a matter of overwhelming public importance.

What is the 'public interest'? The courts have made clear that the fact that the public may be *curious* about a matter is not an indication that its disclosure is *in* the public interest.<sup>30</sup> However, a disclosure of confidential information may be in the public interest where it reveals:

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<sup>29</sup> The code states: "In those categories [of exempt information] 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."

<sup>30</sup> "There is a world of difference between what is in the public interest and what is of interest to the public", Griffiths LJ, in *Lion Laboratories Ltd v Evans*, [1984] 2 All ER 417 at 435

- “crime or fraud”<sup>31</sup>
- matters which “threaten...individual safety”<sup>32</sup>
- “any misconduct of such a nature that it ought in the public interest to be disclosed to others”<sup>33</sup>
- or helps prevent a wrongful conviction<sup>34</sup>.

The public interest principle does not apply only where misconduct or danger to the public is involved. In Lord Hailsham’s words “the categories of public interest are not closed”<sup>35</sup>. For example, the courts have held a disclosure may be justified in the public interest where provides electors with important information about a council’s performance *before* rather than after a local election<sup>36</sup>.

The above case describes a public interest in *accountability* - a principle central to the objectives of an FOI Act. This too is acknowledged in the Cabinet Office’s guidance on the Open Government code which states:

“The public interest in disclosure is particularly strong where the information in question would assist public understanding of an issue subject to current national debate, or improve the transparency and accountability of a particular function of Government.”<sup>37</sup>

Some indication of how a public interest override may operate can be seen from the following cases under overseas FOI laws.

- ***Cancer test results (USA)***

A consumer group applied for animal safety studies carried out by the manufacturer of silicone gel breast implants, which indicated a possible carcinogenic effect in animals. They also asked for details of consumer complaints to the manufacturer. The US Food & Drug Administration argued that the information was exempt partly on grounds of commercial

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<sup>31</sup> [1856], 26, LJ Ch.113

<sup>32</sup> *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 WLR 848 at 869

<sup>33</sup> [1968] 1 QB 396, 405

<sup>34</sup> For example, where A disclosure may prevent wrongful convictions for drink driving by revealing that a breathalyser device used by the police was inaccurate, as in *Lion Laboratories Ltd v Evans*, [1984] 2 All ER, 417-435

<sup>35</sup> [to come]

<sup>36</sup> [to come]

<sup>37</sup> Paragraph 3

confidentiality. The court concluded that the commercial value of the information was negligible, partly because most were carried out 20 years previously and would be of limited value to a competitor now seeking approval for a rival product. It added “*disclosure of the positive tests, which demonstrate that a product poses a danger when used in a certain manner, is unquestionably in the public interest. To argue that this type of information is confidential suggests that, in order to protect whatever marginal commercial benefits Dow Corning may get from having independently discovered certain risks, other manufacturers be permitted to blindly put out potentially damaging products. Certainly, Dow Corning, as a good citizen, would not risk the public health in this manner. The benefit of releasing this type of information far outstrips the negligible competitive harm that defendants allege.*”<sup>38</sup>

- ***Marine accident report (New Zealand)***

The Maritime Safety Authority was asked for a copy of an investigation report into a fatal boating accident. It consulted the victims’ widows who both expressed a desire for the information not to be made public. The Ombudsman acknowledged that there was a privacy interest which should be protected. *However, he formed the view that there was also a public interest in release of the information, in that release of the information would play a part in the prevention of boating accidents in the future. In this case, the Ombudsman decided that the public interest in release was stronger than the privacy interest in withholding*”<sup>39</sup>.

- ***Contract details (Victoria, Australia)***

Certain documents relating to the contract for an inquiry into the operation of an Ambulance Service were held to be exempt under the Victoria FOI Act on grounds of commercially confidentiality. The Tribunal which deals with appeals nevertheless ordered disclosure. According to a report of its judgment “*there was a public interest in accountable government, and in the amount of money spent out of public funds. The Tribunal found that...due to time constraints, the contract for the consultancy was awarded without any process of tendering or seeking of expressions of interest. This meant that the contract was awarded in a manner inconsistent with the Government’s own contracting out guidelines, which increased the public interest in the disclosure of the commercial terms of the consultancy.*”<sup>40</sup>

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<sup>38</sup> *Teich v Food & Drug Administration*, 751 F. Supp. 243 (D.D.C. 1990) 243-255129 129

<sup>39</sup> Ombudsman (NZ) Quarterly review, Volume 1, Issue 2. June 1995 ISSN 1173-4736

<sup>40</sup> *Thwaites and Department of Health & Community Services* (No 95/025696), reported in: Freedom of Information Review, No 68, June 1997, 43-44

- ***Reasons for the dismissal of a government official (Victoria)***

Information was sought about the dismissal of the chairman of the Victorian Gaming Commission, who had been criticised by the government while in opposition. The Tribunal found that the requested information was exempt on privacy grounds, but: “*Whilst accepting that details of the financial impact on [the individual] and of his financial affairs generally, were protected...the Tribunal also held that the public is entitled to know the amount an individual is paid from public funds upon the termination of her/his employment or removal from office, the source or particular fund from which such payment is made and the terms and conditions, if any, upon which the payment is made.*”<sup>41</sup>

- ***Management buy-out of a public corporation (Victoria)***

A public body providing mobile road maintenance equipment was privatised and sold to a management buy-out. Some documents relating to the sale were exempt on the grounds that they revealed tactics for future negotiations or were commercially confidential. However, because the enterprise had been sold to a group of employees who had been coordinated the information supplied to other prospective tenderers, the Tribunal ordered disclosure. “*The Tribunal did not make a finding of impropriety but held that in the circumstances the public interest required access to some of the exempt documents*”.<sup>42</sup>

## **Statutory prohibitions on disclosure**

Much government information cannot be released because of statutory prohibitions on its disclosure. There are some 250 of these<sup>43</sup> which generally prevent a public body from releasing information obtained under statutory powers from third parties. Some protect personal privacy or legitimate business secrets, but others are all-embracing blanket bans on disclosure. The FOI Act should override these, otherwise some of the most acutely needed information - for example about safety problems - will remain secret.

Existing restrictions on disclosure include:

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<sup>41</sup> *Lamont and Department of Arts, Sport and Tourism* (No 93/7380), reported in: *Freedom of Information Review*, No 59, October 1995, 79

<sup>42</sup> *Mildenhall and Vic Roads* (1996) 9 VAR 362, reported in *Freedom of Information Review*, 67, February 1997, 9-10

<sup>43</sup> Listed in *Open Government*, Cm 2290, July 1993, Annex B

- section 118 of the Medicines Act 1968, which prevents the Medicines Control Agency releasing information obtained from manufacturers about the safety of medicines;
- section 28 of the Health and Safety at Work Act 1974 which restricts the disclosure by the Health and Safety Executive of much safety information;
- section 38 of the Consumer Protection Act 1987 which prevents the Secretary of State releasing information obtained in the course of deciding whether to prohibit a dangerous product;
- section 43(5) of the Road Traffic Regulation Act 1984 which makes it an offence to disclose information relating to the operation of an off-street parking place;
- section 64(2) of the Weights and Measures Act 1985 which makes it an offence to disclose “the identity of the packer of a package or the identity of the person who arranged with the packer of a package for the package to be made up”;

In 1981, an official committee which reviewed the Public Records Acts commented a secrecy provision in the Statistics of Trade Act:

“As things stand, this Act prevents detailed basic data collected by government on industrial, commercial and other economic development from ever becoming generally available. No judgment is made about the period after which ‘commercial sensitivity’ abates enough to allow access without risk of harm. Whereas the great majority of Cabinet papers (and most other government records of high sensitivity) are declassified and transferred within the normal period of 30 years to the Public Records Office to be made available for public inspection, returns made under the Statistics of Trade Act are treated with much greater circumspection: in effect, they remain TOP SECRET for ever.”<sup>44</sup>

The last government:

- proposed to review and amend excessive secrecy provisions but later retreated from the complexity of the task<sup>45</sup>.
- proposed a new statutory right of access to health and safety information which would override what the government itself acknowledged were the

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<sup>44</sup> *Modern Public Records*, Report of a Committee appointed by the Lord Chancellor, Chairman Sir Duncan Wilson, HMSO, 1981 Cm 8204, paras 187-189

<sup>45</sup> *Open Government*, white paper, Paragraph 8.40

“too restrictive” legal provisions<sup>46</sup> in this area. However, time was never made available for the promised legislation.

In theory, existing restrictions might be left in place, until they were amended individually perhaps after a review. This would be unsatisfactory, since information would remain secret perhaps for years after an FOI Act’s introduction.

A better solution would be for FOI right of access to take precedence over any other restriction on disclosure. The Act’s exemptions could be relied on to protect information which genuinely required confidentiality. Precedents for this approach can be found in:

*The Data Protection Act 1984* which provides that the right of access by individuals to their own computerised personal files “*shall apply notwithstanding any enactment or rule of law prohibiting or restricting the disclosure, or authorising the withholding, of information.*”<sup>47</sup>

*The Environmental Information Regulations 1992*, which provides a right of access to environmental information held by public bodies overrides any statutory restriction - unless the restriction coincides with one of the regulations’ own exemptions, in which case disclosure remains prohibited<sup>48</sup>.

However, it would be preferable if exemptions were discretionary and allowed authorities to withhold information where an existing statutory restriction applied, but (unlike the Environmental Information Regulations) did not require them to do so. An exception may be justified for restrictions protecting sensitive medical information, where the prohibition should remain in force, ensuring that, for example, the identity of individuals treated at clinics for sexually transmitted diseases<sup>49</sup>, or who have undergone abortions<sup>50</sup>, continue to be protected.

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<sup>46</sup> Paragraph 8.9

<sup>47</sup> Section 26(4)

<sup>48</sup> Regulation 3(7) states: “Subject to regulation 4 below, where any statutory provision or rule of law imposes any restriction or prohibition on the disclosure of information by any person, that restriction or prohibition shall not apply to any disclosure of information in pursuance of these Regulations.” Regulation 4(3)(a) provides that information must be treated as confidential under the Regulations if it falls within any of the specific exemptions set out in Regulation 4(2) *and* its disclosure would “contravene any statutory provision or rule of law or would involve a breach of any agreement”.

<sup>49</sup> The National Health Service (Venereal Diseases) Regulations 1974, regulation 2

<sup>50</sup> The Abortion Regulations 1991, Regulation 5

### 3. A MINISTERIAL VETO?

Most FOI laws are fully binding on government. However, some countries permit ministers to override the enforcement body in certain areas. Any form of ministerial veto here would be seen as fundamentally contrary to the spirit of the legislation.

In particular, it would:

- undermine public confidence in the legislation, by retaining the very principle - of unfettered ministerial discretion - that the Act should remove;
- imply that the Commissioner could not be trusted to uphold a legitimate claim for exemption;
- distort the development of case law, leaving wide gaps where the Commissioner would otherwise be able to distinguish between the circumstances in which an exemption did or did not apply;
- discourage departments from thinking rigorously about the need to withhold information, by permitting them to rely on an unscrutinised veto whenever they felt insecure about a possible disclosure.

Under the Australian Freedom of Information Act, a form of ministerial certificate can be used to prevent certain decisions being questioned by the Administrative Appeals Tribunal (AAT), which deals with appeals. Writing in a personal capacity, two legal officers from the Australian Attorney General's Department, which oversees the legislation, have commented:

“The provisions for conclusive certificates are now anachronisms with little if any relevance to the contemporary world of FOI decisions. Time has proven that the substantive exemption provisions, without the added strength of certificates, are in fact more than adequate to the task of the exemption of genuinely sensitive documents.

To some extent, the certificate provisions are a hangover from the days before FOI, when the feared impact of the legislation was clearly exaggerated. With reference to the FOI maturity gained by 1994, rather than the FOI terrors apprehended in 1982, we may conclude that the certificate provisions have outlived whatever usefulness they may once have had. The provisions should be removed from the Act, enabling the AAT to reach a determinative decision on the merits of the exempt status of documents.”<sup>51</sup>

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<sup>51</sup> Tim Moe and Jane Lye, *‘Prospects for Review of FOI. Can the Commonwealth Regain the Initiative?’* . 8 July 1994

## 4. FEES

Authorities may want the power to charge fees either to recover the costs of processing FOI requests, or to discourage users from consuming the time of officials with what they regard as frivolous or unnecessary requests.

Fees should not be used as a way of discouraging 'excessive' FOI requests. To do so would inevitably deter many reasonable requests from being made; and may all too easily become a means of preserving official secrecy. Fees would also unfairly discriminate in favour of business requesters (to whom fees will generally not be an obstacle) and against the ordinary user. Applicants should normally be given the opportunity to inspect documents, free of charge, or to be supplied with copies on payment of reproduction costs only.

Excessively time consuming requests can be limited without charging - for example, by requiring applicants to be reasonably specific about the information they require or the topic on which information is sought and by permitting authorities to refuse unreasonably voluminous requests which would substantially disrupt their work. In such cases authorities should be obliged to assist the applicant in reformulating more targeted requests.

If fees are charged:

- there should be no application fees - these are likely to make information *more* expensive than at present. Under the existing Open Government code of practice most requests are dealt with free of charge.
- fees should apply only after a generous amount of time - for which no charge is made - has been spent on the request.
- the possibility of a differential charging scheme should be considered under which fees are charged for commercial users but not usually for individuals, non-profit organisations and the media
- fees should be waived for requests that are in the public interest. This is the approach under the American FOI Act.

Overseas experience indicates that the charges likely to be recovered from FOI requesters at best meet only a fraction of the reported cost. For example, fees recovered under Australia's *Freedom of Information Act 1982* in 1994-95 were just over \$0.58 million, around 5% of the Act's actual cost<sup>52</sup>. Some \$0.21 million were recovered under Canada's *Access to Information Act 1982* in 1995-96<sup>53</sup>, representing under 2% of the Act's costs.

Under the Open Government code of practice departments have been able to adopt their own charging schemes, though the government's policy is that charges may only be made where a request leads to work that would not otherwise have been done.

- Most departments make an hourly charge of £15 or £20 for the time spent by officials in handling requests, though some charge more. For example, Ordnance Survey charge £35 an hour, and the Health and Safety Executive charge £45 an hour where the time of a specialist inspector is involved.
- Most departments allow some free time before levying charges, though this may be as little as *10 minutes* - in the case of the Central Office of Information. Some departments (eg Home Office, Department of Health and Treasury) allow *one free hour* of time before making charges. Other departments allow more time. The Ministry of Defence and the Department for Education and Employment allow *4 hours* free; the Department of Transport allows *half a day* free of charge; while the Lord Chancellor's Department, Department of National Heritage, Scottish Office, Welsh Office, the Northern Ireland Office, Department of Trade & Industry and Office of Public Service and Office of Electricity Regulation allow either *five hours or £100* of work free.
- Once the free time is over, most departments charge only the *marginal* additional cost of the request. Thus if the Scottish Office, which allows five hours of free time, spends six hours on a request, it charges only for the sixth hour. Other departments charge for *all the hours worked* in these circumstances. Both the Welsh Office and DTI would make no charge for a request taking 5 hours, but would charge for 6 hours work if the request took an hour longer.
- Most requests under the Code are nevertheless dealt with free of charge. In 1996, charges were made in only 9% of code requests<sup>54</sup>. However, this figure does not indicate how many enquirers may have decided not to pursue requests after being notified of the likely charges.

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<sup>52</sup> Attorney General's Department, *Annual Report 1994-95, Freedom of Information Act 1982*, Australian Government Publishing Service, Canberra, pages 14-15

<sup>53</sup> *Info Source Bulletin*, Statistical Tables 1995-96

<sup>54</sup> Cabinet Office, *Code of Practice on Access to Government Information*, 1996 Report.

If an application fee was the *only* charge made under the Act (other than copying fees) they might be a reasonable proposition. Coupled with other charges, for example, hourly charges after a certain amount of free time - they could prove a substantial deterrent. The Inland Revenue reported that 9 out of 91 applicants abandoned their Open Government code requests in 1994 when notified of its £15 flat fee for all requests. Referring to the £10 Data Protection Act fee for access to computerised personal files, the Data Protection Registrar has reported:

“Research conducted in the past revealed that people felt the fee was too high. We have serious doubts about whether the fee should be retained when on occasions it may be a deterrent to those those seeking to exercise their rights”<sup>55</sup>.

Application fees would mean that requesters would generally pay, even for information which is presently available free of charge. At present only a few departments regularly charge for information under the code. The regular charges include the the Inland Revenue which in 1966 charged in 62% of cases (70/113); the Overseas Development Agency which charged 61% of requesters (11/18) and the Department of Transport charged 53% of the time (8/15), the Health & Safety Executive 35% (61/181) and the Home Office 33% (12/34). The Ministry of Agriculture, Fisheries & Food, 13% (3/24); the Valuation Office Agency, 13% (6/48); Customs & Excise, 11% (4/37).

Other departments rarely if ever charged: Department of Health and Department of Social Security charged for only 3% of requests (3/115 and 1/39 respectively); and the Ministry of Defence in 2% (1/52). Departments which did not charge in even a single case were: Department for Education and Employment (0/15); Employment Service (0/124); Department of the Environment (0/25); Office of Fair Trading (0/2); Foreign & Commonwealth Office (0/52); Lord Chancellors Department (0/18); Department of Natural Heritage (0/26); Office of Public Service (0/4); Scottish Office (0/57); Benefits Agency (0/73); Department of Trade & Industry (0/50); Treasury (0/26); and Welsh Office (0/22)<sup>56</sup>.

When they do charge, the temptation to abuse the power is sometimes not resisted. In December 1996 the Ministry of Agriculture, Fisheries and Food asked for almost £6,500 to release the names and addresses of 26 rendering and incinerating plants whose handling of

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<sup>55</sup> ‘Data Protection & the EU Directive, the View of the Data Protection Registrar’, July 1996, p 57.

<sup>56</sup> Cabinet Office, Code of Practice on Access to Government Information, 1996 Report.

cattle carcasses had been found to fall short of the required BSE standards<sup>57</sup>. The request was made under the Environmental Information Regulations. After adverse publicity, the charges were dropped.

The Department of Trade and Industry asked for £325 to be paid in advance for answering a series of questions about the Dounreay nuclear plant, put by a small environmental group<sup>58</sup>. The information later supplied consisted of some two and a half pages of text, a third of which the group said had previously been made public. The DTI said it had not charged for all the time it had actually spent dealing with the request, and the Parliamentary Ombudsman who later investigated said the charges were not excessive under the terms of the Code.

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<sup>57</sup> MAFF letter to Alan Watson, 13.12.96

<sup>58</sup> The Northern European Nuclear Information Group

## 5. PUBLIC RECORDS & FOI

Under the Public Records Acts 1958 and 1967, old government files are normally transferred to the Public Record Office (PRO) and opened to the public 30 years after they have been closed. However, departments can hold onto records “for administrative purposes or...for any other special reason”<sup>59</sup> or may send them to the PRO but require them to be closed for periods of *more* than 30 years<sup>60</sup>.

Ideally, an FOI Act would not only be retrospective but provide a seamless right of access covering both current and historical records awaiting their opening date under the Public Records Acts. This would mean that:

- Instead of having to wait for the passage of 30 years, old files would be available on request
- Decisions to withhold old records would have to be justified under the FOI Act exemptions, rather than under the non-statutory criteria which currently apply<sup>61</sup>.
- Decisions to withhold public records could be challenged under the Act’s appeal procedures.

At present, the only degree of independent oversight is provided by the Advisory Council on Public Records, a body appointed by the Lord Chancellor and chaired by the Master of the

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<sup>59</sup> Section 3(4), Public Records Act 1958

<sup>60</sup> Section 5(1), Public Records Act 1958

<sup>61</sup> The government’s criteria for such ‘extended’ closures were last set out in the 1993 ‘Open Government’ white paper. They permit the extended closure of “Exceptionally sensitive records containing information, the disclosure of which would not be in the public interest in that it would harm defence, international relations, national security (including the maintenance of law and order) or the economic interests of the UK and its dependent territories” and “it is possible to establish the actual damage that would be caused by release”. In addition, records may be closed for more than 30 years if they “contain information supplied in confidence the disclosure of which would or might constitute a breach of good faith” or “contain information about individuals, the disclosure of which would cause either: substantial distress, or endangerment from a third party, to persons affected by disclosure or their descendants.” [*Cm 2290, pages 65-66*]

Rolls. The council is consulted on decisions to retain or close records, and its advice is usually followed - but it has no legal power to compel disclosure. Until 1993 it was not even allowed to see the actual documents that it was consulted about. Since 1993 it has also been able to consider complaints from historians and others whose requests for access to closed records have been turned down. By the end of 1996, not a single complaint had been made to it. (This may be just as well, since the council would probably not have the time to give complaints the detailed attention they would require. It typically meets only three times a year, for half a day at a time, and at such meetings may already have to deal, as it did in 1995-96, with applications relating to some 11,000 items<sup>62</sup>.)

In opposition, the present Lord Chancellor, Lord Irvine, appeared to suggest that access to public records would be brought under the scope of an FOI Act, when he stated that: “A *comprehensive statutory review of the procedure for release of public records should form part of a new Freedom of Information Act.*”<sup>63</sup>

### **Will the 30 year period be reduced?**

Some records, for example cabinet papers, will normally be exempt under an FOI Act, and become available only after a period of years. Need this be as long as the present 30 years? Canada only withholds cabinet and other old records for 20 years. Under Ireland’s new Freedom of Information Act cabinet papers lose their exempt status after only *five* years.

The UK’s ‘closure’ period has already been cut once, having been reduced from the original 50 years to 30 years in 1967. There may be two potential objections to a further reduction.

The first is the cost of processing an increased volume of records. If this proved significant, it could be substantially reduced by initially cutting the closure period only for limited classes of records - such as cabinet minutes, or Foreign Office files - where the volume of records is small, rather than the entire range of government documents.

Another objection is that a shorter closure period might damage the frankness of cabinet discussions. This is a point which the prime minister of the day, Harold Wilson, referred to in 1966 when the 50 year period was reduced:

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<sup>62</sup> Advisory Council on Public Records, Annual Report for 1995-96, page 64

<sup>63</sup> Hansard (Lords), 25 October 1993, cols 756-759

"The right hon. Gentleman the leader of the Opposition, while not dissenting from the Government's view that a specific 'closed' period is preferable in principle to a more indefinite arrangement, has indicated that he is not satisfied that a reduction to 30 years would be justified, mainly on the ground that it might involve embarrassment to politicians and civil servants who are still alive and active in public life and that it might therefore inhibit the confidential nature of Ministerial discussions and the frankness of advice tendered by officials. It appears to the Government, however, that these risks are not significant. Speaking for myself - and under our proposals the papers relating to the earlier stages of my own Ministerial career would begin to be opened in nine years time - if criticisms are to be made of me and my conduct of affairs, I would rather be alive to answer them when they are made. And during all our consideration of this problem, it has not been seriously claimed that a civil servant in his 20's or 30's would be likely to be inhibited from giving frank advice by the prospect that it might be opened to public inspection 30 years later."<sup>64</sup>

An even more vigorous objection to the 'candour' argument was offered by the then Chief Justice, Lord Widgery in 1975 when he refused prevent the publication of the Crossman diaries, including frank accounts of cabinet discussions only a *decade* earlier:

"my considered view is that I cannot believe that the publication at this interval of anything in volume 1 would inhibit free discussion in the cabinet of today, even though the individuals involved are the same, and the national problems have a distressing similarity to those of a decade ago. It is unnecessary to elaborate the evils which might flow if at the close of a cabinet meeting a minister proceeded to give the press an analysis of the voting, but we are dealing in this case with a disclosure of information nearly 10 years later."<sup>65</sup>

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<sup>64</sup> Hansard, 9 March 1966, cols 561-3

<sup>65</sup> Lord Widgery C J, *Attorney-General v Jonathan Cape*, [1975] 3 All ER 484 at 496

## 6. THE BODIES COVERED

This section describes the case for including within the scope of an FOI Act (a) local authorities (b) private bodies undertaking contracted-out functions and (c) the security and intelligence services.

### Local authorities

The public have some rights to local authority information, but these fall short of what a n FOI Act would provide. Under the Local Government (Access to Information) Act 1985 the public are entitled to attend council meetings unless these are closed because specified types of exempt information are likely to be revealed. The Act has led to greater openness in local government. However, because its focus is primarily on *meetings*, not *information*, much information held by councils falls outside its scope.

Where a meeting is open to the public, people are entitled under the Act to see (a) the agenda (b) reports to be discussed (c) background papers relied on in preparing those reports and (d) the minutes.

But there are no rights to information where:

- (a) *the matter has been discussed in closed session, because some of the information is exempt.* The meeting may be closed because just *one* piece of information, perhaps the name of an individual or the amount of a contract bid, is exempt. All other information on the topic can then be withheld, though it may not itself be exempt.
- (b) *the information was exempt at the time of the meeting, but is no longer.* Information may only need to be confidential until a particular decision has been taken - for example, until a contract has been signed. However, if the meeting that discussed the matter was closed to the public, the reports and background papers can be withheld permanently from the public, long after the need for confidentiality has passed.
- (c) *the meeting took place in public but relevant information was not taken into account.* The Act permits public access to “background papers”, but the definition of these depends on an officer’s view of what was relied on.

Material that was overlooked or disregarded can be withheld.<sup>66</sup>

- (d) *the issue has still not been discussed at a meeting of the authority at all* - in this case there are no rights to information.

This means that much of the information held by local authorities is not subject to any legal right of access. There is no formal Open Government code of practice for local authorities (although the local government associations suggested to their members that they introduce their own access policies<sup>67</sup>). Bringing councils within the scope of an FOI Act would be a particularly welcome move, greatly enhancing the public's rights in relation to many essential services.

### **Bodies carrying out contracted-out functions**

Many central and local government functions are now carried out by private contractors. Under an FOI Act, a request could be made to the contracting authority for relevant information. But this might be met with the response that the authority itself no longer hold the details, or that the contractor claims that they are commercially confidential. Yet these are still public functions, paid for by public funds, and should be subject to FOI legislation.

An Act could deal with this by:

- requiring the authority to obtain the information from the contractor in response to a an FOI request, using any existing powers provided for the contract
- if necessary explicitly establishing such powers, for cases where they may not exist or be adequate
- providing a direct right of access to information held by the contractors, without going through the contractor.

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<sup>66</sup> The Act defines "background papers" as "those documents relating to the subject matter of the report which (a) disclose any facts or matters on which, *in the opinion of the proper officer*, the report or an important part of the report is based, and (b) have, *in his opinion*, been relied on to a material extent in preparing the report, but do not include any published works." (*Our emphasis*) Local Government Act 1972, section 100D(5)

<sup>67</sup> 'Open Government: a good practice note on access to information', June 1995. Available from the Local Government Association.

The advantages of the third option is that it puts the obligation to disclose the information on the *contractor*, not the authority. This avoids the extra work that would otherwise fall to the authority, in acting as an intermediary between the requester and contractor. It also means that where any refusal to disclose is challenged, the duty to defend the refusal falls on the contractor and not the authority. Access would thus be possible to such material as: raw data collected during research carried out under contract; information about the way in which the contract was performed; and detailed information about the reasons for any failure to meet expected standards of performance.

Were a direct right of access to contractor-held information created, it would apply only to information relating to a contract with a *public authority*. Information about the contractor's other contracts would not be affected.

### **The security and intelligence services**

The security and intelligence services are not covered by the present codes, and there is likely to be strong resistance to any suggestion of making them subject to FOI. However, the CIA is subject to the American FOI Act, and the equivalent Canadian and New Zealand services are also covered by their countries' FOI laws. Information harmful to their activities is protected under a variety of relevant exemptions relating to national security, law enforcement, international relations and the protection of individual safety.

The case for including Britain's security and intelligence services is strengthened by the fact that they increasingly undertake work not involving national security, much of which was previously dealt with by the police or civil servants.

MI5 now undertakes tasks related to money laundering, drug trafficking, organised crime and Whitehall computer security. The government has acknowledged that MI5 is currently involved in "an audit of security procedures in the DSS"<sup>68</sup>. Part of MI5's responsibilities for computer security were until 1994 exercised by the government's Central Computer Telecommunications Agency (CCTA), which - unlike MI5 - is subject to the Open Government code of practice. Such transfers of responsibility therefore involve a loss of accountability. Although information about current or recent operational activities of the

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<sup>68</sup> Letter from Social Security minister John Denham MP, *Guardian*, 24.9.97

security and intelligence services would usually fall within one or other FOI exemption, information which could not in itself damage its operations, for example on the number of files held on individuals - a disclosure long resisted - might become accessible. Moreover, where serious malpractice had been established, greater access to normally withheld information could be possible if the Act allowed for disclosure on public interest grounds.

The Data Protection Registrar has already called for MI5 to register under the Data Protection Act. At present, it relies on the national security exemption contained in section 27 of that Act to avoid registering any of the data it holds, implying that all its computerised information, without exception, requires protection on national security grounds. The Registrar has objected to this, commenting: *'The extension of the role of the Security Services into areas of traditional policing should not carry with it an extension of the exemptions provided by section 27'*.<sup>69</sup>

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<sup>69</sup> Comments of the Data Protection Registrar on: 'Data Protection: the Government's Proposals', September 1997