

# The Campaign for Freedom of Information

Suite 102, 16 Baldwins Gardens, London EC1N 7RJ  
Tel: 020 7831 7477  
Fax: 020 7831 7461  
Email: [admin@cfoi.demon.co.uk](mailto:admin@cfoi.demon.co.uk)  
Web: [www.cfoi.org.uk](http://www.cfoi.org.uk)



## FREEDOM OF INFORMATION (SCOTLAND) BILL

### STAGE 2

#### Amendments 71 and 72

#### The 'Policy Formulation' exemption

February 25, 2002

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

**Parliamentary Co-Chairs:** Helen Jackson MP  
Archy Kirkwood MP  
Richard Shepherd MP

**We are writing to encourage you to support either or both of amendments 71 and 72 to section 29 of the Bill tabled by Donald Gorrie MSP.**

- **Amendment 71** would introduce a ‘substantial prejudice’ test for the 4 exemptions in section 29.
- **Amendment 72** would remove factual information and its analysis from the scope of 3 of the 4 class exemptions in section 29 (those for policy formulation, ministerial communications and ministers’ private offices).

**Amendments 71 and 72 may be regarded as alternatives to each other. *In this case, we prefer Amendment 72, which provides the clarity of removing factual information and its analysis from the exemption altogether.***

The amendments would bring the Bill into line with the approach of the Irish and Australian FOI Acts, both of which prevent factual information from being withheld under the corresponding exemption. ***This is also the approach under the current Code of Practice on Access to Scottish Executive Information.***

### **The Code of Practice**

The present code requires the Executive and other Scottish public bodies within the jurisdiction of the Scottish Parliamentary Commissioner for Administration to disclose information on request unless it is exempt. The exemption which corresponds to section 29 is Exemption 2 of the code. This exempts “internal discussion and advice” whose disclosure “would harm the frankness and candour of internal discussion”.<sup>1</sup> The exemption is subject to the code’s public interest test.<sup>2</sup>

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<sup>1</sup> Exemption 2 of the Code of Practice on Access to Scottish Executive Information is headed “Internal discussion and advice” and applies to “Information whose disclosure would harm the frankness and candour of internal discussion, including: proceedings of Scottish Cabinet and Scottish Ministerial committees; internal opinion, advice, recommendation, consultation and deliberation; projections and assumptions relating to internal policy analysis; analysis of alternative policy options and information relating to rejected policy options; confidential communications between departments, public bodies and regulatory bodies”.

<sup>2</sup> The preamble to Part II of the Code of Practice on Access to Scottish Executive Information states: “In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.”

Section 29 applies to *any information* relating: to the formulation or development of government policy, ministerial communications and ministers' private offices. The Executive explains that this is a class exemption because of:

“the importance of protecting the candour of advice to Ministers and the free and frank exchange of views in policy discussions”<sup>3</sup>

But if the purpose of the exemption is to protect the frankness of advice and discussion, why not provide such a harm test in the exemption itself – as the code does?

The most obvious effect of the code's drafting is to prevent factual information from being withheld under Exemption 2. This is because the exemption applies only to “discussion and advice” (not to factual material) and applies only where disclosure would be *harmful* to candour.

### **Exemption 2 cases under the code**

The code is enforced by Mr Michael Buckley, the Scottish Parliamentary Commissioner for Administration. There have been no published rulings under the Scottish code since its introduction in 1999. However, Mr Buckley (who is also the UK Parliamentary Ombudsman) has made numerous rulings under the identical exemption in the English code. *He has consistently ruled that factual information cannot be withheld under Exemption 2.*

For example, in relation to a request for information about occasions on which members of the government's Committee on Safety of Medicines declared an interest or withdrew from discussions because of an interest, the Ombudsman held that:

“Exemption 2 is designed to protect, in essence, advice and discussion. However, what Mr I is seeking here is purely factual information; who declared an interest. While Exemption 2 might in principle be relevant to any discussion which took place and was subsequently recorded in the minutes, I do not think it can be applied to the information sought by Mr I.”<sup>4</sup>

In a case involving a request for HM Fire Inspectorate's report to the Home Office on the impact of the proposed closure of a local fire station, he concluded:

“How should Exemption 2 be applied to the information contained in these reports? It is first of all important to emphasise that this exemption is intended to protect advice, not factual information. The factual information contained in these reports is, I imagine, already known to the complainant. However, to the extent that there is

<sup>3</sup> Scottish Executive Freedom of Information (Scotland) Bill, Policy Memorandum, paragraph 71.

<sup>4</sup> Case A16.99. This and other Ombudsman cases cited here are available on <http://www.ombudsman.org.uk/publications.html#england>

factual information that is not known to the complainant, I see no reason why it should not be released.”<sup>5</sup>

The Maritime and Coastguard Agency refused to release a report on the adequacy of safety arrangements on a buoy recovery vessel. The Ombudsman reported:

“I then considered whether the information could be withheld under other exemptions in the Code. Exemption 2 is concerned with 'Internal discussion and advice', the relevant part reading: *'Information whose disclosure would harm the frankness and candour of internal discussion, including . . . internal opinion, advice, recommendation, consultation and deliberation'*. However, the report is an entirely factual account of the buoy recovery operation, and does not contain any element of discussion or advice. Exemption 2 is intended to protect advice, not factual information.”<sup>6</sup>

The Medicines Control Agency was asked to release its assessments of the impact of allowing pharmaceutical companies to advertise prescription drugs directly to consumers. The Ombudsman held that:

"The purpose of Exemption 2 is to allow departments the opportunity to consider matters, particularly those which are likely to prove contentious, on the understanding that their thinking will not be exposed in such a way as to restrict their deliberations by inhibiting the frank expression of opinion...Exemption 2 is intended to protect opinion or advice, not factual information. The remaining information, which includes the pharmaceutical industry's argument for a change in the law and examples of advertising campaigns, is largely factual information. Exemption 2 does not apply to this information.”<sup>7</sup>

Customs and Excise argued that Exemption 2 protected an internal inquiry into the way it had examined one applicant's affairs. The Ombudsman ruled:

“Exemption 2 is only intended to protect opinion and advice, not factual information. A significant proportion of the report is factual information and I see no reason why those factual elements cannot be released to Mr D without undermining the effectiveness of Customs' internal considerative process. Much of that information is, I imagine, already known to Mr D. However, to the extent that there is such information that is not known to him, I see no reason why it should not now be released to him.”<sup>8</sup>

The former Department of the Environment, Transport and the Regions maintained that evidence provided to a working party considering a change to the Building Regulations was protected by Exemption 2. According to the Ombudsman;

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<sup>5</sup> Case A31/99

<sup>6</sup> Case A8/00

<sup>7</sup> Case A.16/01

<sup>8</sup> Case A32/01

“the only such evidence was a technical paper which DETR said had been given to the Working Party to help with their deliberations. The information contained within the technical paper is essentially factual...The paper does not contain any advice, comment or opinion but only factual information, which is not covered by Exemption 2. As such, I do not consider that any of the information contained in that document is exempt from disclosure under the Code.”<sup>9</sup>

A garage owner, who had successfully appealed against the withdrawal of his MOT testing licence, asked for a copy of the engineer’s report which vindicated him. The Vehicle Inspectorate argued it was covered by Exemption 2. The Ombudsman ruled:

“In denying to Mr C the remainder of the information contained in the engineer's report, VI have relied upon Exemption 2, in particular that part of the exemption which refers to information whose disclosure 'would harm the frankness and candour of internal discussion'. How should Exemption 2 be applied to that information? It is first of all important to emphasise that this exemption is intended to protect advice, not factual information. I need, therefore, to distinguish between the factual information which is contained in this report and the comment, opinion and advice which is offered in relation to it. The factual information in this report is, I imagine, already known to Mr C. However, to the extent that there is such information that is not known to him, I see no reason now why it should not be released.”<sup>10</sup>

In a recent case, an Opposition MP asked for the number of occasions on which Home Office ministers had declared a potential conflict of interest to their ministerial colleagues as required under the UK ministerial code. The Home Office argued that the information was covered by Exemption 2. Mr Buckley reported:

The purpose of Exemption 2 is to allow Government departments the opportunity to discuss matters, particularly those which are likely to be sensitive or contentious, on the understanding that their thinking will not be exposed in such a way as to impede their deliberations by inhibiting the frankness and candour of future discussion. Exemption 2 incorporates a ‘harm test’...which requires the harm that would arise from disclosure of information to be balanced against the public interest in making the information available... I agree that matters considered under the Ministerial Code are potentially sensitive, particularly when they relate to a conflict between a Minister’s public duties and his or her private interests. However, Mr Robathan did not request the details of any declarations made or of advice sought, but simply the number of occasions on which they were made....

If I were being asked to consider the release of the details of the discussions on those occasions, then it might be reasonable to argue that the frankness and candour of future discussion, depending on the circumstances of the case, could be inhibited. However, I have not been asked to do so...As regards the particular information sought in this instance, I do not see how the release of this type of factual information could harm the frankness and candour of future discussions regarding the issues raised in the paragraphs of the Ministerial Code cited by Mr

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<sup>9</sup> Case A30/01

<sup>10</sup> Case A29/00

Robathan. I do not consider, therefore, that Exemption 2 can be held to apply to the information sought by Mr Robathan.<sup>11</sup>

If similar cases arise under the Bill, the Executive will find it far easier to withhold factual information about policy matters. Instead of the code's straightforward requirement to disclose factual information, section 29 exempts it – and requires officials to decide whether the public interest in disclosure is greater than the public interest in confidentiality. The English cases suggest they will be predisposed to withhold even factual information.

Although the Information Commissioner will ultimately be able to rule that particular factual information should be disclosed on public interest grounds, many cases will never get to the Commissioner at all. Applicants will often abandon their complaints after an initial refusal.

**If officials and ministers are required to weigh up the public interest for and against disclosure of *the facts* the facts will often remain confidential. It will not be hard to identify a public interest *against* disclosure. It may be tempting to suggest that the information gives an incomplete or misleading picture, is likely to be misinterpreted, is provisional only, may reduce public confidence in decisions, cause needless anxiety or lead to pressure to reopen issues which the authority regards as settled at the expense of what it regards as more important matters. Opening the door to such arguments will encourage a restrictive approach, undermining efforts to achieve a more open culture.**

### **Australia and Ireland**

Both the Australian and the Irish FOI laws explicitly prevent factual information from being withheld under their policy advice exemptions.

- *Section 36(1) of the Australian FOI Act* applies to opinion, advice, recommendation, consultation or deliberation for the purposes of an agency's deliberative processes, whose disclosure would be contrary to the public interest.<sup>12</sup> Purely factual information is explicitly excluded from the exemption,<sup>13</sup> as is scientific and technical expert advice.<sup>14</sup>

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<sup>11</sup> Case A28/01

<sup>12</sup> Section 36(1) of the Freedom of Information Act 1982 [Australia] states: "Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act: (a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and (b) would be contrary to the public interest."

<sup>13</sup> Section 36(5) states: "This section does not apply to a document by reason only of purely factual material contained in the document."

<sup>14</sup> Section 36(6)(a) states "This section does not apply to: reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters"

- *Section 20 of the Irish FOI Act* exempts material relating to an authority’s deliberative processes, if disclosure would be contrary to the public interest.<sup>15</sup> The exemption cannot apply to “factual (including statistical) information and analyses thereof”.<sup>16</sup>

The Irish approach is reflected in **Amendment 72** which also excludes both *factual information* and its *analysis* from the exemption. (Like the Australian Act, the Irish Act also goes a step further and excludes scientific and technical advice from the exemption.<sup>17</sup>)

Two cases illustrate how Ireland’s Information Commissioner has applied this provision. A journalist applied for the monthly budgetary reports which health boards submit to the Irish Department of Health, and related correspondence. The Department withheld the material, relying partly on the ‘deliberative process’ exemption in section 20(1). The Commissioner ruled:

“I should first of all point out that the bulk of the records in this case contain factual information and analyses thereof within the meaning of section 20(2)(b) and therefore do not fall to be exempted under section 20 at all. Reports of actual expenditure, amount of budget variance, steps already taken to keep within budget, changes which have occurred to cause the increased expenditure etc. are all factual information. The only parts of the records which are not factual information are the records or parts of records which reflect proposed courses of action being considered by agencies or the Department.”<sup>18</sup>

In another case, the Department of the Taoiseach (Prime Minister) refused access to minutes and policy papers prepared for an Interdepartmental Strategy Group on Unemployment, also citing the deliberative process exemption.

In relation to one of the documents, the Commissioner held:

“the Background Paper contains factual information and the exemption in section 20 cannot be relied upon to refuse access to this information. Having examined the

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<sup>15</sup> Section 20(1) of the Freedom of Information Act 1997 [Ireland] states: “A head may refuse to grant a request under section 7— (a) if the record concerned contains matter relating to the deliberative processes of the public body concerned (including opinions, advice, recommendations, and the results of consultations, considered by the body, the head of the body, or a member of the body or of the staff of the body for the purpose of those processes), and (b) the granting of the request would, in the opinion of the head, be contrary to the public interest, and, without prejudice to the generality of paragraph (b), the head shall, in determining whether to grant or refuse to grant the request, consider whether the grant thereof would be contrary to the public interest by reason of the fact that the requester concerned would thereby become aware of a significant decision that the body proposes to make.”

<sup>16</sup> Section 20(2)(b) states: “Subsection (1) does not apply to a record if and in so far as it contains....factual (including statistical) information and analyses thereof”

<sup>17</sup> Section 20(2)(e) states: “Subsection (1) does not apply to a record if and in so far as it contains...a report, study or analysis of a scientific or technical expert relating to the subject of his or her expertise or a report containing opinions or advice of such an expert and not being a report used or commissioned for the purposes of a decision of a public body made pursuant to any enactment or scheme.”

<sup>18</sup> Information Commissioner of Ireland, Case 98078

paper, I have decided the bulk of it is factual. The paper does contain some comment, some interpretation and some suggestions as to future actions and predictions of future events as identified below...which are capable of qualifying for exception under section 20(1)."<sup>19</sup>

But in relation to the minutes of the Strategy Group, the Commissioner set out some of the constraints on what constitutes factual material:

"It might be argued that minutes are entirely factual on the basis that they record matters of facts i.e. the events which occurred, the decisions reached and the contributions made, at a meeting. In my view this is too wide an interpretation of the term "factual information" in section 20(2)(b). In particular, in considering whether a report of the contributions made by attendees at a meeting is factual information, it is necessary to look beyond the fact that the contribution was made and examine the contents of each contribution. Thus, for example, the reporting of the fact that opinions, advice or recommendations were proffered at a meeting does not mean that those opinions, advice or recommendations are factual information."

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<sup>19</sup> Information Commissioner of Ireland, Case 98127