

The Campaign for Freedom of Information in Scotland

Wellpark Enterprise Centre
120 Sydney Street
Glasgow G31 1JF
Tel/fax: 0141 554 5161
Web: www.cfoi.org.uk/scotland.html



FREEDOM OF INFORMATION (SCOTLAND) BILL

Stage 1 Debate

17 January 2002

Co-conveners: David Goldberg
Email: deegee_98@hotmail.com

Carole Ewart
carole@ewartcc.com

Derek Manson-Smith
dms@ircuk.demon.co.uk

Introduction

The Justice 1 Committee's Stage 1 Report on the Freedom of Information (Scotland) Bill contains many important recommendations. This paper comments on a number of these issues, and supplements the Campaign's evidence to the Committee itself which can be found on pages 152-158, 175-182 and 188-192 of the Report.

The Bill has many positive aspects, including its broad coverage, its retrospective application, the fact that all written requests (including those which make no reference to the legislation) must be dealt with under it, the wide availability of a public interest test, and the fact that contents based exemptions require authorities to show that disclosure would "substantially prejudice" specified interests (as opposed to the plain "prejudice" of the UK Freedom of Information Act 2000). It improves on the UK Act in other ways, including the stricter time limits authorities must observe and the narrower ministerial veto.

It nevertheless shares some of the UK Act's major shortcomings (including the veto itself) and in certain areas falls short of the Act. This paper concentrates on areas where we think improvements are needed.

Five year commencement date

The Bill permits commencement to be deferred for up to *five years* after Royal Assent.¹ There is no overseas precedent for such delay: New Zealand's FOI Act came into force 7 months after it was passed, Australia's after 9 months and Canada's after 12 months. A similar 5 year period in the UK Act has permitted Westminster ministers to abandon plans to phase-in the right of access from this year, and unjustifiably delay commencement until January 2005. We strongly support the Committee's view (para 127) that authorities should implement the Bill within a maximum of two years, and believe the Bill should be amended to require this.

¹ Section 72(1)(a)

Scope of the legislation

We welcome the Committee's recommendation (para 10) that bodies providing public services through PFI schemes and public/private partnerships should automatically be covered by the Bill. A further anomaly is the fact that only companies which are *wholly* owned by a *single* public authority are subject to the Bill (section 6). We think the Bill should also apply to a company in which a public authority has a controlling interest, and to one which is jointly owned by two or more public authorities.

Unrecorded information

The Bill's right of access is to *recorded* information only.² We favour a wider right of access, extending to information which is known to officials even if unrecorded. This is a requirement under New Zealand's FOI legislation, and under the open government code.³ The former Conservative Government used to cite this as a particular advantage of the code's approach on the grounds that "*departments may be able to bridge the gaps, for example, drawing on unrecorded recollection of events to fill out a particular point*".⁴

The limitation of the Bill's approach is that requests could legitimately be refused, on the grounds the information was not in the files, even though it was well known to staff. There may be no reason for officials to document every step they take, and some information (such as the reasons why one option was chosen over another) may be obvious to those involved, without featuring on the files. The Bill's approach might even encourage officials *not* to record sensitive details, in order to avoid disclosure.

The Committee saw some merit in extending the right of access to unrecorded information, but also difficulties (para 15). However, the requirement that witnesses give evidence in court based on their recollection of unrecorded events is central to our legal system, so extending the right of access in this way should not throw up unanswerable practical problems. As long as any duty to provide unrecorded information is subject to a reasonableness test (so that it would not apply to matters occurring long ago, or where the officials with direct knowledge had all moved on) it should be feasible.

² Section 70

³ Code of Practice on Access to Scottish Executive Information

⁴ Government Response to the Outstanding Recommendations in the Report of the Select Committee on the Parliamentary Commissioner for Administration on Open Government, 7.11.96

The power to conceal the existence of information

Authorities will be able to refuse to reveal whether or not they hold exempt information, even where it would cause no harm to confirm that they do so.⁵ Some members of the Committee expressed concern about this (para 37). We think this is a particularly dangerous provision, and one of the areas in which the Bill is weaker than the UK FOI Act. Under the Act authorities can only refuse to confirm the existence of information if to do so would itself prejudice the interest involved or (in the cases of class exemptions) be contrary to the public interest.⁶ The Bill does not impose these conditions.

The Executive could therefore refuse to say whether it held information about the costs of a proposed policy, on the grounds that if it held cost data it would withhold it (citing the policy formulation exemption.⁷) It could refuse to say whether it had investigated the adequacy of airport security on the grounds that any such report would be withheld under the law enforcement exemption.⁸ This secrecy would foster complacency, allowing authorities to conceal the fact that they had failed to carry out basic elements of their responsibilities.

Absolute exemptions

A number of so-called ‘absolute’ exemptions are not subject to the Bill’s public interest test. The Committee refers to the Executive’s statement that these exemptions are “*essentially technical in nature*” (para 68). We think that is a misleading description: the absolute exemptions reflect a series of policy decisions to limit the right of access. For example: the absolute exemption in section 26(a) allows some 400 statutory prohibitions on disclosure to override the FOI right of access. But the opposite approach has been adopted in other legislation (such as the Data Protection Act and the Environmental Information Regulations) which provide that the right of access takes precedence over statutory restrictions.⁹

Equally, it is not self-evident why there should be absolute exemption for a document which an authority prepares in connection with court proceedings, if disclosure would not prejudice those proceedings; nor why the unpublished report or transcript of a statutory

⁵ Section 18. This applies to most though not all exemptions

⁶ See for example section 27(4) of the Freedom of Information Act 2000

⁷ Section 29(1)(a)

⁸ Section 35(1)(a)

⁹ Data Protection Act 1998, section 27(5), Environmental Information Regulations 1992, Regulation 3(7)

tribunal or inquiry should be subject to an absolute exemption.¹⁰ Similarly, the Bill's public interest test could also be applied to personal data about another individual¹¹ and information subject to an obligation of confidence.¹²

The class exemption/veto combination

In several key areas the Bill provides:

- (a) a class exemption, with no "substantial prejudice" test, and
- (b) a possibility of disclosure only under the Bill's public interest test - subject to a government veto, which could overrule any decision by the Information Commissioner.¹³

In effect, there would be a potential veto over any disclosure within a series of broad areas. The most significant are (a) information relating to the formulation of government policy, including the facts on which decisions are based; (b) ministerial correspondence or any reference to it made by officials; (c) information about the operation of ministers' private offices; (d) legal proceedings; (e) investigations by the police and statutory authorities, including routine inspections by safety and consumer protection authorities; (f) legal advice; (g) national security and (h) information supplied in confidence by other governments or international bodies.

These represent very substantial classes of information. To permit ministers to block any disclosure within these broad classes is a power which clearly could be abused. Indeed, it raises the question of what a 'legitimate' use of the veto would be. The Bill's effectiveness will depend on the extent to which ministers are prepared to tolerate decisions by the Commissioner which they find unwelcome. If they are not, these provisions could fundamentally undermine the legislation. These concerns were shared by some, though not all, members of the Committee (eg paras 67 and 112).

¹⁰ Section 37

¹¹ This is exempt under section 38, which applies the tests for disclosure found in the Data Protection Act. We believe that making the DPA tests subject to a public interest test would be compatible with the European data protection directive

¹² Section 36(2)

¹³ The veto would be available only in relation to a notice served by the Commissioner on the Scottish Administration. Section 52(1)(a)

We would like to see:

- (a) class exemptions replaced by content exemptions, requiring authorities to show that disclosure would cause “substantial prejudice”; and
- (b) the veto removed altogether or, failing that, made more difficult to use.

Policy formulation

The Bill proposes to exempt *all* information relating to government policy formulation. This compares unfavourably to the existing open government code exemption, which requires the Executive to show that disclosure would “harm the frankness and candour of internal discussion”.¹⁴ Although this is a ‘simple’ harm test, it is notable that the Welsh Assembly has adopted a “substantial harm” test in its code.

The breadth of this exemption covers much information which would *not* undermine the candour of discussions, such as factual information, extrapolations, research reports, statistics, scientific findings, cost data, opinion polls, descriptions of current practice, assessments of overseas initiatives and assumptions on which predictions are based. It also covers analysis, explanation and expressions of opinion much of which could be disclosed *without* prejudicing the frankness of discussion on sensitive issues.

We think the Bill should follow the approach of the Australian and Irish FOI laws, both of which state that factual information cannot be withheld under their policy formulation exemptions.¹⁵ The Irish exemption, in particular, is a model of its kind. It expressly states that the exemption *cannot* be used to withhold: factual and statistical information or its analysis; scientific or technical expert advice or opinion; the reasons for a decision taken by the authority; or a study into the authority’s effectiveness.¹⁶

¹⁴ Code of Practice on Access to Scottish Executive Information, Exemption 2

¹⁵ Freedom of Information Act 1982 [Australia], section 36(5); Freedom of Information Act 1997 [Ireland], section 20(2)(b)

¹⁶ Freedom of Information Act 1997 [Ireland], section 20(2)

Investigations

Another class exemption would apply to information which has at any time been held for the purposes of an investigation into a possible offence or for criminal proceedings, even if the disclosure could not prejudice those proceedings (eg because they have been completed).¹⁷ The findings of routine inspections by local authority inspectors responsible for consumer protection, environmental health and public safety could also be withheld under this provision.¹⁸ The only basis for disclosure would be under the Bill's public interest test. Again, we find it hard to accept the assumption that the disclosure of such information would normally be damaging.

Confidentiality

The Bill exempts information whose disclosure would constitute an actionable breach of confidence at common law.¹⁹ The ease with which a legally binding obligation of confidentiality arises may make this a serious obstacle to disclosure. All that is required is for the authority and the person supplying information to agree that it is to be kept confidential. Provided the information is not already in the public domain and is not trivial, the authority will be legally bound to keep it confidential. In exceptional circumstances, a public interest test does apply under the law of confidence. However, this is significantly narrower than the Bill's public interest test.²⁰

We are concerned that authorities may accept information in confidence, where it is not strictly necessary for them to do so preventing public access to it in future. This would, for example, allow lobbyists to operate in secrecy by agreeing with authorities that their information was to be kept confidential.

Additional conditions could be introduced into this exemption, for example, requiring the authority to demonstrate that the information was essential to its functions, and would not have been supplied to it without its agreement to confidentiality.

¹⁷ Section 34(1)(a) and (c)

¹⁸ Section 34(1)(b)

¹⁹ Section 36(2)

²⁰ For example, the courts have sometimes held that the public interest test in the common law of confidence may permit only a limited disclosure – eg to the police – rather than to the public at large

The veto

It is difficult to predict how the veto will actually be used. It could prove to be something which is never used in practice, but helps calm ministerial nightmares. On the other hand, the temptation to use it may prove irresistible and if ministers discover that there is no overwhelming political price to pay it may be resorted to regularly. Overseas experience is not encouraging. Under the New Zealand FOI law, a veto was used to block 14 out of 92 formal decisions of the Ombudsman in the first four years. Vetoed information included the successful tender price for wall plugs, unemployment estimates and an evaluation of computer use in schools. Australia's veto was used 55 times in the same period.²¹

In Westminster, ministers recently overruled the Parliamentary Ombudsman under the open government code when he told them to disclose anonymised statistical information about the number of occasions on which ministers had declared a potential conflict of interest to their colleagues as required by the ministerial code.²² It is true that following changes to the New Zealand veto (requiring collective ministerial agreement) in 1987 it has apparently not been used. However, even when the New Zealand veto could be exercised by individual ministers the decision to use it was in practice referred to the cabinet on each occasion beforehand. Moreover, the reduction in its use is at least in part explained by change in government. Finally, the 1987 amendments included safeguards not found in the Bill, such as a guarantee that the costs of judicially reviewing a veto will be paid out of public funds.

We think the veto should be dropped altogether. In Ireland (where a veto does apply, but only in relation to defence, security, international relations and law enforcement) ministers cannot overrule the Commissioner in relation to the policy exemption. Ministers can only appeal to the High Court on a point of law.

If the veto is retained, it should be made more difficult to use, by inserting an additional statutory test, requiring the First Minister to show that the consequence of allowing the Commissioner's decision to stand would be "exceptionally serious".²³ This would expose decisions taken on lesser grounds to the prospect of challenge by judicial review. It would be in line with the statement in *An Open Scotland* that the veto was intended for use in relation to "information of exceptional sensitivity or seriousness".²⁴

²¹ For more detailed information on the use of the veto overseas, see the Campaign's supplementary evidence to the Justice 1 Committee, on pages 188-192 of its report

²² Described in more detail in the Campaign's main evidence to the Committee, at page 157 of its report

²³ The Irish FOI Act contains an analogous provision, requiring the minister to certify that the information not only meets the harm test contained in the relevant exemptions but is "of sufficient sensitivity or seriousness to justify" use of the veto

²⁴ Paragraph 6.6

Finally, the costs of any judicial review of a ministerial veto should be met from public funds, as is required in New Zealand and permitted in Ireland. This would reflect the fact that ministers would be overturning a legal right to information, after it had been upheld by the Information Commissioner.

Charges

We welcome the Committee's recommendations on charges (para 52). The Executive has not yet indicated its final approach to charges, but its original proposal would allow substantially higher charges under the Bill than under the UK Act.

We think that requests should be free up to a certain cost limit and that thereafter authorities should be able to charge no more than a proportion of the marginal costs. The draft fees under the UK Act stipulate that applicants can be required to pay no more than 10% of the costs of determining whether information is held, locating and retrieving it and providing it in the applicant's preferred form – but cannot be charged for the time spent deciding whether to release the information. The 10% figure applies to the first £550 of actual costs, permitting a maximum of £55 to be charged (plus disbursements).

There must however also be an initial free period. A minimum charge, as advocated by some public authorities (para 48) would in our view be unworkable. This is because *all* written requests for information would have to be dealt with under the Bill, including those which are currently dealt with free of charge in ordinary correspondence between members of the public and authorities. A minimum fee would permit charges to be introduced for answering correspondence, which cannot be a realistic option.

Review by public authorities

We welcome the Committee's recommendation (para 40) that applicants should have longer than 20 days within which to challenge an unfavourable decision.²⁵ Neither the open government code nor the UK Act imposes such a limit. FOI users may not be sophisticated exercisers of their rights. They may assume it is not worth challenging a refusal, perhaps not recognising how unreasonable a particular decision is until this is pointed out to them (perhaps by a legal advice centre who they later happen to consult). It would be wrong to

²⁵ Section 20(5)

remove their rights by requiring them to exercise them within unnecessarily strict time limits.

Criminalising disclosure by the Information Commissioner

The Information Commissioner could in certain circumstances be prosecuted for disclosing information obtained in connection with his or her functions²⁶, including information revealing that authorities or individual officials had behaved obstructively.

An equivalent restriction in the UK Act is more narrowly drawn (it only applies to information obtained from businesses or individuals not from authorities). One of the defences found in the UK Act (that disclosure was necessary in the public interest²⁷) has been replaced in the Bill by a narrower defence.²⁸

The UK Commissioner has vigorously criticised the corresponding UK restrictions which she describes as “inconsistent with the principles of open government and public accountability” and likely to “hinder protection of the public” and risk “undermining her authority”.²⁹ The Committee has called on the Executive to reconsider this provision (para 102). In our view, it should have no place in the Bill.

²⁶ Section 45

²⁷ The offence, found in section 59 of the Data Protection Act 1998, has been extended to cover information obtained by the UK Information Commissioner in relation to her functions under the FOI Act. See by paragraph 18 of Schedule 2 of the FOI Act

²⁸ The defence applies where the Commissioner would have to disclose the information in response to a request under the Act. However, most of the information which the Commissioner obtains from third parties would be held in confidence and exempt under s 36(2) – so in practice this defence would rarely be available.

²⁹ The Home Office claimed the offence was required by the EU data protection directive, a view the Commissioner has always disputed. In a submission to the Home Office in December 2000 the Commissioner, Elizabeth France, wrote: “*The Home Office should from previous submissions be well aware of the Commissioner’s views as to the inappropriateness of the restrictions placed on her by this section particularly as they are subject to criminal penalty. The restrictions are inconsistent with the principles of open government and public accountability, hinder protection of the public and go well beyond the requirements of Article 16 of the Directive. The Commissioner recognises the need to respect the confidentiality of information she receives about identifiable individuals. She is of course subject to the requirements of the Data Protection Act 1998 herself. Now that she is to become Information Commissioner charged with enforcement of the Freedom of Information Act 2000 the Commissioner fears these unnecessary and unwelcome restrictions in relation to her data protection functions will not only cause her embarrassment but risk undermining her authority in her new role.*”

<http://www.dataprotection.gov.uk/dpr/dpdoc.nsf/ed1e7ff5aa6def30802566360045bf4d/16e980c63ca43c4480256b1b00567f79?OpenDocument>