

Notes on the

FREEDOM OF INFORMATION BILL

introduced by Lord Lucas

Second Reading: February 10 1999



Campaign for Freedom of Information

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*These notes describe the main features of Lord Lucas' Freedom of Information Bill and explain how they relate to comparable provisions in other countries' laws and the proposals published by the Government in December 1997 in the white paper, *Your Right to Know* (Cm 3818).*

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see our website (<http://www.cfoi.org.uk>).

For our response to the government's white paper, *Your Right to Know*,
go to <http://www.cfoi.org.uk/wpbriefings.html>

Clause 1 **PURPOSES**

1. (1) The purposes of this Act are -
 - (a) to extend progressively the right of the public to have access to information held by public authorities in order to promote -
 - (i) better informed discussion of public affairs, and
 - (ii) greater accountability of public authorities;
 - (iii) more effective public participation in the making and administration of laws and policies
 - (b) to ensure that persons are given reasons for decisions taken by public authorities which affect them;
 - (c) to ensure that guidelines used by public authorities in making decisions affecting persons are publicly available.
- (2) This Act shall be interpreted so as -
 - (a) to further the purposes specified in subsection (1) above; and
 - (b) to facilitate and encourage the disclosure of information, promptly and at the lowest reasonable cost.

Note

The Bill follows Freedom of Information (FOI) laws in Australia, New Zealand and Canada in providing a ‘purposes clause’. The purposes are not merely statements of good intention, but must be taken into account:

- in interpreting the Bill [*clause 1(2)(a)*]
- when considering whether a disclosure of exempt information may be justified on public interest grounds [*clause 4(2)(a)*]
- by the Commissioner, who is required to exercise his or functions in a manner which furthers those purposes [*clause 7(3)(b)*]

The purposes may be divided into two groups: those which promote accountability and participation [*clause 1(1)(a)*] and those which require authorities to act fairly and openly in their dealings with people [*clause 1(1)(b)*].

Where requested information clearly is *not* exempt, it must be disclosed regardless of whether doing so furthers the bill’s purposes. But where the case is more finely balanced, the case for disclosure will be strengthened if it furthers those purposes.

One of the Bill’s purposes is to “extend progressively” the public’s rights to information. This indicates that the legislation is not intended to produce a static codification of the boundaries between openness and secrecy, but to encourage a constant reassessment of the justification for withholding information.

Equivalent provisions are found in New Zealand's FOI Act¹. These "*ensured that the number, tenor and generality of the exemptions would not overshadow the raison d'être of the Act*", according to a leading commentary on the legislation.² In the course of a New Zealand Court of Appeal ruling, the judge noted that:

"If the decision-maker, be he Minister or departmental head or Ombudsman or Judge adjudicating on a claim of denial of right, is in two minds in the end, he should come down on the side of availability of information. I say this...because the Act itself provides guidance in the last limb of s.5"³

In setting out its purposes, the bill follows the approach of the UK's Open Government Code of Practice, introduced in April 1994. The Code formally sets out its aims.⁴ It also contains a public interest test, requiring that even exempt information be released where the benefits of openness outweigh the harm.⁵ The guidance on the Code advises that the public interest in openness should take account of the need to improve government accountability or further national debate on current issues.⁶

Purposes clauses are more common in overseas legislation than in the UK, but there are a number of significant examples of their use here, for example in the Arbitration Act 1996⁷ and the Crime and Disorder Act 1998⁸. Their use was advocated in the 1975 report of an official committee on the preparation of legislation, which recommended "that encouragement should be given to the use of statements of principle, that is, the formulation of broad general rules".

¹ These provisions are found in sections 4 and 5 of New Zealand's Official Information Act 1982, which are as follows:

"4. *Purposes* - The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament -

(a) 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 to enhance respect for the law to promote the good government of New Zealand;

(b) to provide for proper access by each person to official information relating to that person;

(c) to protect official information to the extent consistent with the public interest and the protection of personal privacy.

5. *Principle of availability* - The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it."

² I. Eagles, M. Taggart & G. Liddell 'Freedom of Information in New Zealand', Oxford University Press, 1992, page 4.

³ Cooke P, in *Commissioner of Police v Ombudsman* [1988] 1 NZLR, p 391.

⁴ "The aims of the Code are: to improve policy-making and the democratic process by extending access to the facts and analyses which provide the basis for the consideration of proposed policy; to protect the interests of individuals and companies by ensuring that reasons are given for administrative decisions, except where there is statutory authority or established convention to the contrary; and to support and extend the principles of public service established under the Citizen's Charter." Code of Practice on Access to Government Information, 2nd edition, 1997, Part I, para 2

⁵ Code of Practice on Access to Government Information, 2nd edition, 1997, Part II, "Reasons for confidentiality"

⁶ Code of Practice on Access to Government Information, Guidance on Interpretation', Cabinet Office, 2nd edition, 1997, para 3

⁷ Section 1 of the Arbitration Act 1996 states: "The provisions of this Part are founded on the following principles and should be construed accordingly - (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; (c) in matters governed by the part the court should not intervene except as provided by this part."

⁸ Section 37 of the Crime & Disorder Act 1998 states:

"(1) It shall be the principal aim of the youth justice system to prevent offending by children and young persons.
(2) In addition to any other duty to which they are subject, it shall be the duty of all persons and bodies carrying out functions in relation to the youth justice system to have regard to that aim."

The feasibility of their general adoption in tax legislation is currently being studied by an Inland Revenue working party⁹.

Clause 2

RIGHT OF ACCESS

2. (1) It shall be the right of any person to obtain access, subject to the provisions of this Act, to official information held by a public authority.
- (2) The right of access under subsection (1) shall apply notwithstanding any statutory or common law prohibition on the disclosure of information other than one contained in an order of the Court.
- (3) A public authority to which an application for official information has been made under this Act shall-
 - (a) give the applicant access to the information applied for as soon as practicable and in any case within the specified period, which is 20 working days from the date on which the application was made, except insofar as an application relates to information obtained by the authority from a third party in which case the specified period is 35 working days from that date; and where, in either case, the information applied for has not been provided within the specified period the application shall be deemed to have been refused;
 - (b) not be required to give access to any information which is exempt within the meaning of section 3(1); but an authority shall not refuse to give access to any record where this can be done by providing a copy of the record from which any exempt information has been excluded;
 - (c) in any case where it withholds exempt information, notify the applicant that it has done so specifying under which of the paragraphs in section 3(2) and for what reasons the information is considered to be exempt and the procedure by which an appeal against its decision may be made;
 - (d) at the request of the applicant, correct any information held by it relating to the applicant which is incorrect, incomplete, misleading, or not relevant to the purpose for which the information is held.
- (4) Any information which is required to be made available under this section shall be made available to any person on application-
 - (a) by supplying a copy of it to the applicant in the form in which it is held unless the applicant requests that it be made available in another form and it is practicable to do so; and
 - (b) if the applicant so requests and it is practicable to do so, for inspection by the applicant.
- (5) An authority shall not be required to give access to information where to do so would interfere substantially and unreasonably with its work by requiring it to identify and retrieve a substantial volume of records, provided that before refusing to provide information on these grounds the authority has taken reasonable steps to assist the applicant to reformulate the application so as to avoid causing such interference.

⁹ *Tax Law Rewrite: Second Technical Discussion Document. 'A Purposive Approach to Rewriting Tax Legislation', paras 3.9 - 1.,3.10*

Any person

Clause 2(1) establishes the basic right of access. It may be exercised by “any person” including an organisation as well as an individual¹⁰ and is not limited to UK citizens or residents. The white paper’s proposed right of access appears to be similar.¹¹

Official information

The right of access is to “official information”, defined in clause 10:

“official information” means information held in any form by a public authority in connection with its functions as such, and information is so held if it is in the possession, custody or power of a public authority’

Information held in printed or written form, or stored electronically or on tape would be subject to the Bill. Information which is known to officials, but not recorded, would also be covered. This may provide some safeguard against any attempt to circumvent the Bill by deliberately not recording sensitive information.¹² Officials could be required, on oath, to testify to the state of their knowledge by the Information Commissioner, who enforces the Bill [*clause 7(5)(b)*].

The Bill’s approach follows that of New Zealand’s Official Information Act, which also provides access to information and not just records.¹³ The white paper also proposes a similar approach.¹⁴

Only information held by a public authority in connection with its functions as an authority is covered. A minister’s constituency correspondence would not be accessible, even though it may be held in a government department.

Information is held by an authority “if it is in its possession, custody or power”. This phrase is used in the Rules of the Supreme Court to describe the records which a party to litigation may be required to disclose by discovery.¹⁵

¹⁰ The term “person” includes a corporate body. Interpretation Act 1978

¹¹ The white paper proposes that the FOI Act access right would be “exercisable by any individual, company or other body” [Cm 3818, para 2.6]

¹² See for example an article entitled “Verbal advice only’ to go to ministers on unlawful acts” in the *Guardian* on 15/4/96 by Richard Norton-Taylor. This stated: “Civil servants have been told that any warnings they give to ministers and senior officials that their actions might be unlawful must in future never be put in writing.

The instruction, from top Whitehall officials, is a result of damaging disclosures contained in documents released to the Scott inquiry and a series of unsuccessful arms-to-Iraq prosecutions...

The Government is concerned about the growing number of legal challenges to its decisions through judicial review, and the steady erosion by the courts of the convention that official advice to ministers should be protected from disclosure...

Officials have been told that in future any concerns they have about the legality of government action must be passed on to Whitehall lawyers either face-to-face or on the telephone. There is less concern about the lawyers’ advice to ministers, since this would enjoy the greater protection given to a client-lawyer relationship.”

¹³ Official Information Act 1982 (New Zealand), section 12(1)

¹⁴ ‘Your Right to Know. The Government’s Proposals for a Freedom of Information Act’. December 1997, Cm 3818, para 2.6

¹⁵ Order 24, Rule 2. “Custody” refers to information which an authority holds on behalf of someone else. “Power” refers to information which the authority is entitled to obtain from the person who holds it.

Retrospection

The right of access applies to information held by an authority, regardless of whether it was obtained before or after the Bill came into force.

Similar retrospective rights of access exist under the Environmental Information Regulations 1992, the Data Protection Act 1984 and the Code of Practice on Access to Government Information. The white paper also proposed a fully retrospective right of access¹⁶ and most overseas FOI laws also adopt this approach.

Public authorities

The public authorities subject to the Bill are defined in clause 10. They include government departments, executive agencies, nationalised industries, public corporations, NHS bodies, local authorities, bodies to whom ministers or public authorities make appointments, or which carry out statutory functions, and other bodies which are created by royal prerogative, statute or by existing public authorities and which receive at least half their budget from public funds.

The scope is broadly similar to that set out in the white paper. However, some of the bodies or functions which the white paper proposes should be excluded from an Act are covered. These include the law enforcement functions of the police and government departments; the prosecution functions of bodies such as the Crown Prosecution Service; information relating to civil proceedings; information about the security and intelligence services; and the personnel files of public sector employees (which the white paper proposed would not be accessible to the staff themselves under FOI).

Right of access overrides other restrictions

Clause 2(2) provides that the right of access takes precedence over any statutory or common law prohibition on disclosure, other than a court order.

Nearly 250 statutory restrictions on the disclosure of information were identified by the former government in 1993.¹⁷ These restrict disclosure to the public of information about safety of pharmaceuticals,¹⁸ about safety problems at individual workplaces,¹⁹ about the Police Complaints Authority's handling of particular cases²⁰ and inquiries into insider dealing.²¹ The

¹⁶ "The access right will apply to records of any date, regardless of whether they were created before or after the Act comes into force", "We...propose that the FOI Act should cover access to both current and historical material" Cm 3818, paras 2.13 and 6.2

¹⁷ They are listed in the 'Open Government' white paper, Cm 2290, Annex B

¹⁸ Medicines Act 1968, section 118 . The following response to a Parliamentary Question is typical: "*Mr Hughes*: To ask the Secretary of State for Health what discussions (a) his Department, (b) the Committee on Safety of Medicines and (c) the Medicines Control Agency had with the product licence holders of the third generation oral contraceptives which were the subject of the safety warning issued in October 1995, between 4 July and October 1995; and if he will make a statement. *Mr Malone*: Information about discussions held with pharmaceutical companies about their products is treated in confidence under the Medicines Act 1968. 16.4.96, col. 488

¹⁹ Health & Safety at Work Act 1974, section 28

²⁰ The 1996/97 annual report of the Police Complaints Authority stated: "*Throughout its life the Authority has regularly drawn attention to the unreasonable constraints imposed on it by section 98 of the Police and Criminal Evidence Act. This makes it a criminal offence for our members to reveal anything but the most general summary of cases which we have handled. Providing a proper explanation of the Authority's decision is almost impossible within the narrow confines imposed by this restriction.*" (page 56)

²¹ Financial Services Act 1986, section 179. Thus: *Mr Miller*: To ask the President of the Board of Trade if she will place in the Library the findings of the previous inquiry into Anglia TV share dealings. *Mr Nigel Griffiths*. Reports of insider dealing inspections [sic] are not published. There are strict legal restraints on disclosure of information obtained in such inspections." *Written Answers*, 18.6.98, col. 322

Bill proposes that such information should be publicly accessible, except where it falls within the scope of the Bill's own exemptions.

A precedent can be found in the Data Protection Act 1984, where the right of an individual to see his or her own computerised file:

“shall apply notwithstanding any enactment or rule of law prohibiting or restricting the disclosure, or authorising the withholding, of information”²²

The Environmental Information Regulations 1992 provide a similar but more cautious approach. The general right of access to environmental information under the regulations overrides other statutory restrictions - *unless* the restriction coincides with one of the regulations' own exemptions. In this case disclosure continues to be prohibited.²³

However, the white paper envisages that existing restrictions would continue to restrain the release of information, but that those which were considered unjustified would be repealed or amended individually.²⁴

There are two potential difficulties with this approach:

First, allowing any statutory provisions to take precedence may prevent access to information in all circumstances - including those where there may be an overriding public interest in disclosure. The white paper proposes that a public interest test will apply, as does *clause 4* of the Bill.

Second, the task of reviewing large numbers of individual provisions is a substantial one that has defeated other governments, and allowed unjustified restrictions to continue:

- The last Conservative government was elected on a manifesto commitment to repeal unnecessary statutory prohibitions.²⁵ Some review of the provisions was carried out; and concluded that most were too broadly drafted. But the government retreated from “the major exercise” of amending them individually.²⁶
- The Australian government promised to review statutory prohibitions within three years of the FOI Act coming into effect in 1982. The review was never completed and the prohibitions remain force.²⁷
- The Canadian Access to Information Act contained a statutory requirement to complete a review of restrictions within three years.²⁸ The Parliamentary committee which

²² Data Protection Act 1984, section 26(4). A similar provision appears in section 1(5) of the Access to Personal Files Act 1987.

²³ Environmental Information Regulations 1992, regulations 3(7) and 4(2)

²⁴ Cm 3818, para 3.20

²⁵ The Conservative 1992 manifesto promised that the government would “*review the 80 [sic] or so statutory restrictions which exist on the disclosure of information - retaining only those needed to protect privacy and commercial confidentiality*”. The review found there were actually 249 statutory restrictions.

²⁶ Cm 2290, para 8.39

²⁷ Australian Law Reform Commission/Administrative Review Council. ‘Freedom of Information’ Discussion Paper 59, May 1995, para 6.15

²⁸ Access to Information Act 1982 (Canada) section 24(2)

undertook the task was defeated by it.²⁹ Canada's Information Commissioner later said the provision which permits statutory restrictions to override the Act "has no place at all in the law."³⁰

The Canadian parliamentary committee noted that:

"in every instance, the type of information safeguarded...would be adequately protected by one or more of the exemptions already contained in the Access Act."

The Australian Law Reform Commission reported that:

"Many secrecy provisions were drafted at a time when democratic accountability was not a primary consideration. Secrecy provisions run counter to the FOI Act"³¹. It later added: "the exemption provisions in the FOI Act represent the full extent of information that should not be disclosed to members of the public. Secrecy provisions that prohibit the disclosure of information that would not fall within the exemption provisions are too broad. The Review considers that repealing s 38 [which exempts such information] will promote a more pro-disclosure culture in agencies."³²

Response period

Clause 2(3)(a) requires authorities to release requested information "as soon as practicable" and no later than 20 working days from the application.

Where the information has been obtained from a third party, the period is extended to 35 days, to allow the third party to be consulted about whether any of the information is exempt. Regulations requiring such consultation may be made under *clause 9(1)(g)*.

A 20 working day response period is currently required under the Code of Practice on Access to Government Information and under the American and New Zealand FOI Acts. Ireland's 1997 FOI Act permits a 28 day response and the Australian and Canadian laws provide for 30 days - but these are calendar days, not "working" days. The Australian Law Reform Commission has recommended that the 30 day Australian period be cut to 14 days, in light of new developments in electronic records management.³³

Withholding of exempt information

Clause 2(3)(b) permits authorities to withhold exempt information - but does not require them to do so. Only the exempt information, not the whole record, may be withheld. Where information is withheld, the applicant must be told which of the exemption provisions has been invoked, why that provision is considered to apply, and how the he or she can appeal against the decision [*clause 2(3)(c)*]

²⁹ 'Open and Shut: Enhancing the Right to Know and the Right to Privacy' Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act, House of Commons (Canada), March 1987, page 116

³⁰ Information Commissioner of Canada, Annual Report 1993-94, page 32

³¹ Australian Law Reform Commission/Administrative Review Council. 'Freedom of Information' Discussion Paper 59, May 1995, para 6.15

³² Australian Law Reform Commission Report No 77/Administrative Review Council Report No 40. 'Open government: a review of the federal Freedom of Information Act 1982', 1995, para 11.3

³³ Australian Law Reform Commission Report 77/Administrative Review Council, Report 40, para 7.10

Correction of inaccurate records

An applicant who shows that information held about him or her was “incorrect, incomplete, misleading or not relevant to the purpose for which the information is held” would be entitled to have it corrected [*clause 2(3)(d)*]. This is similar to the existing right of correction under the Data Protection Act, which allows individuals to correct computerised information about themselves which is “incorrect or misleading as to any matter of fact”.³⁴ The Data Protection Registrar can take separate enforcement action to deal with any expression of opinion based on inaccurate material³⁵ or information which is not relevant to the purpose for which it is held.³⁶

The white paper proposed that individuals should have the same rights to correct inaccurate information held about them, regardless of whether that information fell under the scope of Data Protection or Freedom of Information legislation.³⁷ The bill seeks to achieve a common standard by providing for regulations which would deem FOI requests for personal information to be requests under the (new) Data Protection Act 1998.

Form in which access is given

Clause 2(4) entitles an applicant to inspect a record and to be supplied with a copy of it, in the form in which it is held. (That, is to obtain a photocopy of a document, or a copy of a computer disk.) If the applicant asks that the information be supplied in some other form - eg a print out of information held electronically - the authority would be required to comply, where practicable.

Requests which interfere substantially with authority’s work

Clause 2(5) permits authorities to refuse requests which would substantially and unreasonably interfere with their work because of the difficulty in locating and retrieving large numbers of records. What is unreasonable, will depend on the circumstances. A voluminous request which furthers the purposes of the Act (eg by promoting accountability)³⁸ would justify greater resources than one made for purely private or commercial reasons [*see clause 1(2)(a)*].

Before invoking this provision, an authority would be required to discuss with the applicant ways of reformulating the request so as to avoid causing it serious problems. This might involve narrowing the scope of the request or looking at a sample of records first, to identify which are likely to be relevant.

³⁴ Data Protection Act 1984, sections 24(1) and 22(4).

³⁵ Data Protection Act 1984, section 10(3)(a)

³⁶ The holding of such information would contravene the 4th data protection principle, set out in Schedule 1 to the 1984 Act, and could result in enforcement action under section 10(1).

³⁷ Cm 3818, paras 4.10 and 4.11

³⁸ See clause 1(2)(a)

Clause 3

EXEMPT INFORMATION

- 3 (1) Official information is exempt if its disclosure would be likely to cause substantial harm to any of the interests specified in subsection (2).

The substantial harm test

The white paper proposed that to withhold information authorities would have to show that disclosure would cause not *harm* but “*substantial harm*”. However, press reports suggest the government is preparing to drop this requirement, in favour of a lower test,^{39,40} blunting the Act’s cutting edge and making it considerably easier for authorities to withhold information. This would weaken the provision most likely to bring about the fundamental change in the culture of government promised by the Prime Minister.⁴¹

The white paper explained that the “substantial harm” test was required to improve on the relatively weak tests in the Code of Practice on Access to Government Information. In some cases, the Code exemptions apply where a disclosure would cause “harm” or “prejudice” to particular interests.⁴² Other exemptions contain no harm test, but exempt classes of information

³⁹ See: “Access to Secrets Will be Diluted”, Andrew Grice, *Independent*, 5/2/99; “Straw to Weaken Code on Freedom”, Valerie Elliott, *Times* 12/1/99,

⁴⁰ The matter was reported on BBC1’s 9 pm news on 26/1/99, and the BBC published the following account of its report on its internet site the following day:

“The government is facing a revolt from within its own ranks over plans to water down a key election pledge to create a new freedom of information law.

The Home Office is preparing a draft of the law, which has already been delayed several times, to go before Parliament in late February. But sources close to the government have confirmed to BBC News that radical proposals to increase the public’s right to access files that government departments and public bodies keep on almost every aspect of life have been significantly weakened.

Former cabinet minister David Clark, who framed the proposals before his sacking last July, said he had hoped to end the ‘British culture of secrecy’.

Under the original wording, right of access to information would be permitted ‘unless substantial harm is caused’. The word ‘substantial’ has been removed, greatly broadening the scope for officials to refuse to release information.

Many MPs will view a weaker freedom of information law as a betrayal of Labour’s claim to the the party of reform and ministers are privately preparing themselves for confrontation over accusations of backtracking.

Labour MP Rhodri Morgan who sits on the Public Administration Committee, said he anticipated a ‘major row’. ‘Instead of what we were promised - that is, making Britain one of the most open societies in the world in terms of freedom of information - we’ll still be dragging our feet’ he said.

The Liberal Democrats have worked closely with Labour on right of access, and deputy leader Alan Beith warned that the government was in danger of ‘wasting an opportunity that it had created’. ‘Freedom of information is vital to the wellbeing of many citizens who need to know what information the government is using to make crucial decisions that affect their lives’ he said.

Former Labour Chief Whip Derek Foster said the government also ran the risk of undermining its support within the party if it backed down over freedom of information. ‘There is already a great feeling of disappointment’ he said. “I think if we back down on this - one of more most important manifest commitments - there will be a great deal of anger’.”

<http://news.bbc.co.uk/hi/english/uk%5Fpolitics/newsid%5F263000/263582.stm>

⁴¹ Speaking in 1996, Mr Tony Blair said: “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.” Speech at the annual Awards of the Campaign for Freedom of Information, 25 March 1996.

⁴² For example: Exemption 1(b) protects “information whose disclosure would *harm* the conduct of international relations or affairs”; Exemption 7(b) applies to “information whose disclosure would *harm* the proper and efficient conduct of the operations of a department”; Exemption 4(a) refers to “information whose disclosure could *prejudice* the administration of justice”

without direct reference to the effect of disclosure.⁴³

The white paper states:

“we see the tests for harm in the *Code of Practice* as insufficient. In particular, there is for most exemptions no indication of the extent of harm against which the disclosure or withholding of information should be judged.

We believe the test to determine whether disclosure is to be refused should normally be set in specific and demanding terms. We therefore propose to move in most areas from a simple harm test to a substantial harm test, namely **will the disclosure of this information cause substantial harm?**⁴⁴

Launching the white paper in the House of Commons, Dr David Clark, then Chancellor of the Duchy of Lancaster, said:

“Significantly, in most cases, information could be withheld only if its disclosure would cause substantial - I repeat substantial - harm. That is a further important advance on the code, which laid down a simple harm test.”⁴⁵

The “substantial harm” test was also intended to reflect the Public Interest Immunity (PII) test. This refers to the circumstances in which the government may seek to withhold information from discovery during legal proceedings. Following the Scott Report, the Conservative government announced a new, stricter policy based on a test of “serious harm” or “real harm”.⁴⁶ David Clark described the “substantial harm” test as analogous,⁴⁷ a point also made in the published background material to the white paper:

“Information would be exempt from disclosure where to do so would cause “substantial damage” to a specified interest. It is unlikely that the nature of “substantial damage” would be defined on the face of the Act (due to the complexity of formulating such a definition), but as a test of harm it would clearly be more stringent (and so provide greater openness) than the Code of Practice on Access to Government Information (which normally exempts on the basis of simple “harm” or “prejudice”) and would be closer to the “real damage” test of PII. Practical experience of applying a “real damage” test in litigation indicates that it results in a substantial reduction in the volume of material which would be withheld.”⁴⁸

⁴³ For example: Exemption 4(a) applies to “Information whose disclosure...is, has been or is likely to be addressed in the context of” legal proceedings or the proceedings of any tribunal, public inquiry or other formal investigation”. It operates regardless of whether disclosure would prejudice those proceedings. Exemption 11(b) applies to “Information held only for preparing statistics or carrying out research, or for surveillance for health and safety purposes (including food safety), and which relates to individuals, companies or products which will not be identified in reports of that research or surveillance, or in published statistics”.

⁴⁴ Cm 3818, paras 3.6 - 3.7

⁴⁵ Hansard, 12/12/97, col.1184

⁴⁶ The Attorney General, Sir Nicholas Lyell, told the Commons “The new emphasis on the test of serious harm means that Ministers will not, for example, claim PII to protect either internal advice or national security material merely by pointing to the general nature of the document. The only basis for claiming PII will be a belief that disclosure will cause real harm...a document will not attract PII simply because it falls into a pre-defined category.” (18.12.96, col 950)

⁴⁷ Evidence to the Public Administration Committee, 16.12.97.Q.102

⁴⁸ ‘Your Right to Know - Background Material’, Cabinet Office, January 1998. This material consists of edited versions of the papers submitted to the ministerial committee on freedom of information, chaired by the Lord Chancellor.

Experience with the Code of Practice explains why a stricter test is necessary. A 1996 select committee report concluded:

“We do view with concern the tendency of departments to be over-defensive and quote every exemption that might remotely explain the withholding of information...To scatter excuses like so much gun fire, in the hope that some exemption might hit the target, is to undermine the spirit and purpose of the Code and to show disregard for the rights of the individual requester.”⁴⁹

The former Parliamentary Ombudsman, Sir William Reid, who supervised the Code, stated:

“there is a tendency in some departments to use every argument that can be mounted, whether legally-based, Code-based or at times simply obstructive, to help justify a past decision that a particular document or piece of information should not be released instead of reappraising the matter in the light of the Code with an open mind. I have found it time-consuming to have to consider a whole series of different defences, even when many of them prove to have no real foundation.”⁵⁰

More recently, the present Ombudsman, Mr Michael Buckley, has reported that some departments engage in a:

“process of haggling...about the interpretation, whether or not the Code applies”⁵¹

“departments...dispute my interpretation of the Code and the exemptions under it; or dispute my judgement regarding the ‘harm’ test.”⁵²

“Too often, departments quote exemptions...rather than follow the spirit of the Code and give as much information as they are able.”⁵³

Such comments illustrate the case for adopting a significantly more demanding burden of proof from authorities seeking to withhold information. Overseas experience is that the mere introduction of an FOI Act is not itself guaranteed to produce a fundamental change in attitude. According to Canada’s Information Commissioner:

“A culture of secrecy still flourishes in too many high places even after 15 years of life under the Access to Information Act. Too many public officials cling to the old proprietorial notion that they, and not the Access to Information Act, should determine what and when information should be dispensed to the unwashed public.”⁵⁴

In the same report, the Canadian Commissioner reviewed the UK’s white paper with great enthusiasm, noting that the proposals “left Canada trailing in the dust” and “represent...nothing other than a breathtaking transformation in the relationship between the government and the

⁴⁹ Select Committee on the Parliamentary Commissioner for Administration, Second Report, Session 1995-96, “Open Government”, HC 84, para 111

⁵⁰ Parliamentary Commissioner for Administration, Annual Report for 1995, page 51

⁵¹ Oral evidence to the Public Administration Committee, 2/12/97, Third Report, Session 1997-98, HC 398(1), Q34

⁵² Memorandum to the Public Administration Committee, January 1998, Third Report, Session 1997-98, HC 398(1),

⁵³ Parliamentary Ombudsman. Press release, 10/12/98

⁵⁴ Information Commissioner of Canada, Annual Report 1997-98, page 2

governed”, and hoping that his own legislation might be improved in similar terms. One of the features he admired was the proposed substantial harm test.

THE EXEMPTIONS

The exemptions set out in *clause 3(2)* correspond to the seven ‘specified interests’ that the white paper proposed.⁵⁵

The ‘substantial harm’ test in *clause 3(1)* applies to *all* categories of exemption. This differs from the white paper, which proposed that ‘substantial harm’ should apply to six of the seven interests. A *lower* test of just ‘harm’ was proposed for policy advice.⁵⁶

Defence, international relations, security & intelligence

- (2) The interests referred to in subsection (1) are-
 - (a) the defence or international relations of the United Kingdom and its dependencies or the lawful activities of the security or intelligence services;

Information whose disclosure would cause substantial harm to defence, international relations or the security and intelligence services is exempt.

The Bill would apply to the security and intelligence services, although the white paper excludes them. These services are also covered by the American, Canadian and New Zealand FOI laws.

Only information about the services’ “lawful” activities is protected. Information about unlawful activities could not be withheld. A similar approach is found in the Australian Act, where only information about “lawful” law enforcement activities can be withheld under the law enforcement exemption⁵⁷ - a provision intended to ensure that *unlawful* actions could not be concealed.

Law enforcement

- (b) the prevention, investigation or detection of crime, the apprehension or prosecution of offenders or the prevention of escape of persons from legal custody

The Bill contains no exclusion for law enforcement bodies. All information relating to these functions would be accessible, unless disclosure would cause substantial harm.

The white paper proposed that information about public authorities’ functions relating to the “investigation, prosecution or prevention of crime” should be excluded from the scope of the Act altogether.⁵⁸ The exclusion would apply to “the investigation, prosecution functions of the police, prosecutors and other bodies carrying out law enforcement work such as the Department of Social Security or the Immigration Service”.⁵⁹

⁵⁵ Cm 3818, para 3.11

⁵⁶ Cm 3818, para 3.12

⁵⁷ Freedom of Information Act 1982 [Australia], s 37(2)(b)

⁵⁸ Cm 3818, para 3.11, subparagraph 2

⁵⁹ Cm 3818, para 2.21

No other country's FOI law excludes these functions. Such information is normally accessible, so long as disclosure does not harm law enforcement. The consequence of the white paper's approach would be that information about the ordinary work of the police or law enforcement bodies would remain secret in all circumstances, even where disclosure would not harm law enforcement or would be justified on wider public interest grounds, for example, because there had been serious malpractice. The Public Administration Committee has described some of the apparently innocuous information that would be protected from disclosure by this approach, and expressed scepticism about the justification for it.⁶⁰ No information about the police's conduct in relation to the investigation of the death of Stephen Lawrence could be obtained under such an FOI Act, even if no harm to policing or to potential legal proceedings was possible.

The white paper proposals would actually lead to the *removal* of some existing rights. Unlike the police, the Immigration Service is subject to the Code of Practice.⁶¹ Information about immigration, nationality and asylum matters can be obtained under it so long as disclosure does not prejudice immigration controls or other statutory provisions.⁶² Some of this accessible information would be removed from the scope of the legislation by the white paper proposals - an unfortunate consequence for a Freedom of Information Act.

The Home Secretary has explained the proposed exclusions as a response to the "substantial harm" test, suggesting that a more open approach would have been adopted if a lower test of "harm" had been adopted.⁶³

As a compromise, the Public Administration Committee suggested that the law enforcement test should be reduced from "substantial harm" to plain "harm", in order to bring policing information within the Act's scope.⁶⁴ The government replied that it would consider this proposal further⁶⁵ and subsequent press reports have also indicated that some such change is being considered. It is not clear whether what is being considered is to remove the exclusion altogether or merely to narrow its scope.

⁶⁰ 'We asked Mr Jack Straw, the Home Secretary, what sort of information would be covered by the law enforcement exclusion. He was asked whether there needed to be protection, for example, for information relating to the adequacy of policing arrangements outside a football ground following an incident in the crowd; to the reasons why the police had failed to respond promptly to a 999 call; to the excessive use of CS gas in inappropriate circumstances, or an improper disclosure to an employer of confidential information by the police in respect of a spent conviction. He argued that all of these pieces of information required to be kept confidential: "they all impinge upon the central issue. Questions, for example, which appear to be prosaic, like the numbers of police officers who are outside a football ground, go to the strength of that force in that area" (though Mr Straw appeared to undermine the point by saying that "the general information is in any event available about the number of officers in a force and within a sub-division"). He said that "if you openly provide intelligence about the total numbers of police officers available, then that would be used by the criminals involved": this concern appears misplaced as the information would only be available after the event, not before it.' Public Administration Committee, 3rd Report Session 1997-98, HC 398-I, para 28.

⁶¹ The Code only applies to bodies within the jurisdiction of the Parliamentary Ombudsman - this does not include the police.

⁶² Code of Practice on Access to Government Information, Exemption 5

⁶³ In evidence to the Public Administration Committee in April 1998, the Home Secretary, Mr Jack Straw said: "If you have a simple harm test, then it is possible to have more things testable in the courts. If you go for a substantial harm test, then as far as I am concerned the public interest requires that matters relating to law enforcement, investigations and prosecutions have to be exempted altogether." Public Administration Committee, 3rd Report Session 1997-98, HC 398-I, Q 508.

⁶⁴ HC 398-I, para. 30

⁶⁵ Public Administration Committee, 4th Report Session 1997-98, 'The Government's Response to the Public Administration Select Committee's Report on Freedom of Information', 21.7.98, para 12

Legal proceedings

- (c) the fairness of legal proceedings;

The Bill exempts disclosures which would cause substantial harm to the fairness of legal proceedings. It differs from the white paper, which proposed to exclude altogether information about “the commencement or conduct of civil proceedings”.⁶⁶

In justifying this, the white paper states “*FOI should...not undermine the...bringing of civil or criminal proceedings*”. This explanation is itself set out in terms of a “harm test”, raising the question of why disclosures about proceedings which would *not* “undermine” these functions should be excluded from access.

Legal professional privilege

- (d) the position of the public authority to which the application for disclosure of information has been made in any actual or contemplated legal proceedings insofar as any harm to that position results from the disclosure of information to which legal professional privilege applies;

The white paper proposes that the government’s legal advice should be excluded from the Act altogether. The Bill allows access to such advice unless disclosure would cause substantial harm to an authority’s position in actual or possible legal proceedings.

This would permit disclosure of legal advice (and other information normally subject to legal professional privilege) where:

- any legal action has been concluded and there is no possibility of further similar cases
- the advice relates to proceedings under legislation which has since been repealed
- advice merely summarises case law on an issue of public policy, explains the purpose of a provision in a bill or the consequences of a new judgement, statute or European directive.

Such material may be helpful to the public, while holding no prospect of undermining an authority’s position in the courts.

The American FOI Act exempts documents subject to attorney-client privilege⁶⁷ but in 1993 the US Attorney General urged agencies not to withhold such information unless they “*reasonably foresee...that disclosure would be harmful to an interest protected by that exemption*”⁶⁸. The Department of Justice has urged that this approach be applied “*even to information that falls within the traditional attorney-client privilege*”.⁶⁹

Canada’s Information Commissioner has described the sweeping protection for legally privileged documents under his country’s legislation as “unsatisfactory”:

⁶⁶ Cm 3818, para 2.21

⁶⁷ Exemption 5 protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency”

⁶⁸ US Department of Justice, *FOIA Update*, Summer/Fall 1993

⁶⁹ US Department of Justice, *FOIA Update*, Spring 1994

“Most legal opinions, however stale, general or uncontroversial, are jealously kept secret. In the spirit of openness, the government’s vast storehouse of legal opinions on every conceivable subject should be made available to interested members of the public.

Tax dollars paid for these opinions and, unless an injury to the conduct of government affairs could reasonably be said to result from disclosure, legal opinions should be disclosed.”⁷⁰

Commercial confidentiality

- (e) the competitive position of the public authority to which the application for disclosure of information has been made or a third party, insofar as any harm to that position arises from the use of information which is confidential to the authority or third party by a competitor of that authority or party,

This exemption protects information whose disclosure would cause substantial harm to the competitive position of the authority or a third party. Only harm which resulted from the use of the information by a *competitor* of the authority or party would be relevant. Where there was no competition - for example, because the owner of the information had a monopoly, the exemption could not apply.

Privacy

- (f) the privacy of an individual to whom the information relates and who has not consented to the disclosure; and for the purposes of this paragraph a disclosure shall be regarded as causing substantial harm to an individual's privacy if it consists of-
 - (i) information relating to the individual's personal affairs which the individual was required by law to supply to the public authority to which the application for disclosure of information has been made, or which he supplied to it in confidence in connection with a statutory benefit provided by the authority; or
 - (ii) information obtained in connection with the provision of health care or social work services to the individual.

Disclosures which would cause substantial harm to an individual’s privacy are exempt. Certain types of information are deemed to cause such harm: information which an individual is required to supply by law (such as the information supplied on a tax return); information supplied in applying for a statutory benefit (such as income support) and information contained in the individual’s health or social work records.

Human safety and endangered species

- (g) the protection of the life or safety of an individual, the public or rare or endangered species or their habitats;

This exemption protects information whose disclosure would cause substantial harm either to human safety (for example, by revealing the identity of informants who might be at risk of reprisals) or to rare or endangered species (by disclosing their location to collectors).

⁷⁰Annual Report 1993-94, page 30

Volunteered information

- (h) the ability of the public authority to which the application for disclosure of information has been made to obtain from a third party information which is necessary to its work, insofar as any harm to that interest results from the disclosure of information which has been supplied to the authority in confidence by a third party who-
 - (i) was not, and could not have been, required (whether by statute, contract or otherwise) to supply it, and
 - (ii) did not supply it for the purposes of influencing the contents of legislation or the policy or practice of an authority or of securing some material benefit for itself;

The white paper proposed to exempt “information supplied in confidence”, subject to a test of substantial harm.⁷¹ This exemption attempts to define that harm. It protects information volunteered to the authority in confidence whose disclosure would cause substantial harm to the authority’s ability to obtain such information.

It does not protect information merely because it was given and accepted in confidence. This would permit an authority and third party to agree on confidentiality, merely to avoid embarrassment. Its purpose is to protect the authority’s ability to obtain information - not to protect a third party’s commercial secrets (these should be dealt with under the commercial confidentiality exemption in paragraph (e).)

The exemption would *not* apply where the authority has the statutory or contractual power to compel the supply of that information. Its future supply would not be jeopardised in these circumstances.

Nor does it apply to information supplied for the purpose of lobbying the authority about proposed legislation or changes in policy or practice. The Bill assumes that authorities will continue to be lobbied by interest groups, regardless of disclosure, and that there is an overriding public interest in making this process transparent.

Policy advice

- (i) the ability of the public authority to which the application for disclosure of information has been made to give adequate consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration, insofar as that ability would be harmed by disclosing the advice, opinion or recommendation tendered by an identifiable individual in the course of that individual’s official duties for the purpose of the formulation of the policy of the authority.
- (3) Information does not fall within paragraph (i) of subsection (2) insofar as it consist of-
 - (a) factual information;
 - (b) the analysis, interpretation or evaluation of, or any projection based on, factual information;
 - (c) expert advice on a scientific, technical, medical, financial, statistical, legal or other matter, other than advice falling within subsection (2)(c) above;
 - (d) guidance such as is described in section 6(2)(c); or
 - (e) information relating to the personal affairs of the applicant or the reasons for any decision taken in relation to the applicant.

⁷¹ Cm 3813, para 3.11

The Bill exempts policy advice if disclosure would cause substantial harm to an authority's ability to adequately consider a matter about which no final decision has been reached. The provision acknowledges that internal discussions may require confidentiality, particularly where they involve the discussion of untested ideas, whose feasibility and desirability have not yet been considered. However, it proposes that much of this information be disclosed once a decision has been taken. Where the advice relates to one of a series of related decisions, the disclosure point may be after the end of the series.

Certain classes of information (set out in *clause 3(3)*) are excluded from this exemption, and could not be withheld unless covered by another exemption. These include factual information; its analysis, interpretation and evaluation; projections based on factual information; and expert advice.

Access to advice once a decision has been taken will allow the public to see whether the real implications of a new policy or decision have been dealt with, and judge whether potential obstacles have been properly considered. Knowledge that such material may become public is likely to improve their quality, encouraging a more rigorous and balanced approach to policy analysis.

Examples of such disclosures include:

- the last government's decision to publish the minutes of the monthly meetings between the Chancellor of the Exchequer and Governor of the Bank of England. These were released just six weeks after the meetings had taken place. The release of such high level advice, so soon after the event, would previously have been regarded as so damaging as to be unthinkable. In fact, they have helped to reassure the City that decisions are being taken for good reasons, and have improved the quality of public discussion. The present government has continued the practice, releasing the minutes of its Monetary Policy Committee meetings just two weeks after they take place - a development which has also been widely welcomed.⁷²
- the publication by the Cabinet Office of the Background Material to the government's FOI white paper, in January 1998, a few weeks after the white paper appeared. The material consists of edited versions of papers submitted to the ministerial committee considering the FOI proposals. At many points the papers clearly reflect the opinions of officials on the relative merits of alternative options; and at some points appear to endorse approaches which do not feature in the white paper.

Under New Zealand's Official Information Act 1982, policy advice is frequently disclosed once decisions have been taken. The Information Authority, which monitored the legislation during its first years, commented:

“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

⁷² According to the Independent's 'Outlook' columnist “This transparency is all the more important in the present circumstances, with interest rates still high and growth declining, for it explains and justifies the policy stance. We may not agree with it, but at least we can see how the MPC is arriving at its decisions. The Bank of England gets a pretty rough press as things are, but without these minutes, it would be a good deal rougher and unforgiving.” Independent, 15.10.98

their relationships with their Ministers.”⁷³

More recently, the New Zealand Law Commission has commented:

“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.”⁷⁴

According to the chief executive of one of the New Zealand agencies subject to the Act :

“A large number of briefing papers to ministers are now published, and these include, for example, most of the briefing papers from departments to an incoming government, but it is not unusual for ministers to introduce policies which ignore or run counter to the advice of their officials. Where this happens there is often comment in the media that ministers have not adopted the advice of their officials. Ministers may be called upon to justify their policies, which they usually do by reference to the democratic process and the need to take into account the wishes of their electors. The situation does not appear to be particularly embarrassing to either the ministers or the departments involved. Indeed it could be argued that one of the consequences of the Official Information Act is that it has helped to reduce the politicization of the public service by making it more obvious if advice is partisan.”⁷⁵

The Bill’s approach to policy advice differs from that of the white paper, which proposed that unlike other classes of information this should be subject to a plain test of “harm” and not to the “substantial harm” test.⁷⁶

Clause 4

PUBLIC INTEREST

4. (1) A public authority to which an application for official information has been made under this Act shall give access to the information, notwithstanding that it is exempt, where to do so is justified in the public interest having regard both to any benefit and to any harm that may arise from going so.
- (2) In determining whether a disclosure is justified in the public interest a public authority shall have regard to-
 - (a) the purposes of this Act set out in section 1(1) above, and
 - (b) the question of whether the information indicates the existence of any-
 - (i) offence, failure to comply with a legal obligation or miscarriage of justice;
 - (ii) abuse of authority or neglect in the performance of official duty; or
 - (iii) danger to the health or safety of an individual, the public or the environment.

⁷³ Report of the Information Authority, 31/3/86

⁷⁴ Law Commission. ‘Review of the Official Information Act 1982’, October 1998, Wellington, New Zealand, page 5.

⁷⁵ ‘Open Government in New Zealand’, Judith Aitken, Chief Executive of New Zealand’s Education Review Office, In: A McDonald & G Terrill, eds ‘Open Government, Freedom of Information and Privacy’ Macmillan, 1998, pages 131-2

⁷⁶ Cm 3818, Para 3.12

(3) In any proceedings for an offence under the Official Secrets Act 1989, it shall be a defence to show that the information whose disclosure gave rise to those proceedings would have been available to an applicant under this Act having regard, in particular, to the provisions of this section.

Public interest override

Many countries' FOI laws contain a public interest test, which permits exempt information to be disclosed where the benefits of openness outweigh the harm. A provision of this kind appears in the Code of Practice on Access to Government Information, which states that for those exemptions which involve a test of harm:

“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”.

The code does not define 'public interest', but the government's guidance on it and a separate code on access to NHS information, between them set out the key elements:

"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"⁷⁷

“...disclosure might be envisaged [on public interest grounds] where there would be some breach of the law or other wrongdoing, or exposure of a significant risk to public health or to the environment or public safety.”⁷⁸

“Where disclosure is necessary or conducive to the protection of public health, public safety or the environment, such considerations may clearly outweigh financial loss or prejudice to the competitive position of a third party”⁷⁹

Official Secrets Act

Clause 4(3) provides a public interest defence to charges under the Official Secrets Act 1989. Under some provisions of the 1989 Act, offences are committed only if an unauthorised disclosure by a civil servant, or a publication by a journalist or other person, is likely to cause harm.⁸⁰ In other cases, disclosures of particular classes of information are automatically

⁷⁷Cabinet Office. 'Code of Practice on Access to Government Information. Guidance on Interpretation', 2nd edition (1997) para 3.

⁷⁸NHS Executive. Guidance on Implementation of the Code of Practice on Openness in the NHS, May 1995, para 9.43

⁷⁹Cabinet Office. 'Code of Practice on Access to Government Information. Guidance on Interpretation', 2nd edition (1977) para 3.Guidance, para 13.14

⁸⁰ For example, an unauthorised disclosure of information about defence which is likely “to damage...the capability of” any part of the armed forces is an offence under section 2(2)(a) of the Official Secrets Act 1989. A disclosure about international relations which is likely to “endanger...the interests of the United Kingdom abroad” is an offence under section 3(2)(a).

offences, regardless of whether harm is likely to result in that specific case.⁸¹ A defendant is not entitled to argue that the disclosure was justified in the public interest, for example, because it revealed danger to life, corruption or other serious malpractice.

The white paper contains no proposal to create such a defence. Ministers have previously indicated that they believe such a defence is unnecessary.⁸²

Clause 5 **CHARGES**

5. - (1) A public authority shall make no charge to the applicant for the provision of information under this Act other than-
- (a) an application charge, which shall not exceed £10;
 - (b) an hourly charge, not exceeding £15 per hour, in respect of the time required to identify and locate the requested information by a person doing so in an efficient manner, provided that no such fee may be charged in respect of the first three hours so spent;
 - (c) a charge of 5 pence per copy in respect of any photocopies supplied to the applicant;
 - (d) in respect of copies of records supplied other than on paper, a reasonable charge to cover the cost of any blank tape, disk, film or other material onto which the record has been copied;
 - (e) in respect of information sought by a person for commercial purposes, such additional charge as the Secretary of State may, by regulations under section 9, prescribe.
- (2) The charges referred to in subsection (1) above shall be waived-
- (a) where disclosure of the information is in the public interest; or
 - (b) where the cost of collecting and accounting for the charge exceeds the amount of the charge.

Authorities would be able to charge applicants an application fee of up to £10, the same as the current fee for those seeking their personal records under the Data Protection Act. The white paper also proposed such a charge.⁸³ Thereafter a further charge could be made only to cover the time spent locating the records, where this was more than three hours.⁸⁴ However, commercial users could be asked to pay further charges, an option suggested by the white paper⁸⁵ - and adopted under the US FOI Act.

⁸¹ Any unauthorised disclosure of information supplied to the UK government in confidence by another government or international governmental organisation (such as the UN or the EU Council of Ministers) could be an offence, if it was likely to “endanger...the interests of the UK abroad”. The nature of the disclosure would be irrelevant if it was held that the breach of confidence was itself likely to have this effect [section 3(3)(a), Official Secrets Act 1989]. A disclosure which “which falls within a class or description of information” likely to damage the security and intelligence service is an offence under section 1(4)(b), regardless of whether the information itself is likely to have this effect. In the case of disclosures by members of former members of the security or intelligence services, any unauthorised disclosure about their work (whether or not it falls into such a class) is an offence under section 1(1)(a).

⁸² Hansard, House of Commons, Written Answers, 28.7.97, cols 6-7

⁸³ Cm 3818, para 2.31

⁸⁴ A similar approach has been introduced under the Irish FOI Act, where charges are limited to 3p a page photocopying charge, plus an hourly charge of Irish £16.50 for the time spent locating and retrieving records.

⁸⁵ Cm 3818, para 2.33

No charge for the time spent actually assessing the records against the exemptions could be made. Here the Bill differs from the white paper proposals, which envisage that further charges will be made for requests “which involve significant additional work and considerable costs”.⁸⁶ There is concern that this approach could limit use of the FOI Act to those making simple requests. The more penetrating enquiries could be blocked by high fees.

The Background Material to the white paper suggests that the charging regime is likely to involve:

“a relatively substantial ‘free’ or low charge element at the beginning, followed by quite steeply rising charges thereafter to cope with the small minority of complex, time-consuming applications”.⁸⁷

This has been the approach under the Code of Practice, where authorities allow some free time, followed by hourly charges for the time spent handling requests - including the time assessing information against exemptions. The amount of free time allowed varies from department to department, with some offering only an hour’s free work before making charges, typically of £15 or £20 per hour. In some cases the fee is considerably greater: £35 an hour for Ordnance Survey and £45 an hour for Health & Safety Executive nuclear inspectors. Hourly charges by local authorities under the Environmental Information Regulations have reached as much as £62 per hour.⁸⁸

Photocopying fees would be limited to 5p a sheet, to prevent the kinds of excessive charges (up to £13 for a single sheet⁸⁹) sometimes reported. Like the white paper, the Bill proposes that fees should be waived for disclosures that are in the public interest.⁹⁰

Clause 6

DUTY TO ASSIST APPLICANTS

6. (1) A public authority shall take reasonable steps to assist any person seeking to exercise any right under this Act.
- (2) A public authority shall make available-
- (a) a guide sufficient to enable any person wishing to apply to it for information under this Act to identify the classes of records held by it, the subjects to which they relate, the location of any indexes to those records, and, so far as is practicable, facilities to enable those indexes to be consulted by any person;
 - (b) an indexed register containing copies of information released in response to requests under this Act other than information relating to the personal affairs of the applicant;
 - (c) any guidance used by the authority in relation to its dealings with the public or with corporate bodies;
 - (d) to any person, the reason for any decision taken by it in relation to that person.
- (3) The materials referred to in paragraphs (a) to (c) of subsection (2) above shall be made available-

⁸⁶ Cm 3818, para 2.32

⁸⁷ ‘Your Right to Know - Background Material’, Cabinet Office, January 1998, para 188.

⁸⁸ London Borough of Redbridge, cited in Friends of the Earth’s 1996 Report ‘Insisting on Our Right to Know’

⁸⁹ Council for the Protection of Rural England, ‘Public Access to Planning Documents’, 1994

⁹⁰ Cm 3818, para 5.12

- (a) for inspection by any person without charge;
 - (b) by supplying a copy to any person on request, for which a charge not exceeding 5 pence per page so copied may be made;
 - (c) on the internet, provided that the materials are held by the authority in electronic form and it is practicable for it to so make them available.
- (4) Nothing in this section shall require an authority to disclose information which is exempt within the meaning of section 3(1).

Indexes

Authorities would be required to assist applicants in exercising their rights under the Bill. In addition to this general duty, four specific duties are laid down.

People will only be able to to make proper use of the Bill, if they know what information exists. Authorities would therefore be required to publish a guide to the classes of records they hold. This does *not* require that all records be listed individually, only that the types of records and the subjects they deal with be described. Where indexes to these records *already* exist, they must be made available to the public, so far as is practicable.

Second, authorities are required to keep and make publicly available an indexed register containing copies of the information they release under the Bill. A disclosure made to one person will thus be available to all. It ensures that an authority's efforts in processing a request are not wasted if the applicant fails to make full use of the information, perhaps because it comes too late to be of use, or is too complex for them, or because they lack the means to disseminate the findings. These materials will also help illustrate to potential users the kinds of information they may expect to obtain - and the types which are likely to be exempt, thus encouraging applicants to approach the Act with more realistic expectations of what may be available. Neither of these proposals appears in the white paper.

Authorities would also be required to make public the guidance they use in dealing with the public or organisations, and to give people the reasons for decisions affecting them. These are both requirements under the Code of Practice, which the white paper proposes be carried over into an FOI Act.⁹¹

The above materials would have to be made available for inspection without charge, supplied as photocopies on request, and published on the Internet - provided the information information is held electronically, and publishing it in this way is practicable.

⁹¹ Cm 3818, para 2.18

Clause 7

INFORMATION COMMISSIONER

7. (1) For the purposes of this Act there shall be an officer known as the Information Commissioner ("the Commissioner").
- (2) The Commissioner may be appointed by Her Majesty by Letters Patent.
- (3) The Commissioner shall-
- (a) subject to the provisions of subsection (4) below, investigate any complaint that a public authority has failed to comply with any requirement of this Act and may initiate an investigation in the absence of a complaint;
 - (b) perform his functions under this Act so as to further the purposes specified in section 1(1) above;
 - (c) conduct an investigation with as little formality and as expeditiously as the requirements of this Act and a proper consideration of the matters concerned permit;
 - (d) arrange for the dissemination of such information as he thinks fit about the operation of this Act and other matters within the scope of his functions, and may give advice to any person as to any of those matters;
 - (e) annually lay before each House of Parliament a report on the operation of this Act,

and may from time to time lay before each House of Parliament such other reports on the operation of this Act as he thinks fit.

The Bill would be enforced by an Information Commissioner, with the power to order authorities to comply with its provisions. This is also proposed in the white paper.⁹²

The Commissioner would be appointed by Her Majesty by Letters Patent. A previous version of this Bill proposed that the Commissioner's appointment would follow a more complex procedure.⁹³

- (4) The Commissioner may decline to investigate a complaint in relation to any decision or action of a public authority if-
- (a) before making it the complainant has failed to comply with any procedure prescribed by regulations under section 9 for seeking the internal review by the authority of any such decision or action; or
 - (b) the review has been completed within 15 working days from the day on which the application for review was received, or the complainant is dissatisfied with the outcome of the review.

The Bill makes allowance for a requirement that, before approaching the Commissioner, complainants ask the authority concerned to review any unfavourable decision. Internal review is required under the Code of Practice, and is proposed in the white paper.⁹⁴ Internal review is required in Australia, but the Australian Law Reform Commission has proposed that it should

⁹² Cm 3818, Para 1.7

⁹³ The Bill introduced by Andrew Mackinlay MP on 18/11/98 proposed that: "The Information Commissioner shall be appointed by Her Majesty by Letters Patent on an Address presented by both Houses of Parliament following a motion by the Prime Minister acting with the agreement of the Leader of the Opposition and the Chairman of a select committee of the House of Commons who has been designated by the Speaker of that House for this purpose."

⁹⁴ Cm 3818 para 5.8

be an option available to an applicant - not a requirement.⁹⁵

The white paper states that under the Code it has led to further disclosures in some 30% of cases. Its potential advantages and disadvantages were summarised in the Background Material:

“117. The advantages of internal review are that:

- * it can provide a quick, simple and fairly informal mechanism for resolving some complaints, especially as the culture change prompted by FOI legislation takes effect (i.e. it might be expected that disputes will arise because a public body does not apply the legislation consistently or properly, or because staff are insufficiently experienced in interpreting the rules). Under the Code, 30% of internal reviews have resulted in further disclosure (a figure broadly common to the USA and Australia) and
- * it should therefore ease the burden on the Information Commissioner, leaving him or her to concentrate on more complex cases.

118. However, internal review also has a number of perceived disadvantages:

- * it can introduce further costs, complexity, and delay into the appeals system;
- * FOI applicants might have a legitimate expectation that government should get its decision "right first time"; and
- * with the protection that the internal review stage gives, there is the prospect that junior officials will "play it safe" and make restrictive disclosure decisions, knowing that the decision can be changed later on should a request for internal review be made.”

The Bill addresses concerns about further delay by requiring internal review to be completed within 15 working days. If it is not, the applicant would be free to complain to the Commissioner directly.

⁹⁵ Australian Law Reform Commission Report No 77/Administrative Review Council Report No 40. ‘Open government: a review of the federal Freedom of Information Act 1982’, 1995, recommendation 83.

Commissioner's powers

- (5) For the purpose of an investigation under this Act, the Commissioner-
- (a) may require any Minister, officer or employee of the public authority concerned or any other person who, in the Commissioner's opinion, is able to provide information or produce records relevant to the investigation to do so;
 - (b) shall have the same powers as the Court in respect of the attendance and examination of witnesses (including the administration of oaths and the examination of witnesses abroad) and in respect of the production of documents;
 - (c) may examine any record containing information to which this Act applies, including any record containing information which is or may be exempt;
 - (d) shall take all reasonable precautions to avoid the disclosure of information which is or may be exempt but may disclose to the appropriate public authority any information, including exempt information, which in his opinion indicates the commission of an offence or significant misconduct on the part of any person;
 - (e) may receive and consider any record or information, whether or not it would be admissible in a court; and
 - (f) may enter any premises occupied by a public authority and examine or remove any record or material relevant to the investigation.
- (6) No obligation to maintain secrecy or other restriction upon the disclosure of information, whether imposed by or under an enactment, by any rule of law or otherwise, shall preclude a person from supplying information to the Commissioner for the purpose of an investigation under this section.
- (7) The Crown shall not be entitled, in relation to any investigation by the Commissioner, to any privilege in respect of the production of records or the giving of evidence as is allowed by law in legal proceedings; but anything said or any information supplied in any record produced by a person in the course of such an investigation shall be privileged in the same manner as if it were said or supplied in proceedings in court.

The Commissioner's powers of investigation are described only briefly in the white paper, which states that he or she would have:

“the right of access to any records within the scope of the Act and relevant to an investigation”⁹⁶

This approach would deny the Commissioner access to records which, under the white paper's approach, would be excluded from the Act's scope - such as those relating to the law enforcement functions of the police and immigration service, the prosecution functions of the Crown Prosecution Service, the work of the security and intelligence services. This would fundamentally hamper the Commissioner's ability to investigate complaints *within* the Act's scope.

⁹⁶ Cm 3818, para 5.12

Clause 8

ENFORCEMENT

8. - (1) On the completion of an investigation under section 7, the Commissioner may make an order requiring a public authority to take such steps as he deems necessary to comply with the requirements of this Act within such period of time as the order may specify.
- (2) If any person without lawful excuse-
- (a) fails to comply with an order of the Commissioner;
 - (b) obstructs the Commissioner in the performance of his functions; or
 - (c) is guilty of any act or omission in relation to an investigation by the Commissioner which, if that investigation were a proceeding in the Court, would constitute contempt of court
- the Commissioner may certify the offence to the Court.
- (3) The court to which an offence is certified under subsection (2) may inquire into the matter and, after hearing-
- (a) any witness who may be produced against or on behalf of the person charged with the offence, and
 - (b) any statement that may be offered in defence
- may deal with him in any manner in which the Court could deal with him if he had committed the same offence in relation to the Court.
- (4) Any person who-
- (a) destroys a record which, at the time it was destroyed, contained information which was the subject of an application, or a complaint to the Commissioner, under this Act; and
 - (b) who does so intending to prevent disclosure of that record in accordance with the requirements of this Act or in circumstances in which it was foreseeable that such disclosure would thereby be prevented,
- is guilty of an offence.
- (5) A person found guilty of an offence under this section shall be liable-
- (a) on summary conviction, to a fine not exceeding the statutory maximum; or
 - (b) on conviction on indictment, to imprisonment for a term not exceeding six months, or to a fine, or to both,
- unless he can prove that, at the time of the alleged offence, he did not know and had no reasonable cause to believe that the record was a record to which subsection (4) applies.

Appeals

The Bill, like the white paper, proposes that the Commissioner's orders are legally binding and that failure to comply would be treated as contempt of court.

No specific right of appeal against an order is provided, but judicial review would be available where it was considered that the Commissioner had exceeded his powers, acted unreasonably or erred on a point of law. This was also the approach of the white paper, which stated:

“We have decided to take this approach because we believe it to be in the best interests of the FOI applicant. Overseas experience shows that where appeals are allowed to the courts, a public authority which is reluctant to disclose

information will often seek leave to appeal simply to delay the implementation of a decision. The cost of making an appeal to the courts would also favour the public authority over the individual applicant.”⁹⁷

However, the government subsequently decided that a right of appeal to a special tribunal should be permitted.⁹⁸ Such an appeal would presumably be on the merits of the case.

Offences

The Bill makes it an offence to deliberately destroy records in order to frustrate a request which has been made, or an investigation by the Commissioner [*Clause 8(4)*]. It goes beyond the white paper which proposed an offence only apply where records were destroyed in order obstruct the Commissioner.⁹⁹ It reflects Canadian experience, where the Information Commissioner has described several cases in which officials have deliberately destroyed requested records. Having initially declared that he was confident that administrators would never attempt to undermine the legislation, later described himself as having been “naive”. He called the Canadian Act - which contains no sanction against such conduct - “toothless”.¹⁰⁰

Clause 9

REGULATIONS AND REPORTS

9. (1) The Secretary of State may by regulations make further provision for-
- (a) the manner in which applications under this Act are to be made;
 - (b) the form in which information applied for under this Act is to be supplied;
 - (c) the making of applications for personal information by representatives of the individual to whom the information relates;
 - (d) the measures which public authorities shall take in order to assist persons in exercising their rights under this Act;
 - (e) the procedures that should be followed by a complainant in asking a public authority to review any decision or failure to act before a complaint may be made to the Commissioner;
 - (f) the charges which may be made for the provision of information for commercial purposes;
 - (g) the steps that a public authority shall take to consult a third party before giving access to information obtained by it from that party;
 - (h) applications made under this Act for access to information relating to the personal affairs of the applicant which do not consist of personal data within the meaning of section 1(1) of the Data Protection Act 1998 to be deemed to be applications for access to such data and to have been made under section 7 of that Act;
 - (i) the procedure to be followed by the Commissioner in carrying out an investigation under section 7(3);
 - (j) the records that public authorities shall be required to keep, and the information that they shall be required to supply to the Secretary of State, relating to the operation of this Act; and
 - (k) the salary and expenses of the Commissioner.

⁹⁷ Cm 3818, Para 5.16

⁹⁸ Lecture by the Lord Chancellor, Lord Irvine, to the Constitution Unit, 8 December 1998, Church House Westminster.

⁹⁹ Cm 3818, Para 5.14

¹⁰⁰ John Grace, Information Commissioner, Annual Report 1996-97, p.9

(2) The power to make regulations under this section shall be exercisable by statutory instrument; and no such statutory instrument shall be made unless a draft of it has been laid before, and approved by resolution of, each House of Parliament.

This section provides for a number of largely procedural matters to be laid down in regulations.

Clause 10

INTERPRETATION

10. In this Act-

"the Court" means-

- (a) in relation to England and Wales, the High Court;
- (b) in relation to Scotland, the Court of Session; and
- (c) in relation to Northern Ireland, the High Court in Northern Ireland;

"official information" means information held in any form by a public authority in connection with its functions as such, and information is so held if it is in the possession, custody or power of a public authority;

"public authority" means-

- (a) a government department or executive agency;
- (b) a nationalised industry or public corporation;
- (c) a health service body within the meaning of section 2(4) of the Health Service Commissioners Act 1993;
- (d) any other authority or body subject to examination by the Comptroller and Auditor General by virtue of section 6 of the National Audit Act 1983;
- (e) any other body in relation to any function which it exercises on behalf of the Crown;
- (f) a local authority;
- (g) any body which is wholly or partly constituted by appointment made by Her Majesty, a Minister of the Crown or a public authority;
- (h) any body which-
 - (i) is established by virtue of Her Majesty's prerogative, by an Act of Parliament, Order in Council, Order made under an Act of Parliament or in any other way by a Minister of the Crown in his capacity as a Minister, a government department or public authority; and
 - (ii) receives at least half of its revenue directly from money provided by Parliament, from a levy, fee or charge of any description authorised by or under any enactment, from a fee or charge of any other description so authorised or from more than one of those sources;
- (i) any other body carrying out a statutory function or performing a public function on behalf of a public authority.

Clause 10 defines a number of terms.

Clause 11

FINANCIAL PROVISIONS

11. There shall be paid out of money provided by Parliament-
- (a) any expenses of the Secretary of State under this Act; and
 - (b) any increase in the expenditure of public authorities resulting from compliance with the provisions of this Act.

Clause 12

SHORT TITLE, COMMENCEMENT ETC

12. This Act-
- (a) may be cited as the Freedom of Information Act 1999;
 - (b) shall come into force on 1st January 2000;
 - (c) extends to Northern Ireland; and
 - (d) binds the Crown.

Clauses 11 and 12 deal with financial provisions, short title, commencement and extent.

CAMPAIGN FOR FREEDOM OF INFORMATION

February 8, 1999