

# The Campaign for Freedom of Information

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## THE MACPHERSON REPORT and FREEDOM OF INFORMATION

House of Commons debate: Monday 29 March 1999

- The Government has rejected key elements of the Macpherson report's recommendations on freedom of information.
- The Macpherson report called for *all* information about policing to be covered by a Freedom of Information Act, with no class of police information excluded wholesale. The government proposes to exclude two classes of police information from the Act - information about investigations or prosecutions, and information about informers. The scope of this exclusion is, however, narrower than had previously been proposed, permitting access to some information about operational matters.
- The Macpherson report proposed that police information should be withheld only where disclosure would cause "substantial harm". The government proposes that such information will be subject to "an appropriate harm test" - implying a test that is less demanding than "substantial harm"
- These proposals would allow the police to withhold information that could be disclosed without harm to their work.

**Hon. President:** Godfrey Bradman  
**Co-Chairs:** James Cornford, Neil McIntosh  
**Director:** Maurice Frankel

**Parliamentary Co-Chairs:** Archy Kirkwood MP  
Richard Shepherd MP  
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## **A Freedom of Information Act**

In its white paper of December 1997<sup>1</sup>, the government proposed a Freedom of Information Act covering the whole of the public sector at national, regional and local level. People would be able to apply for any information held by a public authority, which would have to be released unless disclosure would cause “substantial harm” to one of a number of specified interests. These included defence, security, international relations, law enforcement, commercial confidentiality and privacy. Civil service policy advice could be withheld on a less demanding test, that disclosure would cause “harm”. Refusals could be challenged by complaining to an Information Commissioner with the power to order disclosure.

### **Class based exclusions**

Although the proposed scope of the Act is extremely wide, a number of bodies and functions are to be excluded from it altogether. These included the law enforcement or prosecution functions of the police, police authorities, prosecutors and other bodies.

The exclusion for law enforcement information was said to be required because of:

*“the need to avoid prejudicing effective law enforcement, the need to protect witnesses and informers, the need to maintain the independence of the judicial and prosecution processes, and the need to preserve the role of the criminal court as the sole forum for determining guilt”<sup>2</sup>*

All these interests could be protected by exemptions allowing information to be withheld on a case by case basis where disclosure would be harmful. Under the government’s approach, information would be withheld even where it would not cause harm.

The dangers of “class” exclusions have been recognised by the government itself. For example:

- the FOI white paper criticises such exclusions. It describes the current Code of Practice on Access to Government Information as inadequate partly on the grounds that *“its wording encourages the use of a ‘class-based’ approach towards exemptions. This is where a whole category of information or record is protected, leaving no scope for partial disclosure of a record, after deletion of sensitive material”<sup>3</sup>*
- the Home Office has made clear that it is unhappy with the courts’ current practice of protecting investigation reports into complaints against the police from disclosure on a class basis.<sup>4</sup> The Home Affairs select committee and the Macpherson report both objected to this approach. In its response the Home Office said that it would *“prefer PII claims only to be made on an individual ‘contents’ basis”<sup>5</sup>*

Nearly all overseas FOI laws contain ‘harm test’ exemptions, permitting the disclosure of law enforcement information where harm would not be caused. The footnotes at the end of this paper include relevant exemptions from the Australian<sup>6</sup> and American<sup>7</sup> Acts.

This is also the approach under the UK Data Protection Act 1984, which allows individuals to see computerised police (or other) data relating to themselves unless disclosure would “*prejudice*” law enforcement. The relevant exemption states:

“28 (1) *Personal data held for any of the following purposes -*

*(a) the prevention or detection of crime; or*

*(b) the apprehension or prosecution of offenders; or*

*(c) the assessment or collection of any tax or duty,*

*are exempt from the subject access provisions in any case in which the application of those provisions to the data would be likely to prejudice any of the matters mentioned in this subsection.”*

The 1998 Data Protection Act which will extend the right of access to much information held by the police and others in paper files contains an almost identical exemption.

In evidence to the Public Administration Committee, the Home Secretary justified the proposed exclusion of the police’s law enforcement functions by suggesting that the white paper’s “substantial harm” test would be damaging to the police. Mr 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.”<sup>8</sup>*

The Public Administration Committee did not accept the case for excluding any class of police information, noting that it had “deeply worrying implications”.<sup>9</sup> To address the Home Secretary’s concerns, it proposed a compromise: that all police information should be covered, but subject to a less demanding test of “harm” rather than “substantial harm”.<sup>10</sup>

### **The Macpherson recommendations**

The Macpherson report similarly rejected the idea of an exclusion for police information. It argued that to secure public confidence there must be “a vigorous pursuit of openness and accountability across Police Services”. It went on:

*“we consider it an important matter of principle that the Police Services should be open to the full provisions of a Freedom of Information Act. We see no logical grounds for a class exemption for the police in any area”<sup>11</sup>*

The report did not follow the select committee in suggesting that the police should be subject to a lower test of harm than other public authorities. Recommendation 9 proposed:

*“That a Freedom of Information Act should apply to all areas of policing, both operational and administrative, subject only to the ‘substantial harm’ test for withholding disclosure”*

The government has decided to retain an exclusion for some classes of police information, though these are now more narrowly defined than before. *Some* operational information - that relating to “the *conduct* of an investigation” - will be disclosable<sup>12</sup>. This in itself is a welcome improvement.

It does not, however, go far enough. Two classes of police information will still be excluded from the Act’s scope: information “relating to informers” and “information relating to an investigation or prosecution”.

Other information will be accessible, but based on a test of harm apparently lower than “substantial harm”. The government’s response says only that this will be “an appropriate” harm test.

## **THE CASE FOR ACCESS**

**Clearly, some information about police investigations would be harmful to disclose.**

No-one would suggest that criminals should be able to discover how close the police are to catching them, that informants should be exposed to the risk of reprisals, or that evidence which tends to incriminate a defendant should be made public before a trial. Such information could be protected by a harm-test exemption for law enforcement and legal proceedings. In addition, the Act’s privacy exemption would normally protect information which would identify a police suspect, prior to arrest.

**But much excluded information could be released without harmful consequences.**

The information may simply describe the circumstances of the crime, or reveal, indirectly, how thoroughly and competently it had been investigated.

**In some cases there may be no prospect of a trial that could be prejudiced.**

For example:

- the investigation may have been closed without a suspect having been identified
- a trial may have taken place and been completed. Relevant evidence may not have been presented, for example, because the defendant pleaded guilty.
- an unsuccessful prosecution may have been brought (as in the Lawrence case) preventing the defendant facing charges for the same offence in future.
- a defendant may have died before a trial.

In these circumstances information may be disclosed without risk of prejudice to legal proceedings.

**Information of positive value to the *victims* of crime will needlessly be withheld under the government's proposals**

A former Australian police officer, who handled FOI requests on behalf of the South Australian Police Force, has commented:

*"The majority of our applicants were victims of crime seeking information in order to make formal claims. Victims were given every assistance by our staff, as most applicants did not know exactly what they wanted..."*

*We have had...occasions in which victims have asked for full information on the police investigation only to find that information that they were aware of but failed to pass on to investigators had not been included. In these cases FoI was responsible for finalising several cases and arrests were eventually made. It is vital that people are able to communicate properly and do not just assume that police are aware of something known to the victim."*

He added:

*"I am happy to say that on my retirement, I can see a big improvement in file management, accountability and record keeping by police officers as a result of the impact of FoI. There is always going to be some pain in the process, but the awareness, which FoI has generated over the last eight years, has made for better policing, file management and public relations."<sup>13</sup>*

(Note: a copy of this article is attached.)

**Crucial evidence of police incompetence in the investigation of the Stephen Lawrence murder would be concealed by this exclusion.**

For example:

- the Macpherson report revealed that the police had received sufficient evidence to arrest the Lawrence murder suspects within 48 hours - but arrests were not actually made until two weeks later, by which time crucial evidence was no longer available;
- the report showed that the police had been tipped off that the suspects were known to keep knives hidden under the floorboards, but failed to lift the floorboards when searching any of the suspects' homes.

Neither of these points could be established under the present FOI proposals. Although information about *the conduct* of police investigations could be sought, information obtained by the police during their inquiry would fall into the excluded class. This would include the fact that the suspects had been named by informants, and that they were known to keep knives under the floor.

**Any approach adopted in relation to the police may have implications for information held by other law enforcement bodies.**

The white paper proposed to exclude information about the law enforcement functions of a range of bodies - not just the police<sup>14</sup>. A common approach may therefore apply to information held by other government departments with law enforcement functions, such as the Inland Revenue, Customs & Excise and the DTI and to other bodies with responsibility for enforcing health and safety, environmental, consumer protection, anti-discrimination and other legislation.

A general exclusion for information obtained in connection with the investigation of offences would have wide-ranging implications.

**Reducing the exemption threshold from “substantial harm” to a lower test, will significantly weaken the Act.**

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.<sup>15</sup> Other exemptions contain no harm test, but exempt classes of information without direct reference to the effect of disclosure.<sup>16</sup>

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?**”<sup>17</sup>*

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.”<sup>18</sup>*

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”.<sup>19</sup> David Clark described the “substantial harm” test as analogous,<sup>20</sup> 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.”<sup>21</sup>*

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.”<sup>22</sup>*

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.”<sup>23</sup>*

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”<sup>24</sup>*

*“departments...dispute my interpretation of the Code and the exemptions under it; or dispute my judgement regarding the ‘harm’ test.”<sup>25</sup>*

*“Too often, departments quote exemptions...rather than follow the spirit of the Code and give as much information as they are able.”<sup>26</sup>*

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.”<sup>27</sup>*

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 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.

**It is likely to damage public confidence in the police if, under an FOI Act, they are able to withhold information without needing to show that disclosure is harmful.**

The whole thrust of the Macpherson report is that restoring public confidence in the police requires vigorous efforts to demonstrate their openness and accountability. If the police - unlike nearly all other public authorities - are permitted to withhold information under FOI without having to justify it, this will undermine efforts to rebuild trust in their work.

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March 26 1999

<sup>1</sup> Your Right to Know, Cm 3818

<sup>2</sup> Cm 38189, para 2.21

<sup>3</sup> Cm 3818, para 3.3

<sup>4</sup> These are reports of investigating officers appointed by the police, to investigate complaints. As a class, these are normally protected from disclosure during legal proceedings by Public Interest Immunity.

<sup>5</sup> Select Committee on Home Affairs, 2nd Special Report, Detailed Response by the Home Office, 16/4/98 para 39. A similar comment, in relation to PII claims generally, is made in the Home Secretary's Action Plan for responding to the Lawrence Inquiry, page 10

<sup>6</sup> "(1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to

(a) prejudice the conduct of an investigation of a breach, or possible breach of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;

(b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of the law; or

(c) endanger the lives or physical safety of persons engaged in or in connection with law enforcement.

(2) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to -

(a) prejudice the fair trial of a person or the impartial adjudication of a particular case;

(b) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or

(c) prejudice the maintenance or enforcement of lawful methods for the protection of public safety."

*Freedom of Information Act 1982 (Australia) section 37.*

<sup>7</sup> As amended in 1996, Exemption 7 of the FOI Act permits the withholding of: "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual."

<sup>8</sup> Public Administration Committee, 'Your Right to Know. The Government's Proposals for a Freedom of Information Act', 3rd report, 1997-98, HC 398-I, Q. 508

<sup>9</sup> HC 398-I, para 25

<sup>10</sup> HC 398-I, para 30

<sup>11</sup> 'The Stephen Lawrence Inquiry. Report of an Inquiry by Sir William Macpherson of Cluny', Stationery Office, CM 4262-I, February 1999, para 46.32.

<sup>12</sup> 'Stephen Lawrence Inquiry. Home Secretary's Action Plan', Home Office, March 1999, page 9

<sup>13</sup> Geoff Rawson, "Some Personal Reflections on FOI and the Police in South Australia". Freedom of Information Review, Legal Service Bulletin Cooperative Ltd (Australia), No 76, August 1998

<sup>14</sup> The white paper stated: "FOI should not undermine the investigation, prosecution or prevention of crime, or the bringing of civil or criminal proceedings by public bodies...the Act will exclude information relating to the investigation and 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. The Act will also exclude information relating to the commencement or conduct of civil proceedings." Cm 3818, para 2.21

<sup>15</sup> 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"

<sup>16</sup> For example: 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".

<sup>17</sup> Cm 3818, paras 3.6 - 3.7

<sup>18</sup> Hansard, 12/12/97, col.1184

<sup>19</sup> 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)

<sup>20</sup> Evidence to the Public Administration Committee, 16.12.97.Q.102

<sup>21</sup> ‘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.

<sup>22</sup> Select Committee on the Parliamentary Commissioner for Administration, Second Report, Session 1995-96, “Open Government”, HC 84, para 111

<sup>23</sup> Parliamentary Commissioner for Administration, Annual Report for 1995, page 51

<sup>24</sup> Oral evidence to the Public Administration Committee, 2/12/97, Third Report, Session 1997-98, HC 398(1), Q34

<sup>25</sup> Memorandum to the Public Administration Committee, January 1998, Third Report, Session 1997-98, HC 398(1),

<sup>26</sup> Parliamentary Ombudsman. Press release, 10/12/98

<sup>27</sup> Information Commissioner of Canada, Annual Report 1997-98, page 2