Conference on the

Freedom of Information White Paper

2 February 1998

Campaign for Freedom of Information

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Organised by

The Campaign for Freedom of Information

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The Campaign for Freedom of Information

The Campaign for Freedom of Information campaigns against unnecessary official secrecy and for a Freedom of Information Act. The USA, Australia, Canada, New Zealand, Ireland, France, Sweden, Norway, Denmark, Holland, Hungary, Thailand and Israel already have such laws. They give people the right to any official information unless the government can show that disclosure would cause real harm to essential interests such as defence, law enforcement and privacy. The Campaign also presses for more disclosure in the private sector, if the information is of public interest. It also seeks to amend the 1989 Official Secrets Act to establish a public interest defence for those charged with releasing information.

The Campaign is an all-party body. It has promoted a series of successful private members bills, giving people the right to see their medical, social work and housing records and information about environmental and safety hazards. It has helped to promote other private members bills to give protection to people disclosing information in the public interest, as well as amendments to government legislation to increase public rights to information.

It encourages authorities to disclose more information voluntarily. At its annual Freedom of Information Awards ceremony, it recognises individuals who have campaigned for greater openness and authorities and companies which have taken important initiatives in releasing more information.

The Campaign publishes briefings and other publications, and maintains a web site whose address is: **http://www.cfoi.org.uk/**

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Introduction

Sheena McDonald
Conference Chair

I'd like to start by welcoming you all to this conference which I know is going to be a very stimulating and informative day for everybody here. Your contributions are much looked forward to, as well as those from the platform. Can I start by, on behalf of the organisers of today's conference and indeed the Campaign, saying thank you to sponsors and supporters who helped to make today possible, who include the Consumers' Association whose director, Sheila McKechnie, joins us on the platform, UNISON, the union, and the Joseph Rowntree Charitable Trust. Many thanks to all those.

Thanks also to today's speakers. And I might particularly mention the minister, Dr David Clark, Chancellor of the Duchy of Lancaster, who will be joining us later on this morning and two speakers who have come from further afield than most. Kevin Murphy, who is with us already, who is the Information Commissioner designate under Ireland's 1997 Freedom of Information Act. He has come from Dublin to be with us and Michael Tankersley who will be speaking on the platform this afternoon who is from Ralph Nader's Public Citizen Litigation Group. He has come from Washington and I know what he will have to say will be interesting.

Now you've got the programme and as you can see there is plenty of time in the course of the day for contributions from the floor. Since the conference is being recorded and a transcript is going to be produced it will be helpful if when you do speak, you could identify yourself and any organisation or body that might be relevant to what you've got to say when you speak. For those of you who are not familiar with the system here - each of you has a microphone and when you want to speak, if you could press the green button and then release it and then speak. Then when you are finished you press the green button again and it switches off. And I have been told by the technical people here that there is actually an override so if you get terribly stroppy we can switch you off again, but I don't anticipate that.

A little bit of housekeeping. There are breaks in the course of the day including most importantly lunch which will be served where we had coffee and where you registered. I know not everybody has a ticket for lunch and there are venues very close by including the Methodist Central Hall just off Parliament Square up the road, the Abbey Community Centre across the road here in Great Smith Street and the little café, Tevere, which used to be patronised by a certain John Major, is very good for corned beef sandwiches and other things. We are going to start promptly at 1.30 pm so wherever you have your lunch that's when we will be starting.

And my final word at this point is, if ever there were an occasion not to say Chatham House rules apply this would be it, although I know that some of you might wish that were the case and would be inclined to confine your most interesting remarks to those breaks when there is

relative privacy compared to this open forum. But the success of today's event to a great degree depends on the difficult questions being asked and debated and, if this is going to be the dynamic and indeed alchemical event that the organisers hope it will be, I would advise you to throw all caution to the winds for the course of the next six hours or so and we will all benefit from that.

It is also worth saying that we are in the course of a consultation period on the Freedom of Information white paper which ends at the end of this month so I hope you bear that in mind when you are making your remarks, and of course the Public Administration Committee hearings are also ongoing at the moment. So everything that is said today is part of the ongoing process towards an effective Act. So let's begin and of the many people who over many years have campaigned to get to where we are now and beyond, none has been more dedicated, and many would say effective, than the Director of the Freedom of Information Campaign, Maurice Frankel and I am going to ask him to kick off with an overview of the white paper that we now have.

Overview of the White Paper

Maurice Frankel
Director, Campaign for Freedom of Information

Thank you Sheena.

I think the first thing to say is, the white paper was worth waiting for. We have been surprised and impressed at the tone of the white paper and at the main elements. I think the Government is aiming high in many respects and in particular in relation to the range of bodies covered which is virtually the whole of the public sector and parts of the public sector who probably don't consider themselves to be in the public sector like the privatised utilities. And there is a reference to information about bodies undertaking contracted out functions. That is all extremely welcome and indeed rather bold.

I think equally positive is that the range of information that is going to be accessible under the white paper, because the proposal is that there should be a right, not just to recorded information and that is both paper and non paper records, but also to information. And the implication of that must be that information which is known to officials but not recorded will be accessible as well and that may go a little way towards dealing with the fear that people so often express, which is freedom of information will deter people from writing things down. Well that may not be a way of getting round the Act if the information is known to people within the department.

The third positive element of the proposals is that the exemptions, or the protected interests, are going to be, in many cases, based on a test of 'substantial harm' to the interest concerned and not the plain 'harm' that we have at the moment under the Open Government Code of Practice [- where there is a harm test at all -] and in fact which we have under many overseas freedom of information acts as well. So we are starting, I think, by aiming high in that substantial harm test. I think it is very necessary in the British context because, however good the Freedom of Information Act is on paper, we are dealing with a very deep seated culture of secrecy here and I think it needs that kind of strong legislative language to actually change the presumption from what it has traditionally been to a presumption of openness.

The procedure we have had all too often in the past has been, and I think you can see it under the Code is, you ask for information, there is sometimes an almost reflex refusal to disclose it and thereafter the burden of proof is on you, the applicant, to overturn the department's reasoning for withholding the information. And this is a process which is not made any easier by the fact that the department very often doesn't tell you what its reasons for withholding the information are. You are left to try and guess what is in the minds of those involved and rebut the arguments and when you succeed in rebutting the arguments you very often have entirely new arguments put forward and new exemptions claimed. This is what the former Ombudsman, Sir William Reid, had to say about it:

> "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 to real foundation. That is one reason why it has taken longer than I would wish to complete my investigations during 1995."
>
> *Parliamentary Commissioner for Administration, Annual Report 1995*

I think you can see from that comment that this is a process which doesn't end with the applicant but has continued when the Parliamentary Ombudsman begins his enquiry into a complaint as well. Now, the 'substantial harm' test does not apply across the board. There is a lower harm test of simple 'harm' for policy advice and indeed in the areas covered by the Official Secrets Act, which are basically law enforcement, defence, foreign relations and anything about security and intelligence that isn't altogether excluded from the Act. It's not clear whether the general test in the white paper will apply or whether the sometimes lower tests in the Official Secrets Act will apply.

The fourth positive aspect of the proposals is a public interest test, and that is that decisions are going to be judged against three public interest factors. One is that the decision should not be perverse, in the sense of you should not be able to withhold information from individuals on the grounds of protecting their privacy when it is the individuals themselves who are harmed by that. Although that might seem implausible, you only have to look at overseas case law to see that is precisely what departments and agencies sometimes try and argue. The second is that it has to be in line with existing legislation and restrictions and that is what, I'm afraid, brings our old friend the Official Secrets Act into play. Our view is that rather than bring the Freedom of Information harm test down to the Official Secrets Act, we ought to bring the Official Secrets Act test up to the proposed test in the Freedom of Information Act. And the third is that decisions should be in line with the accountability purposes of the Act. That's another very positive feature of the proposals and we hope that it will imply that before information is withheld it should be shown that the interests of accountability do not nevertheless require disclosure; that the interests of participation do not nevertheless require disclosure; and that the classic public interest factors that the courts apply in breach of confidence cases, that is that the information reveals that crime, misconduct or danger to the public's health and safety or the environment, that those factors will also come into play so that in these circumstances we can also expect the information to be disclosed.

The final positive thing we have got in the white paper is the enforcement mechanism which is terrifically important. It is legally enforceable but not in the first instance through the courts, but through a Commissioner with the powers to order disclosure - whose orders will have the force of court orders. That means that the individual will be able to have a legally enforceable decision made without the cost, which will usually be prohibitive, of having to go to court to do that. If you look at the proposals you see the Government has rejected the

idea of ministerial vetoes and certificates. Now you might think well it obviously would have to reject that, that would be so out of keeping with the spirit of freedom of information that it couldn't possibly be contemplated, but many overseas laws including Ireland's new Act have got ministerial vetoes so I think the fact that we have avoided them is another extremely positive sign.

But there are a number of potential obstacles that we would need to deal with, in order for this to work. I think the first thing is the enforcement process has to be fast. If people have to wait months or years for a decision it will not work. The white paper suggests weeks not months will be the timetable for enforcement decisions. We very much hope that is the case but I think a lot of work will have to be put in into making that enforcement process as quick as that. It will not automatically follow. It hasn't been the case under the Open Government Code of Practice where it's close to a year on average and so I think one needs to look very carefully at the factors which have led to these delays and ensure that they don't occur here.

Now although we have been positive generally about the proposals, we have some reservations. The law enforcement functions of the police are not going to be covered by the proposals. We think that is a mistake. We think the police should be fully subject to the Act, subject to an exemption which allows withholding in cases where disclosure would be harmful. Given that we have had the Metropolitan Police Commissioner admitting publicly that a small minority of his officers are "corrupt, dishonest, unethical", the case for full scrutiny of the police seems to me difficult to resist. If policing is thought to be responsible for safety problems at a football match, the implications are we will not be able to find out how many police were allocated, where they were sited, just to take a simple example.

We have a similar problem on law enforcement functions in relation to the immigration service and the DSS, which are again going to be excluded. In some respects that involves a weakening of the existing position under the Open Government Code of Practice. The security services are not going to be covered - that's not surprising but I think we would want to see them brought in, subject to the necessary exemptions, and we would want to see legal advice and information about civil proceedings brought within the scope of the Act and not excluded altogether as currently proposed.

The final exclusion is employment records. Civil servants' and public servants' employment records will not be accessible to them under the Act and the white paper treats this as a private employment matter between the individual and the public body concerned. We see that as a more important matter. That is, if we are going to uphold the principle of civil service neutrality, if we are going to uphold the protection of whistleblowers, allowing civil servants and public officials to see their records is an important safeguard against those individuals being victimised for standing up for the proper conduct of their functions. It is also important, if you are going to impose duties which some officials will think are burdensome, that it is helpful to show them that they too benefit under the Act. And finally, to exclude employment records implies that people whose public functions put them at risk - like the Gulf War veterans - if they are not to be allowed to see their own employment

records they are going to be denied essential information about how the Government has protected their safety.

The issue of charges is always central under freedom of information laws. It is a problem that crops up in every jurisdiction. Here we have proposals for an application fee of up to ten pounds which can be applied in all cases. Additional fees in complex cases, but an important safeguard - public interest fee waivers. Despite that safeguard we are concerned about a ten pound application fee. It sounds a modest amount but what it implies is that information which is presently available free of charge may come with a ten pound price tag in future. Most requests under the Code of Practice, most requests under the Environmental Information Regulations, currently don't attract charges. We would hope to avoid charges particularly for these kinds of requests under the Freedom of Information proposals.

The other area we want to see looked at is some kinds of sanctions in those cases where there is obstruction. I don't expect this to be very common, but I think it is wise to anticipate that there were problems of this kind sooner or later down the Act. In Canada, the Information Commissioner took office proclaiming that he believed that no public servant would ever attempt to undermine the public's rights under the Act. Seven years later he reports that he was naive in that view. He has cited cases in which records had been deliberately shredded after they had been requested in order to prevent them being disclosed.

> "Canadians were given a sad lesson in what public officials are capable of doing to undermine the public's right to know:
>
> - altering records before release to an access requester without informing the requester of the changes and without invoking any exemptions under the Act;destroying some original records so that the alterations would not be found out;
> - grossly inflating the number of hours spent on searching for and reviewing records requested under the access law;
> - giving access requests the narrowest possible interpretation so that, by slavish adherence to the letter of law, the spirit of the law was violated;
> - dispersing records ordinarily held in one location to many locations throughout the department, thus making it more expensive for access requesters;
> - taking pains not to write things down or doing so on stick-on notes which can be easily removed if there is an access request;
> - refraining from taking minutes of meetings because of concerns about possible access requests;
> - conducting inadequate searches for records requested under the access law;
> - senior level involvement in monitoring the access requests made by selected requesters
> - disclosure widely within the institution and, on occasion, outside, of the identities of access requesters;

- ignoring response deadlines to suit the convenience of senior officials, to facilitate lengthy sign-off processes and to enable media response lines to be developed;

- employees treating their own computer files as private property and, hence, not covered by the access law;

- following a philosophy in censoring responses to access requests which states: when in doubt about the likely consequences from disclosure, keep it secret a philosophy specifically rejected by the Federal Court;

- publicly attacking the motives of an access requester who used the access law to find skeletons in the ND [National Defence] closet;

- taking legal action (unsuccessful) to muzzle the Information Commissioner's criticisms of the department; and

- delaying responses to requests for so long that some requesters lost their right to complain to the Information Commissioner, a right which must be exercised within one year of the date the request was made."

Information Commissioner of Canada, Annual Report 1996-97

These are actually direct quotes from one of his reports where requesters were seeking information about the role of Canadian troops in Somalia on a UN peace-keeping mission where they were accused of murder, of going completely out of control. These are the quotes from the Information Commissioner of his findings of the Department of Defence's behaviour in response to requests. I think we need sanctions to deter this kind of response in the very small minority of cases in which I think they are possible. I think it ought to be made clear that this would not arise where people are simply very cautious and slow in dealing with the requests through diligence or through overwork, but there should be some sanction, perhaps an offence where there is a deliberate attempt to obstruct or undermine the legislation in this way.

We are going to need to address the question, how can people exercise their rights if they don't know what information exists? When you go into the Public Record Office and you begin to look at the information that is held there about old files and you begin to realise the range and depth of information - it's an incredible eye opener to see what actually exists. People who are not closely involved with government don't know that. I think they need to have a way of finding out. I don't think departments should be required to create indexes of every document they receive but I think it would help if their existing indexes were made available to the public so they could be consulted. If they published guidance to the classes of records that they hold and if they published the records they actually disclose - these should be made public on the Internet - and lists kept so people can see what they are likely to get.

And finally just a couple of words about the specific exemptions and exclusions. The substantial harm test, I hope, will be applied so as for example, to ensure that the behind-the-

scenes lobbying that goes on by commercial and vested interests is forced out into the open. I mean we read in Saturday's papers, "Tony Blair is planning to abandon Labour's long standing commitment to a public right to roam on Britain's countryside after fierce lobbying by big landowners including the Duke of Westminster". I hope the Duke of Westminster's lobbying efforts will be publicly available under a Freedom of Information Act so we can see exactly what the strength of the argument is.

And the final thing I want to say about this is, I hope we will see significant movement on access to internal analytical material about the implications of government policies. There is a lower test of harm here than substantial harm, but I think it is important that we should be able to see, perhaps once the decision is announced, what the analysis of the policy options is, whether the problems have been taken fully into account and the implications properly considered. I think that will lead to more rigorous analysis by the people who are doing the analysis, and to greater accountability after the event, if we can see that. It will not stop government from thinking the unthinkable, people tossing around untested ideas in the early stages of policy development and it will not stop somebody saying, 'This guy is a bloody nuisance, what the hell can we do to stop him undermining our entire programme?'. When they have to make frank, outspoken, comments that will still be possible. But I think it is important we should be able to see the analytical material of this kind under freedom of information and that will be beneficial to the decision making process as well. But overall I think these are extremely positive proposals, better than we had expected, perhaps better than anybody had expected any British government would bring forward. So they are very much to be welcomed. Thank you.

Sheena McDonald

Thank you very much indeed. A typically, bracingly, comprehensive overview of the good news and the perhaps not quite such good news. We have got time for a couple of questions and points. Has anyone got anything they would like to say at this point in response to Maurice's first contribution? I'm not surprised. It was deep and broad, and dense and provocative. I'm actually a bit surprised though because there are a number of points that he raised and I'm not going to do your job for you, but I might at this point invite Charles Ramsden, who I should have introduced earlier, who is the Head of the Freedom of Information Unit in the Cabinet Office. Presumably you and Maurice have spoken about these things before so nothing he has said is a surprise to you, but how would you respond to some of his anxieties?

Charles Ramsden, *Cabinet Office*

Thank you very much Chairman, and good morning to everyone present. Just before responding I ought to say that I've been placed, by Maurice, helpfully on the platform for the rest of the day although as you will see my own slot is quite a long way down in the running

order and I am here, as it were, to answer any particular points that people have raised. I am not obviously in a position to give an all embracing and all inclusive statement of Government policy on everything but we'll see how we do and I hope I will be able to answer quite a lot of questions. On the particular issues that Maurice has raised, yes indeed we were in discussions with the Campaign for Freedom of Information throughout the process of preparing and producing the white paper, and obviously since the publication of the white paper in that respect, and also because of the Campaign for Freedom of Information's work which has interacted with Government on the Code of Practice for several years before the election and the change of government where we've become fairly familiar with Maurice Frankel's agenda, the Campaign's agenda. We are not surprised, I think it's certainly true to say, we are not surprised by the points that he made, in particular the exclusions and - the proposed exclusions - and the charging regime we know to be matters of particular and long-standing concern pretty much irrespective of the sort of proposals the Government produces. I think it may be helpful if I leave further comment at the moment to the Chancellor of the Duchy of Lancaster who will be I think, as part of his speech, trying to put into context the status that this white paper has, the extent to which it's green, the extent to which it's a fully settled statement of government policy etc. That may give people some idea as to the extent to which it's likely to change in the near future and as we go forward to drafting the legislation for freedom of information and the extent to which it is open for further lobbying on the sort of points that Maurice has raised.

Sheena McDonald

Well that's fair enough. Of course, he won't have had the precise advantage of having heard what Maurice has just said so I'm sure I will be coming back to you with specific points later in the day. And I might just ask you myself just one question, Maurice, since it leads on to where we are heading. One concern you had was about the pace of enforcement. You said that the white paper suggests that this should happen within weeks rather than months, but we must look at the factors which have led to delays with the old system and the Open Government Code of Practice. Would you like to be more specific about what those factors have been and might be?

Maurice Frankel

Well, we know from the former Ombudsman's comments that he attributes a significant part of them, though not entirely, to what he has called obstruction by departments. Now I know departments don't always accept that, and so that's not always the account, but I think that must be part of the argument and I think we need some kind of mechanism to ensure that delays are reduced to the absolute minimum, both by the departments and also by the investigation procedure. I hope if the Commissioner is able to intervene - not necessarily by going though a full, formal investigation of all cases - by sometimes trying to get at what the objection is and see whether that can be shifted quickly, in an informal way, and I believe

from what I've been told that that is part of what the Government has in mind, that will help. But I think it's important not to be blasé about being able to get this done quickly, and to recognise that if we don't get it done quickly the legislation is capable of being significantly undermined in practice.

Sheena McDonald

Thanks very much indeed. Yes, could you press the green button and say who you are, thanks.

Juliet Solomon, *Safeguard the Alexandra Park & Palace*

Maurice's remarks on enforcement and obstruction. They are the two main things that seem to be the most difficult in the sense to deal with. Obstruction, number one, is when you send your first letter to the local authority, the Audit Commission or the Charity Commission and three years later get your holding letter back. And that is actually practically obstructive. At that point, the average punter gives up or waits for the information that was coming in due course, due being whenever whoever it is thinks it's due. This is actually a major problem and a serious problem. You then take your Local Authority through the magistrate's court, hoping to get a copy of whatever. Well if they then don't provide what you asked for, there isn't an enforcement mechanism. Interestingly, when you come into it, you can't then go to the Ombudsman because you can't use the Ombudsman anyway unless you can prove individual loss. Now, that's one of the things that worries me about this. That if the Information Commissioner works on a similar basis - is that not going to happen? If the proof, the demonstration that you personally will suffer loss, actually makes the Ombudsman extremely difficult and of course the Ombudsman cannot compel enforcement which is another problem, so you can be in an authority that has say ten Ombudsman reports on it, as indeed I am and about three of them have been followed up, because there is no enforcement. I think in a sense there is a problem. If there is a thirty mile an hour speed limit there are policemen buzzing about so that your man in the street knows that if he drives at forty there is a chance he'll be caught. With something like this, I do not know how you design it but there has to be a feeling that the policemen are buzzing about the street while you write your letter saying thank you, we will look into it.

Sheena McDonald

Right, well, I've directed you towards this one so let me briefly put that back to Maurice? Charles, do you want a word about this at this point?

Charles Ramsden

Thank you. Well on a number of the points that you've just raised. In terms of the question of delays, initial delays in responding to requests, there is already a concept of trying to address this problem built into the existing government Code of Practice on Access to Government Information where there is a 20 day response limit, at any rate for straightforward requests for information. The Parliamentary Ombudsman has jurisdiction over complaints which include complaints that a department or agency has unreasonably delayed a response. This is taken forward in the white paper in paragraph 2.23 where it proposes the time limits for response will be set out in the Act to ensure that applicants do not have to wait an excessive or unreasonable time for responses. And that is further projected later in the white paper in terms of potential time limits for an internal review of a complaint etc. You made the point about the recommendations of the Ombudsman and that they are not enforceable and here we are presumably talking about the Local Government Ombudsmen rather than the Parliamentary Ombudsman whose recommendations, though not literally enforceable as such, are *de facto* enforceable on the department. Well, the white paper was careful to set out a wide range of powers for the Information Commissioner which includes - this is 5.12 in the paper - the power to order disclosure of records and information which are subject to the Act. Obviously because of the inclusive approach that's been adopted with the white paper the Information Commissioner, in respect of FOI, would have jurisdiction in the sort of areas that you are talking about as well as central government. I think those are my immediate [comments].

Sheena McDonald

Anything to add, Maurice? No? In that case, let's move on. So we start with hope tinged with scepticism which is healthy enough. Our next speaker is Sheila McKechnie, Director of the Consumers' Association, who I know will have a very precise agenda because the working title of what you have to say, Sheila, is, 'The key to consumer confidence is the right to know.' Are we about to get it?

The Right to Know - the Key to Consumer Confidence

Sheila McKechnie
Director, Consumers' Association

Thank you very much. I'd like to start though with some personal comments because I've been a member of the Council of Freedom of Information since it was set up. In fact I remember discussions with Maurice about setting it up and I think there are one or two general points that are worth making in that capacity which Maurice was far too modest to make and I would like to say on behalf of the Council. We have all stayed committed to this, in our respective ways, for a number of reasons. Those people who are committed to freedom of information tend to be those of us who do not take the democratic health of our society for granted. We were deeply concerned about the breakdown in trust between the governed and the government. We were deeply concerned about the, if you like, all the opinion polls showing that people no longer trusted politicians, had contempt in fact for the way decisions were made. One symptom of a democracy breaking down is groups operating in unconstitutional ways outside that democracy and one of those strongest features of any pressure group, and I have a great deal of experience of this, is the fierceness with which pressure groups get set up in the first few years and it is almost inevitably about the failure to disclose information on a particular topic that is of particular concern to a group of citizens, that being denied access to information creates more fissures and creates more problems for our democracy than disclosure. So freedom of information is part of a very broad agenda to do with modernising the British state and it doesn't just refer to government organisations. The Act, obviously we're very pleased that it also is broad enough to cover, if you like, quasi-government organisations or private organisations acting in a capacity that affects us as citizens. So I think it is worth saying that this is a broad agenda. It is not about simply the detail. It is about refashioning and trying to overcome the aspects of our democracy that have given us cause for concern.

There is one particular point I want to make because it's very much in current parlance and that is the 'nannying state' and if I sound irritated that's because I am. I can't think of an expression which puts a stop to sensible debate more effectively than this phrase 'nannying'. All principles taken to extreme become absurd. I could argue, quite logically, that traffic lights are nannying. They are an infringement of my personal freedom to drive up Hampstead High Road at 90 miles an hour but I don't think the rest of you would be very worried about that restriction on my individual freedom. The debate is about the proper role of the state, the nature of the regulation we need to meet our needs. We are in a situation where the inadvertent affects of new technology are giving rise to great concern and quite frankly the level of the debate on those kinds of issues at the moment is extremely low. However, there can be nothing more nannying and more patronising than to say, as I have been told many times in my career, 'There, there dear. We have an expert committee. They have considered the issues and the outcome of their deliberations is this, this and this. Now don't worry your little head and get on with it'. That is the epitome of the nannying state and

that is what we want to change.

The Consumers' Association, nothing to do with me because I have only been Director of the Association for three years, supported the Campaign for Freedom of Information I am sure for all these grandiose reasons that I've just outlined. But like all charities, the consumers' organisation would have been very willing to say yes we support this in principle but when asked to cough up a bit of dosh to make it happen their criteria are rather more pragmatic. And what I want to outline is the importance of the Act on this very practical level of getting the kind of information that consumers need to actually establish both their individual rights, access the rights that we have within a whole range of services, and collectively get information in order to actually access the work that we do. So the Consumers' Association's interest is primarily to do with those services that we pay for as taxpayers, we engage in those dialogues about what the state should be spending on this and this as citizens, but many of us are then on the receiving end of the services as consumers. And the primary role of CA's charitable activities and through its publishing, Which? Limited, its primary role is to provide people with information on which to make informed decisions. While a great number of services are going into the private sector, it is astonishing the breadth of services that impact on our daily life and we want that information as individuals. If somebody makes a decision about whether I can do something or I can't do something or I can't have access to this or not access to that, I want to know the reason and I have a right to know the reason as a grownup person in this society. I have paid for that information as a taxpayer and it should not be withheld from me unless there are very specific reasons to do so.

If I look at the consumer principles, and I touch on this briefly because I think in the 80's 'consumerism' became a slightly dirty word. It became a word that meant 'I am going to do for me, me, me and the rest of you can take what's left'. The Consumers' Association's view of its role and the whole principles of consumerism come from a very different agenda. The consumer principles actually date from the Kennedy era and there is somebody here from Mr Nader's organisation, that was very influential in terms of setting up the Consumers' Association and the direction it took in this country. The consumer principles are access to services, choice, quality, value for money, safety, redress and information. If you think about it, access to information is fundamental to all these other principles. And without access to information, we cannot do our job. If you think about it, if we say right, we are going to have a look at ambulance services or we are going to have a look at the provision of information in the National Health Service, every Consumers' Association or Which? project starts with the collection of information. In relation to some projects we have actually had to set up detailed computer models of our own, and at huge cost, simply to get access to information which we ought to have been able to get because we are dealing with a public service. The quality of the information that we can give to individual consumers or groups of consumers is entirely dependent on the quality of information that we can get access to, to do our research.

The way we normally go about things is to say, what is the consumer agenda in this area and then what is actually being provided. There have been a lot of improvements in recent years in this field and we are hosting this conference today while there is another conference going

on out there on the [Citizen's] Charter, it is worth saying that I think on the whole while the Consumers' Association has been somewhat critical of the Charter, we think it has moved in the right direction in terms of spelling out what people can expect from public services. But in order to actually get beyond that generalised statement, we have to have access to the nature of services. I'll just give you a few examples, and they are too numerous, and you won't blame me for putting BSE at the top of the list. But from 1985 onwards and we have a file about an inch and a half thick which we put together for the European Parliament enquiry into BSE, and which we will updating for the public enquiry into BSE that the Government has now set up. But almost every second bit of correspondence in that file with the MAFF was a request for information and that information was denied. That made it extremely difficult for us all through the period to actually get access to the information on which Government was making its decisions, and quite frankly no one in the Consumers' Association believed the patronising assurances that it was safe. I'll give you a very specific example and again it's the one I feel most strongly about. It was actually after the March appointment, when it was known that it could jump across species from animals to human beings. The committee, SEAC, was asked to consider what advice they should give about children eating meat. Now I'm talking about a time when the controls on the diseased material going into the food chain was still not as effectively enforced as they could have been. The committee discussed this issue and came out with two sentences which went something like, 'we do not think there are going to have to be any special advice towards children'. Now on the basis of what we knew, we wanted access to the expert opinions on which that advice was based, and so did every other parent in the country. That was one of the key questions and we could not get to the basis of that advice.

Safety is a very big issue in all fields of transport and that is one of the areas I think the lack of information leads people to assume that things are much worse in many instances than they are. There are numerous examples of where safety information has been denied. Medicines - you cannot get information on the adequacy of safety testing of new drugs, and that is another area where we over the years in the Consumers' Association, particularly as the publishers of Drug and Therapeutics Bulletin, where we have been very keen to get information. No reasons for why it should be given, the definitions of commercial confidentiality simply protect the interests of the companies and not the interests of consumers. If you take the current controversy over Vitamin B6 - not exactly one of the things which would be regarded as something causing extreme problems, but it's a very lively debate and we in the Consumers' Association have got caught in the flak. What we desperately want is the information on which government judgements are being made to be put in the public arena so it can be subject to peer group review and so sensible debate can take place. On a much less grand level, if I am paying for a whole panoply of inspectors, as you all are, to inspect restaurants, to inspect ships, to inspect everything under the sun as part of the whole government role, then why should we not be able to look up - the idea that Americans could be denied access to information on their inspectors' reports is just so laughable to them, it wouldn't occur. But we have been denied that information. Now it might not be the most important thing in the world to have it, but it would create circumstances in which I think a lot of enforcement would be much more effective, simply

because the results of that enforcement were in the public arena.

I don't want to end though without saying in very broad terms that we have been very pleased with the white paper. The breadth and the bodies covered were one of the most important areas for us. We have just done some detailed research into all the different utility regulators and looked at access to information on companies that we can get from the actual regulators. You and I again pay for these regulators. They are there to protect the consumer interests. They are there because the market cannot be trusted because it's a semi-monopoly or in the case of water, will always be a monopoly. The regulator is there to protect the consumer interest and we cannot get access to the information we need to input into the regulators what we think are the interests of consumers. So where you've got gas and electricity companies merging, trying to get to grips with who is actually, what the cost structure is, without a disclosure of information system would have been extremely difficult. We welcome the Commissioner's enforcement powers and we welcome the way in which the onus has been put - right through the regulation - to show that something, to prove that there is an issue. There are concerns. Self-regulatory bodies is one area that we have concerns about, bodies like the ASA, the Advertising Standards Authority, who have to take initial action before the OFT procedures kick into operation. ICSTIS, who look after premium line telephone calls - very effective self-regulatory organisation, but again that grey area where we need to look at and I have to say it occurred to me over the weekend that it might actually include CA because having taken the previous government to court to get the right to challenge unfair contracts in the court, we are going to get that right shortly. Does that make us a quasi-legal body and I am going to have to get my act together? Of course I am and I would hate to be accused of hypocrisy and I assure you we will meet any standards.

Three-way agreements are an issue, where another government or another body is involved. Some of you will remember my extremely vociferous exchanges with Alastair Morton over safety in the Channel Tunnel and one of the issues that came up again and again was that we wanted evacuation data. We wanted to know if everybody being used in the test was 18 years of age, could run half a mile in God knows how many seconds and was not in our opinion a typical consumer. And we could never get access to that information. And our concerns over Channel Tunnel safety - we were specifically excluded from having that information by the Channel Tunnel Act, by the agreement between the French and British governments and therefore it is quite important for us to look at those areas. We are equally concerned about the disclosure fee. On the other hand I would like to finish by saying it's the cultural change that is going to make the difference. It's the way government departments and organisations get their house in order to push the information out that is going to determine the success of this legislation. If we all go into it, seeing it as some kind of cat and mouse game, or David and Goliath where somebody desperately wanting information has to go through the whole procedure to get it, I think the opportunity that this gives us to change the way we work, to create new trust, to create, if you like, a grown up debate about some of the major issues facing our society, then I think we will have missed a major opportunity. Thank you very much.

Sheena McDonald

Thank you very much. Again points and questions. Yes, over there first of all and then there. And can you tell us who you are.

Rhodri Morgan MP, *Chairman of the Select Committee on Public Administration.*

Would it be a fair criticism of the white paper that the exclusion of international relations means treating all international relations issues as one category when in fact it should be divided into several different categories? I am thinking particularly of decisions or discussions with European Community institutions, which since they are part of domestic jurisdiction should be regarded as one category, and then what our intelligence services tell us about where Saddam Hussein is keeping his anthrax factories are an entirely different issue with entirely different secrecy implications. Even within the discussions or decisions of the European Commission or Council of Ministers, there would be two further sub-categories. One is where it's just a straight deal between the British Government and the European Commission to say, exclude the Cardiff Bay barrage from the environmental legislation, or there would be another, as touched on by Sheila McKechnie, where there might be another member state involved as well, as in the electricity interconnector deal, which if you were a mine worker you might want to know, what was the nature of that deal done with the European Commission, the British Government and the French Government. Now do you think it would be better if there were these sub-categorisations in terms of right to know as regards international relations, and they weren't just covered by a kind of blanket exemption?

Sheena McDonald

I'll put that across to the panel, but Sheila first.

Sheila McKechnie

I'd make some general points but if you want the solution to it, I'm going to ask Maurice to come up with a solution. The one that comes immediately to my mind is something much more mundane than your examples. Again it's in the food sector. Most people won't know this, but one of the things that is going to determine food safety for the foreseeable future are negotiations under the World Trade Organisation. There is a thing called Codex Alimentarius and all the big issues in food safety, genetically modified organisms, all those things, the determination is within that body and then the negotiations between Europe and the WTO. Now if we are going to have a say as consumers we need access to the information at all of those levels and I think you are absolutely right that if there is a blanket, if the proposed Act is interpreted to exclude all of that, then as we move towards a more

global environment and as a lot of things move towards EU decision making, then I think it will be frustrated, the purpose of it will be frustrated. For the solution to it, can I hand over to my much more expert colleague.

Maurice Frankel

Rhodri has already heard my comments on this, but I think as far as Europe is concerned, European institutions, and for that matter other international standard-setting bodies, they certainly ought to be treated in a separate way. Explicitly in the Act I hope, so that a much higher degree of harm would have to be shown before information would be withheld about matters which are in fact to do with effectively domestic legislation, coming through Europe or decision making which directly affects Britain as a part of the European Union. That is not the same as the kind of bilateral negotiations which people normally associate international relations with, and there ought to be a much stronger presumption that we will have access to that information and not have to wait until final decisions are announced and it is too late for people here to do anything about the discussions which lead up to them in Europe.

Sheena McDonald

Anything to add, Charles?

Charles Ramsden

A couple of points to add to that. The words 'exclusion' and 'exemption' are of course sometimes used rather interchangeably. There is no proposed exclusion in the legislation which is postulated in the white paper, for information of this sort, whether incoming from an EC organisation or indeed from another state wherever that might be located around the world, if it is held by one of the public authorities covered in the white paper's coverage section. So we are talking about a protection mechanism but not an exclusion of such information from the Act. In terms of communications received in confidence from international organisations, and I agree that is the expression used without differentiation, that is one of the specified interests in the white paper which are considered to warrant protection. In this case as with most of the specified interest, the test for harm would be 'substantial harm' which would have to be caused before disclosure was refused. Obviously the whole issue of the UK's place in the European Community as opposed to the world community is an interesting one. Naturally we went out and had a look at the existing good practice FOI international models but in many cases obviously those are models in other parts of the world where there is not quite this same complexity of international relationships. One area, one country of course which has similar experience because it is similarly placed within different world organisations is Ireland and I therefore wonder whether I could use the end of

this slot to flip the question back across the table to see what the Irish position is on that?

Sheena McDonald

Could I invite Kevin Murphy to add that to what you are going to say, because I know you have other things to say, if that's alright? Maurice, I think, would like another word on this.

Maurice Frankel

I think this is just one of the areas where I think we need clarification. I'm pleased to hear Charles say that information from international bodies like the EU is subject to the 'substantial harm' test, but this is one of the areas where it is not clear from the white paper whether it would be 'substantial harm' or whether it would be the Official Secrets Act test, because the Official Secrets Act applies to information in confidence from international bodies and the test, as stated, is lower than 'substantial harm'. I think 'substantial harm' would certainly be the appropriate test for issues that Rhodri has raised and we have been discussing.

Sheena McDonald

Thank you. There was a point up at the back there, yes? Can I say there will be more time for points and questions before lunch so I am going to try and keep to the schedule if you would like to hang on to points on the whole.

Deborah King, *Hillingdon Law Centre*

I'm not sure that I share Sheila's optimism about the American situation, having seen a documentary on television recently about aviation safety in the United States where it seemed as though the enforcement body had a tremendous amount of difficulty in stopping documents being destroyed, and a plane crash from an airline which they had decided was unsafe. It didn't sadly manage to prevent that even though the government knew that its safety standards weren't adequate. In the UK we are moving because of European Law towards an open skies policy which means that instead of airlines being regulated by an external body in relation to their aircraft engineers, they are moving towards a situation where their aircraft engineers are assessed by the companies themselves. And so we end up with a public/private difficulty in terms of access to the information, where access to the data, that there's actually a financial or personal motive by the company not to give it to an external regulator, and I think that's one of the difficulties that hasn't been looked at thoroughly in relation to safety information.

Sheena McDonald

Thank you. Sheila, can I ask you just to hold that point and I will take another couple of points from the floor before we move on.

Marlene Winfield, *National Consumer Council*

Sheila touched on the need for a change of culture and Maurice was just talking about the Official Secrets Act. One of our concerns is that even if the exemptions in the Official Secrets Act are brought into line with the Freedom of Information Act, that there will still be - having the two run along side each other - will produce what, in psychological terms is called a double-bind, where two seemingly incompatible messages are being received and the front-line civil servants who will have to be responsible for this change of culture will not know what to do, will cause confusion. What are the arguments against repealing the Official Secrets Act and incorporating any necessary exemptions within the Freedom of Information Act?

Sheena McDonald

Thank you. I will take the other points and then put the various points appropriately back to the Panel.

David Shepherd

Some quick points. As I understand it the registrar of interests of MEPs and members of the European Commission is available for inspection but only in Brussels. Apparently two years ago the European Parliament voted that it should be published and at least held in the capitals of the member states. I don't know whether you have got any…

Sheena McDonald

Could I just ask you to direct your remarks to the microphone a little more. Thanks very much indeed, just so everybody can hear. Thank you.

David Shepherd

Again, as I understand it, political parties are charities and indeed it might be interesting to see whether the Conservative Party, like trade unions, actually know who their members are, vote for their leaders and produce audited accounts at least once a year. I don't know

whether political parties are within the scope of this proposed legislation but it seems to me that we already pay and subsidise in terms of tax relief, and rate relief presumably, and indeed free political broadcasts. I would also like to ask whether there is going to be anybody responsible for the factual truth of political advertising. At the moment neither the ASA nor the Press Complaints Commission accepts responsibility for the factual truth of political advertising. The other two short points - about 12 years ago I participated in a successful vote at an AGM of a government canteen down the road to boycott South African fruit. We won the vote but we didn't get the boycott because I was told that the European food labelling rules were too vague and you couldn't tell the provenance of fruit in ships' holds. More recently when it was discovered that Israel was selling three times its orange juice to the EU, it was discovered by chemists of the European Community that the juice came from Brazil. I can't understand why the origin of orange juice can be determined now but the origins of oranges could not be determined 12 years ago.

Sheena McDonald

Can I pause you there, Mr Shepherd, because that is a good number of points. Right, let's just pick up a couple of those before we move on. Marlene Winfield wants to repeal the Official Secrets Act and there was a point at the back about American legislation not being all we might hope it would be. Do you want to briefly...?

Sheila McKechnie

Just a couple of small points, because I think Maurice could answer more accurately. The issue of air traffic control and getting that information into the public arena is a very broad issue and a very difficult one and one which consumers have great concern. As I understand it, they will certainly be covered and we will certainly have access to that information. Just flagging up one general point in that arena. As anybody who is having to deal with this at the moment will know, one of the key bits of information on the whole of public safety, transport safety, is compliance with Year 2000, or rather proof that the problems with the Year 2000 bug have been eliminated from systems. When companies like IBM say none of this, I think it was the big UNIX systems that they use in America for air traffic control, none of them will be Year 2000 compliant, and the fact that our own air traffic control, the new system is now 3 years behind, it does raise a whole lot of very difficult questions. There is a classic, where at the moment we would have no right to have access to that. By the way, as far as I am aware, political parties should be relieved to hear they are not charities and they are very specifically excluded from the privileges of being charities; they are private organisations, but I think Maurice could actually deal with the specifics on that better than I.

Maurice Frankel

Can I just address Marlene's question about changing the culture. I think the key thing here will be how do ministers react the first time they get stung by something that is disclosed under Freedom of Information? And if they go around their department saying, 'Who the hell let that out, I don't care what the Act said you should have found a way of stopping it', things are not going to go well.

Sheena McDonald

And what could make you think that might happen?

Maurice Frankel

If they say, 'Right, this is part of the price we pay for opening up society, is to get stung from time to time, but the benefits we will get in terms of public confidence in the whole process will far outweigh that', then I think the thing will work. We have just seen some of the requests we have had, which are not particularly contentious but have gone to the Ministry of Defence, where we have had initial refusals and then in the internal appeals process the MOD has coughed up the information although it has led to embarrassing press stories. I think that's storing up credit for the MOD, at least in the areas we are dealing with. There will be people in other areas dealing with the MOD who probably won't feel as warmly about it. This is a storing up of credit, which I hope they will appreciate, and recognise as doing them good in the long term despite one or two embarrassing news stories.

Sheena McDonald

And what about the double-bind that Marlene referred to, where she suggested that front line civil servants will be caught between two pieces of legislation?

Maurice Frankel

Well, the Official Secrets Act is not to do with the disclosure of information. It's not intended to set a standard for disclosure. It's to do with deterring the leaking of information. So I think that as long as officials are releasing information under Freedom of Information, going through the procedure properly, they are not in trouble with the Official Secrets Act and we should ignore the Official Secrets Act. The problem comes when the tests they have to apply, might either be the 'substantial harm' or the sometimes lower tests in the Official Secrets Act, and nobody will know which they are. It will be important to clarify that in the legislation and you are asking the wrong person Marlene, if you are asking me what are the arguments against reforming the Official Secrets Act, as I just can't think of any. Charles?

Charles Ramsden

In terms of the Official Secrets Act, the point was made, the expression front line civil servants was used, clearly in very large parts of the government machinery, certainly the front line civil service, would not in the normal course of events be involved with the Official Secrets Act. Or have much to do with the sort of material that the Official Secrets Act seeks to protect, so I hope in so far as that question was meant and directed at the front line of government, that in itself should not be an issue. In terms of the Act itself, then obviously the point that Maurice has made is important, that the Official Secrets Act is seeking to prevent unauthorised disclosures of information, and so, as he says, it does not seek to set a particular standard above which, or beyond which, disclosure of every sort of information would be an offence and create problems in this respect.

In terms of the Act and its repeal and its future and all the rest of it, obviously it will be clear from reading the white paper with the commitment to ensure that the Official Secrets Act and the Freedom of Information Act work together and are compatible. It is not government policy, set out in here, to modify or abolish the Official Secrets Act, but certainly there is concern or interest to ensure that the way that the Official Secrets Act is manifest within government in terms of the classifications that are used and the thinking, as it were, that goes on behind the classification of particular papers or pieces of information, that that is not used in such a way as unnecessarily to increase any amount of tension that there might be between the Act and a Freedom of Information statute. Certainly work is already underway in fulfilment of the commitment in the white paper to ensure compatibility in that respect. As far as political parties were concerned, well I fear for the questioner that the answer is no. The FOI Act proposed in this white paper, as I believe in common with just about every similar piece of legislation elsewhere in the world, is not intended to apply to private organisations like political parties.

Sheena McDonald

Thank you. I fancy that may not be the last word on the Official Secrets Act today. But let's move on to our next speaker who may indeed have something to say about this. We are delighted to welcome Kevin Murphy who is the Irish Ombudsman and Information Commissioner designate. He has been Ireland's Ombudsman since 1994 when he was appointed by the President on the nomination of the two houses of Parliament. He is Information Commissioner designate and will be responsible for reviewing decisions by public bodies who refuse information when the Freedom of Information Act 1997 comes into force in April of this year. I know you all know the White/Green Paper back to front but I thought it might just be useful to set you in the context of what is proposed for the United Kingdom. The White Paper/Green Paper says, "We see independent review and appeal as essential to our Freedom of Information Act. We favour a mechanism which is readily available, freely accessible, quick to use, capable of resolving complaints in weeks not months... We propose to build on the Code's two-stage system of appeal. The internal review

stage will be formalised and a new independent Information Commissioner will be given wide-ranging powers. The Commissioner will be able to challenge authorities which refuse to release records and information which is subject to the Act. The Commissioner will have the power to order disclosure. We envisage the Information Commissioner will fulfil a role similar to that performed by the Parliamentary Ombudsman under the Code. However we intend to make the new Commissioner an independent office holder rather than an officer accountable to Parliament. We believe an independent officer is the more appropriate model given the wide coverage of the Act", and so on. So a different proposal for here but you will hold both roles, Kevin Murphy, so let me invite you to offer your wisdom.

A View from Ireland

Kevin Murphy
Information Commissioner of Ireland

Thank you very much Chair. I was delighted to accept Maurice's invitation to speak to this conference, not only because of its relevance to me as the Information Commissioner designate, but also because it enables me to acknowledge publicly the tremendous support and cooperation I have had, as Ombudsman, from my counterparts in the United Kingdom. When I first took up office as Ombudsman and Sir William Reid was the then United Kingdom Parliamentary Commissioner for Administration and Health Services Commissioner, and he was particularly helpful to me. And I think that excellent cooperation that developed between our two offices has continued with William's successor, Michael Buckley, who is here. As has the equally good relationship we have with the local government Ombudsman in England, Scotland, Wales and of course my counterpart in Northern Ireland, Gerry Burns. I must warn you though that all this fellowship and goodwill is temporarily suspended as from next Saturday when the Five Nations tournament starts.

The Irish Freedom of Information Act was passed last April and it comes into effect on the 21st April for government departments, the defence forces as we call them, a wide selection of agencies and offices associated with government departments, the general administration of the courts, of the attorney general and the director of public prosecutions. The Houses of Parliament are also covered, but the private papers of MPs, official documents which are required by the rules or standing order of the two houses to be treated as confidential are excluded. The Act will come into force for local authorities and the health services on the 21st October so there is a further six month period there. And after that, all the bodies that are covered in your white paper are also covered in the Act and it is a matter of extending them progressively by regulation. It will cover the police, a whole range of public bodies such as the public utilities as well as private bodies to the extent that they perform public statutory functions.

I think the significance of this Act for the Irish public service is absolutely enormous because hitherto ourselves were dominated by a culture of secrecy in which attitudes formed by an Official Secrets Act, much worse than yours in fact, because it provided that all official information was secret unless you were actually authorised specifically to reveal it. And the transition from that culture to a new one of openness is going to be a major challenge for the public service, but also for the government. Now in the time available to me I am going to concentrate some very specific issues and I am going to assume a degree of familiarity with what I would call the general concepts and essential characteristics of a Freedom of Information Act. My talk will fall into two parts. I would like to say a few things about your white paper, make perhaps a few comparisons and then I want to go on to say what is happening in Ireland and my own role in that regard. I start from the position that the really essential elements for a good Freedom of Information Act are actually contained in the Irish

legislation and I think they are also contained in the proposed legislation as set out in the Government's white paper. But there are some interesting differences and I'll deal with these under the three broad headings: coverage, gateways and exemptions. In doing so, I would like to make the point that I am not going to be making any value judgements, because as Ombudsman I have learned that while an effective office has to have certain essential characteristics, every national institution develops its own degree of uniqueness.

Let me start with coverage. I note, just in passing, that Parliament is excluded from the proposed bill and certain security services are also excluded as are the functions of public bodies including the police relating to the investigation, prosecution or prevention of crime or the conduct of criminal or civil proceedings by public bodies. A somewhat different approach was used in Ireland. These functions are not excluded but the records relating to them may, and I underline the word 'may', be exempt and there is provision, subject to certain safeguards for the issue of ministerial certificates in particularly sensitive or serious cases. And the effect of that certificate is to exclude decisions, to refuse access from review by the Information Commissioner. But I would stress, because Maurice mentioned this certificate, I would stress that the certificates are confined to that category of information; information relating to law enforcement, or to security, defence or international relations - and I'll say a little word about that later. Now there is provision for appeal to the high court on a point of law in relation to certificates. But there is also another interesting thing in these exemptions and that is the exemption does not apply to any record relating to investigations or actions which are not authorised by law or which contravene the law, or records which contain information about the effectiveness or efficiency of the public bodies involved, or the policies, programmes and schemes operated by them. I think that is an important exemption. Could I just mention too that in relation to records covered by legal professional privilege, which are also proposed to be excluded from your Act, access to them in Ireland shall be refused by Irish public bodies and indeed there is provision that their existence may not be disclosed if it were considered that such disclosure would be contrary to public interest. But I equally go on to say that the Information Commissioner will of course have access to those records for the purposes of a review.

The proposal in the white paper to cover privatised utilities, I found very interesting because lots of Ombudsmen in different countries I know are quite concerned at losing public utilities which were in public ownership and which have now been privatised. So it's an ongoing question for ombudsmen. In Ireland all our main public utilities still remain in state ownership even though strategic alliances have been entered into in many cases and even though competition from new entrants has been encouraged. I ask myself the question, while they are covered by our Act and have to be brought into effect by regulation, whether when that time comes whether this question of ensuring a level playing field with competition from home and abroad is going to surface, I suspect it may.

Finally under the heading of coverage, I note the intention in the white paper that access rights will be fully retrospective. In Ireland full retrospection applies only to personal records and there is a limited retrospection for employment records for three years. Otherwise access

is restricted to records created after the commencement of the Act, unless prior records are essential to the proper understanding of current records. Now there is provision for the progressive rolling back of that by regulation. The rationale for this, as I understand it, was not that of workload, which has been used as a rationale in some other countries, but there was a concern that it would distract from the huge effort and commitment needed to bring about this necessary cultural change and to complete the very tight timetable, a lot of work has to be done in this year and there was a feeling that giving full retrospection at this stage might just distract from that effort concerned.

Moving on to gateways to the proposed Act. I notice that the white paper mentions the need to include some 'basic tests of reasonableness' which applications must meet. But it goes on very quickly to say that such tests must be carefully drawn so that they do not obstruct genuine requests for information. And I think also the white paper confirms that the motives of the requester will be disregarded, which I think is a very important thing. Our Act is particularly strong in that regard. In addition our Act provides that even where a request lacks particularity, or is so voluminous that it might substantially disrupt the work of the public body, the request may be refused only after the requester has received assistance - or an offer of assistance - which would enable his request to be dealt with.

As to fees and charges, the Irish position is that fees may be charged in respect after time spent in efficiently locating or copying records based on a standard hourly rate which will be prescribed by the Minister for Finance. No charge will be made for locating personal information unless a huge volume of records are requested. And indeed the cost of copying personal information may be waived where the charge would not be reasonable having regard to the means of the requester.

I turn now to just two exemptions, and the time requires that I be very selective here. So I am going to confine myself to commenting on first of all the public interest test and second the area of exemption 'decision making and policy advice', which indeed is the only specified interest where a simple 'harm' test will apply. I note the indication in the white paper that an attempt will be made in the bill to increase the clarity and certainty of individual decisions by defining what constitutes the public interest. Now the Irish FOI Act does not contain any definition of the term 'public interest'. It proceeds on the basis that, in practice, the public interest test will always turn on the facts of each individual case. It will require on the one hand a careful balancing of the public interest in citizens being informed of the processes of government as against the public interest in the proper and effective functioning of government. One has to balance those two considerations. I think one merit of this approach is that over time the test will maintain the Act's relevance because the balance between factors for and against disclosure of records shifts. To give you an example, over the last 20 years it has shifted dramatically in relation to information on the environment. In my discussions with permanent secretaries and various chief executives of public bodies, I have indicated that in those cases, which will inevitably arise, where a decision to release or to withhold is very finally balanced, they should bear two considerations in mind. First, that the overall thrust of the Act which is set out in a very long title to this Act, it clearly is

predisposed to the release of information rather than the withholding of it. And second there is an explicit direction in the Act that the Information Commissioner should approach each case on the basis that a decision to refuse a request shall be presumed not to have been justified, unless the body shows to the Commissioner's satisfaction that the decision was justified. Now the public interest test, I think, is likely to figure largely in cases where a body considers that the release of information could prejudice the integrity of the decision making of policy and advice processes.

I must admit that I was a little intrigued by the emphasis put in the white paper on the protection of free and frank internal discussions. It reminds me of a number of times when I was chided by my youngest daughter over breakfast or dinner, with the remark 'you are speaking in Mandarin again, Dad' and this argument against disclosure based on the need for frankness and candour in official advice has been very well aired in New Zealand and Australia and indeed the Campaign in their submission to the Committee on Public Administration have given quite a lot of detail about important decisions that have been taken in those jurisdictions. I suspect, and I come to a point that was raised here earlier, that the need to raise this issue in the white paper may arise to some extent from the very breadth of this particular exemption. In Ireland, for instance, this area is actually broken down into three separate exemptions. We have first of all, records relating to meetings of the cabinet, which stands on its own. We then have deliberations of public bodies, which of course embraces internal discussions. And finally, we have functions and negotiations of public bodies. And to just to mention that in relation to the first category, which is the cabinet meetings, the exemption does not extend to factual information relating to a cabinet decision already public, or indeed to records relating to a decision made more than five years previously. I like to think that all policy advice is in fact given freely and frankly and that any case for exemption in this area made to me as Information Commissioner will not be argued solely on those grounds. Indeed it seems to me that to make the argument is to suggest that those concerned would actually make different comments or decide matters differently if their deliberative process were open to scrutiny.

Let me just turn to the second half of my speech now, and I'm going to again deal with this under three headings. First of all, guidance and support for requesters, then guidance and support for public bodies and finally my role as Information Commissioner, my functions and powers. The Act requires that a public body must publish, before the date it comes into effect for that body, information setting out a general description of its structure, functions and the services it provides to the public, as well as a general description of its rules and guidelines as used in implementing its schemes and programmes. In addition it must describe the classes of records it holds and the arrangements for enabling the public access to those records. The provision also requires the public body to set out the rights of review and the appeal processes against its decisions. It goes on also to require that each public body publish the rules, procedures, guidelines, interpretations and an index of precedents used by that body for the purposes of its decisions and recommendations. This, I think, is causing a degree of angst among some public bodies and some government departments. Indeed where such material is not published, or where if it is published it's not correct or complete, the public body

concerned is required to ensure that a person is not prejudiced due to such a failure or an error on the part of the body and that I think is going to provide an incentive for departments to deal with this properly. There is also a legal right on the part of each member of the public to require that personal information relating to oneself and held by a public body be amended where it is incomplete, incorrect or misleading. And one very interesting provision in the Freedom of Information Act, which is perhaps even more interesting for me as Ombudsman, is that the Act confers a legal right on each person to reasons for a decision on a matter particularly affecting that person. I think the white paper does in fact indicate that that is the intention also.

Turning now to the public bodies that are going through this phase of preparation. In May 1997, almost immediately after the passing of the Act, the Cabinet approved an implementation framework and timetable for the year ahead. It set out very specific tasks for each public body and also set up a FOI central policy unit. This unit, I think, is a key element in this process. It was set up within the department of Finance with the broad function of guiding and supporting the preparations for FOI across the public service, and providing an expert advisory service. It gives legal advice in consultation with the attorney general's office on interpretations of particular provisions, precedents from abroad and relevant public interest factors. It also proposes strategies for handling issues of common interest, such as common interest across departments, such as, for instance, tendering processes, policy advice obviously, confidential information received from third parties, as well as assisting in training and records management. It has in addition a central role in informing and educating the public. I think in fact this point was made very well in the white paper, that you can't leave this to the external Commissioner. In fact, there has to be ownership of this among the parties covered by it. In conjunction with an inter-departmental working group that has been set up across the whole Irish civil service, they are developing a media campaign now which will take place just coming up to April.

Now, turning finally to my own role. Pending my formal appointment, which again follows the Ombudsman pattern in that I'll be appointed by the President under nomination of the two houses of parliament, I am in the process of preparing obviously, recruiting some extra staff and moving to a larger premises. There are three of us at the moment, the Director of the Ombudsman's office and myself and an investigator handling this for the moment, and educating ourselves. But my role will cover not only the review of decisions by public bodies and indeed the making of binding new decisions, this is legally binding determinations, but a very broad range of practices aimed at ensuring the successful operation of the Act and the development of a new public service culture of openness. Hopefully in this I will be depending on the support of the public bodies themselves and, obviously, of the two houses of parliament.

The powers I have as Information Commissioner, indeed go further than that of an Ombudsman. They are quite formidable I think and extensive, though I would make the point that when I was approached to take on this job in addition to that of Ombudsman, I did have some initial reservations at the prospect of how my role as Commissioner involving

legally binding determinations, how that would relate to my role as Ombudsman where I make recommendations. I felt this morning there was a tendency to feel that the Ombudsman's recommendations are unenforceable. I think that the flexibility that you get from recommendations plus the sanction of special reports to the two houses of parliament as we have in Ireland, we have never had a recommendation over 15 years actually rejected by any public body. But let me say I think there is a difference in freedom of information in the sense that it is a more specific role, you are concentrating more on particular exemptions and perhaps it is more suitable to binding determinations and I certainly have no problem with that. In fact one of my main factors in making my decision was the encouragement I got from colleagues and counterparts in New Zealand and Australia who emphasised very strongly to me that they saw the two roles as Ombudsman and Information Commissioner as being very complementary. Now, that's my contribution this morning, but could I just wish or hope that the friendly cooperation I have enjoyed as Ombudsman with my counterparts in the United Kingdom will be replicated very soon in my role as Information Commissioner. Thank you.

Sheena McDonald

Thank you very much indeed, Kevin Murphy. That was very interesting. Can I also at this point formally welcome the Minister, Dr David Clark. We are slightly running back but I think we will keep within our framework for the morning and still allow some time for points and questions in response to Kevin Murphy. And I must say, I know Michael Buckley is here - where are you? Yes, we will be particularly interested to hear from you or indeed John Tate and possibly William Reid on what you have just heard. Do you have anything at this point to say, Mr Buckley?

Michael Buckley, *Parliamentary and Health Service Ombudsman*

[Inaudible] It is a moot point whether one should have that [Information Commissioner] jurisdiction added to the other public sector bodies. I say this for two reasons. One is that the existing complaints system in this country for public sector bodies is exceedingly complicated. In most overseas countries, including for example the Republic of Ireland, there is a single Ombudsman who will cover the public services. In this country we have myself as Parliamentary Ombudsman, Health Service Commissioner (in fact, I'm three Health Service Commissioners), there is the local government Commission, again separate in England, Scotland and Wales. There is a separate system in Northern Ireland, you've got the Police Complaints Authority, the Data Protection Registrar and I could go on for most of the morning. We are now proposing to add a further body, in the form of a Freedom of Information Commissioner, to that already pretty crowded playing field. I think there is a danger that complainants will find it very difficult to work their way through. It is very important indeed that if we do have a separate Freedom of Information Commissioner then that should not get in the way of dealing with, as it were, the normal complaint. There is, I

think, what one of the things that Kevin had in mind in saying that it is useful to have the two together, is that a very great number of complaints involve a freedom of information aspect. The department, the agency, has made a mess of my case but I can't find out enough to prove it. We get more mixed complaints of this sort than pure requests for access to official information. I am very glad to see in the white paper what was said about the need to foster cooperation between the Freedom of Information Commissioner and the existing public sector Ombudsmen. It's absolutely essential that the emergence of a new jurisdiction shouldn't get in the way of that.

Secondly, I have to say, Chairman that you read out from the white paper a number of comments that are there which are actually very misleading. It is just not true to say that I am not an independent body and I hope that that will now be put right and the government - I have had some correspondence with Dr Clark who said that this, misrepresentation I have to say in the white paper, was inadvertent and I hope we can put that right. Like all the other public sector Ombudsmen I am independent of the political process. Thank you.

Sheena McDonald

Thank you, and I am sure Minister you are familiar with Mr Buckley's views. Of course that was only one aspect of what Kevin Murphy talked about so let's, before I come to you, Maurice Frankel, get a couple of other points from the floor.

Oonagh Gay, *House of Commons Library*

I wondered if Mr Murphy could give us a little bit more detail about how the system of ministerial certificates is likely to work. He stressed how narrowly it would be drawn but there have been fears that it would cause extensive exemptions.

Sheena McDonald

Thank you. Can I take the other points and then deliver them generally.

Robert Curnow, *Royal Statistical Society*

I'd like to come back to the question of policy advice which has been mentioned by all our speakers. As a member of government committees on BSE, CJD and tobacco and health, I have to say that the experts on those committees would very much welcome a wider debate. We feel very constrained at the moment. We would like a wider debate while we are considering these issues and also we particularly like a wider, broader statement of the advice that we do give to government. A direct statement of what our advice was. We have to stress

the lack of scientific certainty which some politicians find very difficult to cope with. We also have to cope with the problems and the difficulty of evaluating risk. The Royal Statistical Society is very keen that the National Statistical Office should become an independent statistical service answerable directly to parliament rather than to government. This is mentioned in paragraph 1.4 and we hope that will be acted on. We want to see an independent statistical service, recognising issues that need good information, monitoring the collection and analysis of data. I think this is extremely important and I very much hope that will happen. There is a question that Sheila mentioned of the quality of data. Is the right data being collected? This needs to be looked at by an independent statistical service and as I say I hope that will be part of, I think it's going to be another Act, but I think it's very important that it is established.

Sheena McDonald

Thank you. A couple of other hands. One there and one there.

John Godfrey, *European Research into Consumer Affairs*

I would like to make a comment about Kevin Murphy, based upon common gossip, namely that he has been extremely effective in Ireland by making himself well known to the public, by being available for radio shows and other things so that he gets a very busy office because he has put himself about and I would like that to be borne in mind when this Act is put into effect. We want it to be useful, not just to card carrying busybodies like myself but to everybody.

Sheena McDonald

Thank you.

Robert Hazell, *The Constitution Unit, University College London*

Could I ask Kevin Murphy to say something about the overlap in Ireland with data protection, because Ireland, I assume, as a fellow EC member state will also be obliged to implement the EC Data Protection Directive by October of this year. Can you tell us, is this is being done by a separate statute and if so, will there be overlapping access regimes to personal data under that statute and the Irish Freedom of Information Act? Could you also tell us whether there will be overlapping rights of appeal and say something about what the enforcement machinery will be in Ireland for the new data protection regime?

Sheena McDonald

Thank you. I think that's enough to be going on with for the moment Kevin Murphy, the two substantive points being Robert Hazell's and Oonagh Gay's question about proposed use of ministerial certificates, in particular. I think the Royal Statistical Society's point may be more directed towards Dr Clark. So if you would like to deal with those two principally?

Kevin Murphy

Well, in relation to the certificates. First of all, there has to be a specified minister to do this, and there is also provision under the Act that certain other ministers shall also be nominated as certifying ministers. Now the reason for that is we have coalition governments in relation to, most of our governments are coalition governments. Now the minister has to be satisfied that the record is of sufficient sensitivity or seriousness to justify his or her doing so, so there is a sensitivity test first of all. But when the minister issues the certificate and has to be in a certain form, giving details. A copy of the certificate then goes, and a statement in writing of the reasons why the record to which it relates is an exempt record, goes to the Taoiseach - or Prime Minister - it has to go directly to the Prime Minister, and such other ministers of the government as may be prescribed. I mention that because of the coalition aspect. And the Taoiseach, jointly with these other ministers, will review those certificates every six months.

So it does seem to me that there is an in built degree of pressure perhaps, and I think the experience in some other countries has been that certificates are not the easiest thing in the world to do especially when colleagues are looking at them, but it all depends on the climate of the government, I suppose, really. There is also a provision that the Information Commissioner, while he has no role in certificates, has to get a report of the number of certificates and there would be an opportunity, as I would see it, to - perhaps not officially but in some respects - to comment from time to time if one felt it was being abused. Following the review by the Prime Minister and the other ministers, if they are not satisfied that the record really should be exempt, they can request the minister who issued the certificate to revoke it. I suppose one can argue that anything of that nature creates its own problems, but I put the point forward in the context that you can either exclude it from the Act or, if you provide it in the Act in these very sensitive areas, such as security and the state and law enforcement, one certainly does have to have a somewhat more severe harm test in that sense perhaps than elsewhere.

Could I just jump down to the data protection question. Now we have a separate data protection commissioner and as you know at the moment there is a separate Data Protection Act that applies only to computer records, but there is a directive now which will be given legal effect. I know the government are working on this and one of the concerns I had when I was consulted formally about this, is that the EU Directive is quite lax in some respects in terms of exemptions and it is a weaker - the timescales in some cases are quite lengthy - and I have a concern that nobody will take advantage of the EU directive to perhaps pull back a

little bit from our Freedom of Information Act. I put down a strong marker on that point. I always read British white papers with a degree of awe because everything is in it - you are talking about data protection gelling, the old records, the archives. We have tended to go ahead with the Freedom of Information and say, well we will pick up the overlaps as we go along. There is a slightly different approach here. It struck me very forcibly that your white paper is attempting to tie all the loose ends up together. Now we are prepared to live with a certain amount of loose ends, but on the basis that the data protection commissioner and I will get together and try to sort out the practical difficulties. But there is actually an overlap and there will be an overlap there. And I think in due course, I watched the way the situation unfolded in New Zealand where you had this overlap as well and where ultimately the solution was that there was a Privacy Act and a Privacy Commissioner and I suspect that may be the direction we will ultimately go in Ireland. That you have, on the one hand, an Information Commissioner giving out the information and you have a Privacy Commissioner protecting the rights of the individual to his or her privacy. So, as I say, there will be overlapping appeals.

Could I just make one other general point, because it applies to lots of comments that are made. One of the reasons why I said I wouldn't make any value judgements is because you have to allow for the fact that a huge difference between Ireland and the United Kingdom in terms of size, in terms of how the community can relate to an Ombudsman - it's much easier to get closer to the people in Ireland I suspect. There is also huge differences when you come to areas like security and defence. We are not members of any military alliances and so on, so one has to face reality in some of these respects and it could be very possible for somebody like myself to say idealistically everybody should have openness about everything but I have draw the line and say, well look this is an Irish Act for Ireland and there may be differences between this and what you need in the United Kingdom.

Sheena McDonald

Thank you very much indeed for the moment, Kevin Murphy. We will now move on to hear from the Chancellor of the Duchy of Lancaster and I should say, Dr Clark, that having missed the earlier part of the morning you missed the broad welcome given by both Maurice Frankel and Sheila McKechnie to the government's proposals with the usual fan of 'ifs and buts', many of which I know you are familiar with.

The Government's Proposals

Dr David Clark MP
Chancellor of the Duchy of Lancaster

Thank you for the invitation to be here. I look around and see all the faces and this really is a gathering of the great and the good when it comes to freedom of information. I would like to compliment the Campaign for Freedom of Information, not only for their ongoing efforts over the years, but for organising this conference.

We are in the situation where you have got the white paper, and we are now in a period of consultation. We now need informed debate, informed discussion, and proposals coming forward if we have in fact got anything wrong. I also think that we ought to say a word to the Consumers' Association, to UNISON, and also the Joseph Rowntree Charitable Trust for their ongoing efforts and support in this field. I certainly am aware of their work and very much applaud it.

I also, was delighted, as all politicians are, about the reception which the white paper actually received when it was published just before Christmas. It was doubly welcome because all sorts of aspersions had been cast on both my intentions, the government's intentions in this field. All I'd say is that I've been in Parliament for twenty three years, I've never failed in anything yet and I don't intend to fail in this one either. The white paper is the beginning of the proof of the pudding anyhow. But it is important, and it was important, that we got it right and that is why we've given a full year to do it and I don't apologise for that. Like everyone else, I guess, I was disappointed that we couldn't get it in the first Queen's Speech. If I were honest, and I suspect a number of people here, if they were honest as well, would now conclude that probably it was better not to rush this piece of legislation. I think because we took time to consider the implications - and they were far from being easy - we will actually be able to put forward a piece of legislation to Parliament, and hopefully it will be approved by Parliament, overwhelmingly in my judgement, as a good, all singing, all dancing Bill, which will be a definitive, landmark piece of legislation. Because I happen to believe that Freedom of Information is going to change the whole political culture of British society. I think we are going to have a radical Act which will sweep away the obsessive secrecy which for too long dominated public life here in Britain. I think it is a prerequisite of a fair, open and democratic society. I hope it will be a progressive piece of legislation. I don't believe you can change a culture simply by a flip of the switch. I think it is going to take time to do it but I think we will do it.

If I could just make one other general point. When we were writing this piece of legislation, we were quite intent that the object of the Freedom of Information Act should be to the benefit of the ordinary citizen of Britain. When I say that I must concede that the academics, the newspaper people, as indeed was suggested today rather generously - self-deprecatingly - by one of the questions, nosy busybodies, they should not be at the fore of our minds when

we were devising this piece of legislation. It is a piece of legislation for the citizens of this country and that is why we have tried to produce a white paper that shows a great deal of clarity, that also is a very simple piece of legislation in the way it will operate. And I genuinely believe it is going to change the whole political culture here in Britain.

Now perhaps this morning I could actually look at a bit more detail. The positive responses are still coming in. I don't think there are many white papers than can actually claim praise from newspapers as far apart as the Guardian and Daily Mail, but we actually did that. We are getting a lot of very good response from overseas. I was delighted to get a letter from the Information Commissioner from Canada, John Grace, who actually said "you have raced ahead of us and foreshadowed the next generation of access legislation". I thought that was a very pertinent point. We have been around the world - and I have been criticised for that - but I learnt by going around the world, and I learned from the experiences and the shortcomings of previous legislation elsewhere. We have adapted that legislation for this country but we are, I hope, talking about the next generation of access information and that really is what is driving us.

Maurice Frankel and the Campaign, I have referred to, have been a great help to us as we progressed this piece of legislation. I'm actually told, I don't know whether this is true or not, but the day after when it became clear we were not going to get the white paper out before the summer and it seemed so long ago now, Maurice actually rang up the department and said to one of my officials, 'is this good news or bad news?'. Well, I think he now knows that it was good news and we spent all the extra time in working out a coherent and radical, and a much stronger, document than we would have had if we had produced one in the summer. So I don't apologise for that. I think it was time well spent and I hope you agree with that. And I thought, and I will continue to quote this, that Maurice's view that the white paper "went further than we had thought any British Government would be willing to go" was high praise indeed and I mean that in a very sincere way. But I am very thankful for the help that we have had from people like Maurice who have spent so long in working out the details of this type of legislation.

I am confident that we can build upon the success of the white paper. Given the strength of the Government's commitment to constitutional reform and modernisation, because I think it is right to see this proposal within the Government's whole constitutional approach. We have already brought forward legislation on Scottish and Welsh devolution and on bringing rights home by incorporating the ECHR into UK Law. We are also in the process this session of updating the Data Protection Act, which already has been referred to. The white paper really was the result of many hours discussion in the freedom of information sub-committee chaired by the Lord Chancellor, Derry Irvine. And I must say here, don't believe everything you read in the papers. I had a stalwart supporter in Derry Irvine and without his help I don't think we would have actually got such a radical white paper on time. He really was a bedrock of support to me in my efforts to try and write the white paper.

Now once the policy development was complete, and *Your Right to Know* was finally issued,

it really has given - and the response it's had has helped enormously because it's given authority to the white paper - which is not only my view, it now has the complete and utter endorsement of the Government as a whole, and is not just some result of an adventurous element going off on a limb. It is the centre of the government's approach to constitutional reform. And it follows from this that any significant changes to those proposals resulting from the consultation process would represent a change to a collectively agreed policy and therefore will be considered again by the freedom of information sub-committee if we feel it right so to do. Now the same goes for those proposals arising from the consultation on areas which the white paper itself acknowledges as having green edges. I think in particular of the gateway provisions of the Act, of the charging approach and as to whether we should pay particular attention and differentiate between charging for private individuals and for commercial organisations, the nature and details of the proposed specified interests and the use of a third party appeals mechanism. These we see as particularly green aspects and we very much welcome opinions and advice upon that point.

One other point which I think it would be right to raise, that proposals from within Government which would significantly change the legislative approach outlined in the white paper would have a chance of succeeding only if the consultation process showed clear evidence in favour of those proposals or if the work of preparing a draft FOI bill, in the next stage of the project, suggested that the ideas set out in the white paper were likely prove unworkable in legislation. Now, failing these two tests I am sure that the Lord Chancellor would quite properly take the view that the sub-committee had already fully discussed the issues in question and are now settled. I mention this because some might think the white paper may not really mean what it says, or that the green edges aspect of it mean that what we have here is really just a negotiating package put out to test the water before the government starts its serious work on FOI. That is not the position. This is the considered view of the government. Of course we will listen. But on the other hand we will need a lot of persuading to change it. This isn't something that is going to be watered down as we progress along the way. I think it is very important to make that statement here today.

The responses from abroad again have basically supported what we are trying to do and I know the representative from overseas here today and I was interested to hear what Kevin with his experience in Ireland was telling us today. I am aware of the work that has gone into the preparation of the FOI Act in Ireland and it is far more recent than any other countries I have visited and I am also grateful for the help and assistance they have already given us and the offer that they will continue to share experiences with us to make sure that we get the Act right. So I am grateful for the help from our Irish counterparts and for Kevin in particular for all the help he has actually given us.

This brings me to the consultation process itself. Now, as you know, this runs out the end of this month. It took a while to get going because Christmas intervened and indeed it's meant that there has been a slow response. We have had about 70 responses already, primarily from individuals at this stage, but also including a number of corporate and other organisations. The overwhelming majority, and this is interesting, of the responses have not only been

pleased with the white paper but they also have tended to respond by electronic means, which I will come back to in a moment or so. There has been some concern or reservations expressed about a few aspects. In particular the proposed exclusion of information relating to legal proceedings of public authorities and the outlined charging scheme. And I know that Maurice Frankel has also picked up in statements on behalf of the Campaign in this respect. Now we are obviously going to look at these particular aspects and these issues very carefully but generally I must say the private response we have had from the white paper has really been very encouraging indeed. Now perhaps, Sir Michael is here, this would be appropriate for me to refer, just *en passant*, to the correspondence I have had with him as the Parliamentary Ombudsman, because he felt and expressed some concern, that the chapter on review and appeals might give the impression that the Government saw the Ombudsman as susceptible to political pressure. It certainly was never our intention to suggest this. Far from it. Rather that chapter attempts to address the public perception and you know it sometimes, it's what the world seems to think about you, as opposed to what actually is the position, which is the key element. So this chapter was attempting to address the public perception, mistaken though it may be, or mistaken though it is, that with a large Commons majority the Parliamentary system of appeals for FOI will always offer the Government the opportunity *in extremis* to ignore independent findings of excessive secrecy in departments and agencies. I make that point as a serving politician, knowing the way politics works, knowing the way patronage works and I felt it was important that we made that point there. And in saying this, in no way does this imply any doubt whatsoever about the independence of the Parliamentary Ombudsman himself, or indeed about the government's full and continued confidence in the integrity of his judgement, not withstanding the arguments in *Your Right to Know* for a somewhat different approach to FOI review and appeals. And I am pleased to say that our consultation responses so far do not suggest that the public has been confused or misled by this section of the paper and the government is still of the very firm view that the best way forward is to have a Commissioner with mandatory authority. Nothing we have seen or heard, or any letters we have exchanged, has persuaded us to change our views but let me emphasise and restate the point, this is no way casts any doubt or aspersions on the independent integrity of the present Ombudsman or the previous Ombudsman or future Ombudsmen. They have a key role to play in the general administration of our country.

Now to move on, I know that of particular concern to the Campaign for Freedom of Information is that the consultation process should be as open as possible. That's why I say that 70 per cent of the - we published this immediately on the Web, on the Internet, so people did actually not have to wait to get hold of the white paper, it was there the moment I sat down in the House of Commons having announced this, it was on the Net and it allowed people access to it and I know that that has been widely appreciated. A large percentage, probably 70 per cent, of the submissions have been made via E-mail or some other electronic means of delivery. And most of it to our own site, with the rest to the UK Citizens Online Democracy which has been developed to try and promote discussion of the white paper. Apart from the immediate openness that this approach allows, it is a particular pleasure that so much has been delivered electronically. Only about 20 responses have actually been sent

by post and what we are trying to do is to ensure that these are placed on the Internet over the next couple of weeks. Only in one case, a submission from an individual, has confidentiality been requested. So we will soon be in a position with something like 98 per cent of the discussion on the white paper so far will be in the public domain.

Now this of course, not only the consultative process currently being carried out, is also in line with our general policy proposals. The Public Administration select committee effectively acknowledged the importance of FOI by initiating an enquiry into it at the end of last year and I am pleased to see that the Chair is here today, Rhodri Morgan. I myself gave evidence to the committee within a week of the white paper's publication and just before Christmas the committee sent a list of questions about the white paper to something like a hundred and fifteen different organisations including a number from the private sector who might fall within the proposed scope of the legislation. I am delighted that parliament and the select committee has become so involved in this, because the job of parliament is not only to represent people but to give people their freedom, and I actually believe that freedom of information is a key freedom for which we have waited too long.

So this work of the select committee is a significant consultation process in itself and we clearly will look forward to seeing the outcome of their work and I again very much appreciate the support I have had from that committee in our efforts to try and push that forward. Now this brings me really, lastly, to what has happened since the white paper has been published and what happens next. Well to start with, I am delighted to report good progress in delivering two early post-publication commitments that I made when I announced the white paper in the house. First, I said that I hoped to publish very shortly a Green Paper on the management of crown copyright which clearly has relevance to the white paper's proposals on charges and the position of charged services. We have actually done that now and the consultation period of that now lasts until the end of March and we will await the outcome of that consultation as well.

Secondly, I announced the intention of a further initiative on the form of a published paper setting out background material relevant to the production of the white paper. This would fulfil the commitment I made while the white paper was being prepared and is in line with good practice, both in *Your Right to Know* itself, and in the series of early openness measures, that of making publicly available as much as possible of the factual and background information behind announced policy decisions. I am pleased to say this particular initiative is going well and an announcement is imminent and we soon will have that information in the public arena.

And finally, the next steps. As I mentioned we have taken very particular attention to the consultation period, we are working very closely with the Treasury officials in the preparation of instructions to enable parliamentary council to begin work on drafting an FOI bill and obviously there will be more details and precise consultation once that document and draft bill has been published. Now many of these activities are primarily for officials and work is going on in the background, but the ministerial policy has been set out very clearly

and everyone knows the direction in which we wish to go. I have no doubt that the ministerial sub-committee will want to refocus on that work after the period of consultation so there is still much to do and much to think about. The white paper is in all senses the start of the process rather than its outcome. I think we have been off to a good start but I am determined that we push this forward. We are getting radical demands from the Freedom of Information Campaign. I am delighted that we are being subject to rigorous examination. I think that is only right and proper.

Perhaps I could end up with this particular thought. It seems to me that we really are in a breakthrough of a culture change. Not only in giving people the right to apply for information but I want to see a government that is actually making information available without being asked so to do. It's going to be a slow process, we know that. Culture change, as I say, doesn't happen overnight. But that's why we have tried to move forward and with the Public Record Office we have already published, for example, the papers relating to the embryonic secret service in World War I. Later this year we hope to do the same with the security services in relation to World War II. Next year we are hoping perhaps to deal with the most interesting period - as a political historian - the inter war years. So we are trying to release information up and I am trying to encourage my colleagues also to release information.

We have the advantage that with the increasing use of information technology we are able to cope with this and that's why everything that my department has produced in terms of white papers, green papers, consultative documents have been published on the Internet. I think that is very, very important.

But perhaps I could end up with this thought. When history comes to be written, and people start looking back in twenty or thirty years time, and they look at this new Labour government of 1997, many of the things which are occupying our thoughts at this moment in time will have been forgotten. I mean that's the fascinating thing that when you look at the release of papers after thirty years from the PRO. That so much of what dominates political thinking, and indeed general thinking, is transient. But I happen to believe that one of the things that this new Labour government will be associated with was bringing forward a Freedom of Information Act which is going to change the face of British politics and public life for ever and I have been delighted to have been involved in that and delighted to have been able to put forward to the British people a very very radical white paper and I hope I'll carry on and develop that and see it through to its legislative final hurdle. Thank you very much.

Sheena McDonald

Dr Clark, thank you very much indeed. In particular, thank you, given your enthusiasm for new technology, for appearing in the old-fashioned flesh. Given that you have so done, it means that we are able to ask questions and make comments. Given that I reported the

previous enthusiasm for the majority of the white paper's proposals - and you have reported enthusiasm that you have received at the department - I think we will probably concentrate on doubts, queries and concerns. Can I please ask you to be concise in your points and questions and we will get through as many as possible.

Christopher Price, *Editor, Stakeholder Magazine*

I have been involved with the Freedom of Information for some time. I'd like to ask David Clark a question about something that has come up already. The lobbying industries in all democracies have are growing richer by the day. In fact democracy seems to breed lobbying. Earlier, before you came Minister, there was a reference to the Sunday paper headlines that the Country Landowners Association has persuaded the Government to abandon a commitment to the right to roam and questions were asked about that. But my question is this: Will all lobbying documents by outside organisations come under the Freedom of Information Act, and indeed will it go further than that, in terms of the Formula One thing we've been through, will ministerial meetings with lobbying organisations be open information?

Sheena McDonald

Thank you. Minister?

Dr David Clark

Chris, thanks very much. I have just got hold of, you don't mind if I plug it as well, *Stakeholder* and delighted with the opening lines. I must quote them back at you: "the sheer width and depth of the Freedom of Information white paper published just before Christmas is staggering". Thank you very much. You then actually raise a very interesting point about lobbying, and let me just say in parenthesis, I actually believe ironically that the Freedom of Information legislation will actually lead to a new industry here in Whitehall of actually obtaining information from government through freedom of information than repackaging it and selling it on to interested groups and making a profit out of it. I think one has got to acknowledge that and perhaps I should say there may be a down side to everything, but it's a price I think we have got to pay. On the lobby papers, as I see it, clearly that is background information and unless there are very very good reasons I would foresee that is the sort of information which government departments would actually release. I don't see how, I mean obviously it would have to go through the various specified interests, but there is no particular exemption or exclusion in that respect to background papers. When it comes to lobbying meetings with ministers, let me be very open, because I think it is very important that with the legislation you see what you get and you get what you see. And that's why, in a sense, we wanted to apply the simple harm test as opposed to the substantial harm test,

basically to ministerial meetings and therefore it's going to be more difficult to get information about ministerial meetings and also about advice to ministers. I want to be absolutely dead straight with you on this because I think governments do need, they can't operate completely in a goldfish bowl, and I actually do think - and I heard what Kevin said a little while ago - I still believe that government does need space in which to do business because I do take the view that open government is good government but the two are part of the same.

Anthony Barnett, *founding director, Charter 88*

I'd like to ask two very brief questions. One, developing from the point that Maurice made in his very helpful introductory remarks, where he said it wasn't quite clear whether the analysis of policy, policy analysis, was going to be covered under Freedom of Information and do you think that can be made explicit in the actual legislation, if that is going to be the case, which from what you are saying, I hope it will be and it seems to be?

And the second is a more general remark, a puzzle that I have which you may be able to help with. Like many people, when I read the actual white paper I was astounded at its quality and I think that the congratulations that you have been given on this are thoroughly deserved. It's not just what it purports to try and set out for the future legislation but the clarity with which it is written, the confidence with which it addresses the political culture and the broad radicalism of the approach that has been adopted and which you have repeated here today. Over the last two weeks the Lord Chancellor has said that this will give us, I quote "the most liberal Freedom of Information regime in the world - or one of them". Now you also very helpfully said at the beginning there is a difference between, one has to take notice of what the public perceive and what is the real case. And here it seems to me we have a real case of really excellent legislation. We also have a government with a legendary ability to project itself, indeed to project legislation when it doesn't really yet have a policy, and yet I think that in the broad public does not perceive the achievement of what you are proposing in this paper and there isn't a sense of the radical dynamic of the constitutional reforms which you are now putting into practice, and I wondered if you could explain why this should be the case?

Dr David Clark

Yes, let me deal with your first point. Can I just say that the clarity and a lot of the work, much credit must go to Charles Ramsden on the far right here and his team who have helped us draft this legislation. They have worked very hard and they have taken a lot of attacks in the press before the white paper was published and I do pay tribute to them for all their hard work, dedication and expertise in this field. And I know we all share that so you don't often get many plaudits Charles, but thanks very much for all that.

On the analysis and background papers, clearly we are talking about grey areas, and I mentioned the issue of progression. I hope that as we go on and I hope as mandarins and civil servants and politicians feel more confident, that they will feel more able to be more open because I think there is a lot of strength in the New Zealand argument that as they have had to publish more information, they have actually been more thoughtful on occasions about the precise nature of advice that they have given. So I think there is a strength in that and I see a progressive point and I think the grey area I hope will just become freer.

On your general view about public perception, well I think the truth is that ironically, although this piece of legislation will probably affect people's lives far more than they imagine, I got to say for the ordinary citizen of South Shields struggling to find a job, a pensioner struggling to wonder how they are going to keep warm, for a family whose grandmother or daughter is in hospital, that those are the issues which dominate political thinking in the real world. I don't take any view on the fact that this isn't a high profile issue. I think all of us involved in it, and especially you who have been campaigning for so long, have got to appreciate that people will not notice what you have actually been doing. But we have got the reward in knowing that when we succeed in achieving what we set out to do, we will have improved the lot of many ordinary citizens in this country.

Sheena McDonald

Thank you. Now where was the hand over here? Mr Worcester, was it? Yes on you go.

Robert Worcester

Thank you. I am wearing two hats, one is Chairman of MORI and the other one is a former Senior Vice President of the International Social Science Council and Chairman of the State of Management Policy Committee. I am worried Minister, about one particular aspect, but let me associate myself with Anthony Barnett earlier, that it's a lucid and extremely well written paper, certainly well intended but I think there is one basic problem with it. I would like to describe it as a coach and horses clause that's written in to it, which provides that data - information - that is anticipated for publication, can be an excuse for not responding and that is without limitation. I have had experience of delays of two and more years past their sell by date, when data that would have been subject to, and of interest to, a wide community here in Britain, has been delayed because it was quote, 'intended for publication'. The civil service delayed and delayed and delayed until the issue had calmed down and then it was published in an obscure academic journal and never heard from again. It seems to me that this is one point where the government should be persuaded that the otherwise admirable white paper could be improved and indeed strengthened. Thank you.

Dr David Clark

Well thanks Bob, and thanks for your general welcome. You have raised a very serious point which we will take on board, and indeed as you know, we have partly taken on board. We are conscious that often it takes a long time before even official statistics actually appear. For example I think immediately of the excellent work of the household survey which appears every year, but of course it is a little out of date. As you know we announced only last week, that we are going to establish a people's panel of 5,000 people, which will be looking not at opinions but at the public's reaction to public services, and the key thing about that document is we will be able to get the information out very quickly, certainly within a week on occasions, and that we are committed to publish everything that particular panel produces. That's the first thing. The second thing is I think there is a difficulty, not in the point that you raise, but there is a point here, that for example I am conscious that as a Minister of the Crown, I am also a Member of Parliament and ultimately responsible to parliament. And I think that unless one's careful - and I know this isn't what you are meaning but I want to state the point - unless you actually maintain that relationship one is in some difficulty. I had an application fairly recently under the Code, from another politician as it happened, who wanted to get some information that I was due to present to parliament. I felt it was right and proper to refuse that access to information because I felt parliament ought to hear first from the Minister who is responsible to parliament, and it shouldn't come out in the form of a press release to a member of another political party. So I think in the short term there are reasons why we need to keep that clause but in the longer term it is indefensible that this sort of line and this sort of experience which you say, and certainly I will be working, doing all I can, to make sure this sort of thing doesn't apply.

Sheena McDonald

It will in fact be a great degree be the measure of the legislation and the standard by which citizens judge the new culture that is proclaimed, whether this is addressed, will it not?

Dr David Clark

Yes, yes.

Sheena McDonald

Now I don't want to abuse your time but since there is so much interest, I'll take another couple of quick points, the woman at the back and the gentleman in the middle, yes?

Suzi Leather, *Chair of a community health trust*

I chair a community health trust in the south west of England which runs cottage hospitals and has particular responsibilities for mental health and learning disabilities. Minister, I was very pleased to see the inclusion of the National Health Service in the white paper but could you outline for me briefly what difference you think this will make to patients and particularly to people wishing to be patients?

Dr David Clark

Yes, we obviously are very much aware that there is an access to information issue in the National Health Service. We have actually spoken to the people involved and they have been very supportive. I suspect that what we are going to find when the legislation comes in, that there will be greater publicity about people's rights and there will greater use of the present system that is already in position within the NHS. As regards a health trust, as you know Frank Dobson has put forward certain proposals about the trusts and I think that they will also open up the work of the trusts. On any specific points that you may have, if you want to let us have them, obviously you are somebody involved with a trust, we would be very keen to look at this, to see how they apply and what suggestions you have in practice, because we have tended, most of our knowledge tends to be about central government and central organisations and we are conscious that both the National Health Service, and indeed local authorities have actually been better than central government in openness over the years but it's not something we know a great deal about and certainly I would be very keen to hear of any suggestions or ideas that you have got.

Sheena McDonald

Thank you. Sir?

Toby Mendel, *Article 19*

All of the speakers have stressed the importance of changing the culture of secrecy in government for the effectivity of this Act. In my experience, and that includes not only my work with Article 19, but also a stint in the Canadian Civil Service, a key element in changing this culture is giving individuals not only the right, but also the effective power, to require government to disclose information. Now we feel that the white paper goes a considerable way towards doing that but there are certain relatively minor changes that might enhance it in this respect and I'd like to address just one here and that is the question of costs. The experience in other jurisdictions shows that costs will never recoup more than a very small percentage of the overall cost of providing access to information. It would therefore be a great shame if costs deterred this cultural change that we are talking about. We would like

to see the public interest waiver move from being within the discretion of the Information Commissioner to being a requirement on the government body to whom the request is made. That is to say the government body should be required to waive costs where there was a public interest in that. We would also like to see the test strengthened substantially. There should be a presumption that where the information is not for private or commercial reasons, that it was in the public interest, and that would be particularly the case where the goal of seeking the information was for publication. So we would like to see those two changes made to the costing regime and I think that would effectively empower citizens a lot more.

Dr David Clark

Yes, thanks very much for those suggestions and I know you will have registered the point that I did actually single out the gateways, which includes costs as well, and also the issue of charging, as issues which we regard as particularly 'green'. I accept your basic - two premises really - that one should be as open as possible, that's the first thing, and secondly that departments will only recoup a very small percentage of their costs in actual charges. So those are the particular issues. And I am sharing some thoughts about this here. I mean as you know there is a £10 application fee to use the Data Protection Act and quite often there will be two ways to get information, either through the Data Protection Act or through the Freedom of Information Act for the same bits of information, and therefore we did feel the £10 charge, bringing both systems in parallel made a lot of sense in terms of operating. But I have heard very much your other point about costs. I mean there is just the other thing that perhaps one's got to look at, I mean when we were in Canada - and you mentioned your experience in the Canadian civil service - we were told that there can be problems sometimes with very small departments and they cited as an example, where a disgruntled ex-employee filed so many applications, he literally did grind this small department to a halt. All they were doing all the time was actually looking for information. So there is a slight problem with vexatious requests, but in this case it did actually make it easier for the guy to mess up the system - but that isn't really our thinking, it was just peripheral to our thinking. But it is one of the areas which we do say is very much 'green' in our white paper.

Sheena McDonald

Thank you. Charles, you wanted to add something?

Charles Ramsden

Thank you. Yes, I mean in 2.32 of the white paper, although it is not explicit about who should be the judge of where this aspect of public interest applies, it does say that charging schemes would not apply to information which a public authority is required, under the Act itself, to make publicly available. And we tried to indicate elsewhere in that chapter, with

reasonable simplicity, but working from the basis of the Code of Practice, what sort of areas those would be. Beyond that, there has been a certain amount of concern, and this is reflected in the way that the public interest, there is an attempt to define the public interest within the white paper, that if you say to a public authority, a body of some description lying - as it might well do - well outside central government, "Here it is your request for information. Here's a piece of legislation which may or not be relatively difficult to define or to read your way through and you've got to take public interest decisions, is what you are doing in the public interest or not?" That is a very difficult decision for many public authorities to suddenly be confronted with. Inevitably, confronted with the need to make such a decision, the normal and understandable attitude will be one of caution. We have tried, as far as we can, to make the tests of public interest and the determinance of public interest that have been set out, that Ministers have presented as government policy in the white paper, an objective one rather than a subjective one.

Sheena McDonald

Thank you. A final quickie? Yes?

Toby Mendel, *Article 19*

Can I just respond very quickly on the public interest ...

Sheena McDonald

No, I'm sorry we don't have time.

Dr David Clark

Good try!

William Heath, *Kable*

We are specialists in how government use information and know not much about freedom of information, but I think Sheila McKechnie's starting point is the right one, which is that one doesn't like being patronised, and that is why we should have freedom of information. What I wonder is how you are going to change this culture in say, half a million civil servants, who are used to that sort of culture. I think the general apathy of the public and that fact that it is quite a boring subject for them is significant, and I don't think you can rely on lots of requests and lots of policemen ensuring the laws are adhered to. I really think Dr Clark's

point about an emerging market for this sort of activity is crucial. I think where there is a market and people want to get that information for professional reasons and make it really attractive, I think that is the crucial process one will need to understand better to see where this is going to go, and you can't legislate for that, you just have to really see how it evolves.

Sheena McDonald

And perhaps, a kind of high profile campaign that Kevin talked about, and indeed operates on a personal basis.

Dr David Clark

Yes, I take the point. When I referred to an industry growing-up, and as you know I know the business you are in and you provide very much public service in the sense that there are organisations out there who need to know about government legislation and are too busy to find out, and it's a very efficient and effective way of a company's time to go to a specialist to ask, "Look, get the information for us" and I think that's quite a legitimate business. Having said that I am not sure if the government is going to subsidise the preparation of that information to you and that's really coming back to the balance I made before about charging for the ordinary citizen actually trying to obtain rights about himself or herself and their activities, and organisations who quite simply - and I make no grumble about it - who are adding value to that and actually not only to their own profits but also to society as a whole. I also take your view, and I know you are very committed to this, that we need to be using, and if we start looking through to the next century and the next millennium, we will be using IT and electronic delivery more and more, and that's in a sense why I emphasise so much the point that so many of the responses have been by means of E-mail etc. etc.

Sheena McDonald

Thank you very much. I am aware of the austere time you have been given for lunch and I have truncated it even further so let me stop what has been a very interesting morning there and invite you to thank the minister and Kevin Murphy, Sheila McKechnie; Charles Ramsden of course you will hear again after lunch. And also to say that since the consultation period does run until the end of February, Minister, I think that given the animation here you may expect another 200 responses whether electronically or otherwise within that time. But thank you very much indeed. Lunch is downstairs where you registered and we will try to start as close to kick off time for the afternoon at 1.30 as possible. See you soon.

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Sheena McDonald

We have got four speakers all together before a coffee break. I hope time for questions and comments in the course of the next couple of hours and then we will hear from Charles Ramsden more formally and Jonathan Baume from the Association of First Division Civil Servants. But we are going to kick off with someone who has come a long way to be here. Michael Tankersley, who is Senior Staff Attorney with Ralph Nader's Public Citizen Litigation Group, which is based in Washington DC, about which you might like to say something. I don't know if everybody here is familiar with that. He also teaches, he writes widely and started as a physicist I think, didn't you? Yes, anyway on the laws of things natural and unnatural and what you can tell us about what we are about to receive and achieve, Michael Tankersley.

Lessons from US Experience

Michael Tankersley
Senior Staff Attorney, Public Citizen Litigation Group

Thank you. I'd like to start by just thanking the Campaign for being such excellent hosts and for inviting me to participate in this conference. This is really a very exciting opportunity for me to be an observer and to share in this enterprise with you. I come from an organisation called Public Citizen, that really depends upon the American freedom of information laws for a great deal of the work that it does, and it is essential to our work. We depend upon it to obtain information from the government that we then use to petition the government for change in various laws, we use it to hold public officials accountable for failing to implement various laws or failing to carry out legal duties, and we also use it to educate the public about health issues, about safety issues, about issues concerning campaign finance and lobbying and precisely how the government works. At the same time we also a great deal of work enforcing the freedom of information law. We have a unit which does a great deal of work litigating disputes with federal agencies about what is or is not exempt under the American freedom of information laws. We do this on behalf of our own organisation as well as assisting individuals and other organisations who are seeking to use the law to gain access to information that is essential to their work, or just information that they want to obtain for historical research, for research as journalists, or for other reasons.

In that respect in watching this conference and hearing the discussion this morning, I have two initial reactions. One is one of great excitement. It is kind of a utopian exercise to think about, from our perspective, how we might do things if we are able to start with a clean sheet of paper and start over and learn from our experiences in terms of what was wrong and how we would write it better. It is not an enterprise we really get to undertake in the United States and I am very impressed with both the courage and the boldness of the initiative that the Government has put forward here. The other aspect of the reaction I have from listening to the discussion and the debate, is a sense of how much we in the United States really take our freedom of information laws for granted. It has been thirty years since the law was enacted and it has gotten to be, on our part, something of a canon that we accept without really appreciating what a value right it is and what a enormous contribution it makes to our being able to obtain information and hold people accountable for their decisions and really understand what the government is up to, what private industry is up to, and how the policy debates are shaped by the fact that information is available under these statutes and moreover the rights that are set forth in those statutes are enforceable against the government in a very strongly stated way.

Having said all that, I can then turn to the topic that I have been asked to speak on, but the first thing I have to say is I cannot cover the topic I have been asked to speak on. The advertised topic here is 'Lessons from the US experience' and as I mentioned there has been thirty years of disputes and development under the American freedom of information law and

I cannot cover that waterfront in the time that is allotted here. What I will do though, is try to address two specific areas - the first is one that I kind of regard as a success of the American experience. It is not so much in the sense that we knew what we were doing, but I think over time it has proven that we have been able to figure out what to do about this particular area, and some wise decisions have been made and some fortunate consequences have come about, so that we have a working system that I believe works well with respect to that issue. And then I am going to turn to an area that I think we really have failed and are really struggling to try to come up with solutions for, to communicate those lessons to you as well.

The success area I'd like to speak about is the protection of confidential business information. I would say that for about the first half of our experience with the freedom of information law this was an area of great concern. Business believed it was an area where the freedom of information act was really opening up their information to what was sometimes pejoratively called industrial espionage, where competitors would be able to get confidential information about their business activities in a way that would be harmful to the competitive atmosphere and hurt protected business interests. I think there have been two lessons from our experience with this particular area of the American law. The first being that it is very important for the public interests served the freedom of information laws that the exemption for this type of information be limited to information that would cause substantial harm to legitimate competitive interests. And the second lesson being that the most dire business predictions about the consequences of the exemption turned out to be unfounded and were successfully addressed through the implementation of the Act by making various adjustments that I am going to discuss.

First let me briefly summarise what the American Act does, because it is very similar to what has been proposed by the Government here. The United States freedom of information law exempts trade secrets and confidential commercial or financial information if it has been obtained by a person and it can be shown that the information is confidential or privileged. The application of this particular statute in the US system is carried out in the first instance by agencies, and if you are a requester who has been denied by an agency, there is an internal appeal within the agency where higher agency official is asked to look at the issue. Beyond that there is a direct appeal to the court system, and it is primarily through the court system that the interpretation of this exemption and other exemptions under the American statute has been articulated. What the courts have said over the last 30 years with respect to this is the following. First, that only private submissions are protected under the American law. The courts have held that information generated by the government is not obtained from a person within the meaning of the Act and therefore it is not protected. Commercial information that is generated by the government might be protected under other exemptions but it is not protected under this one. Secondly, they have imposed a substantial harm test. The test for confidentiality is an objective one, not a subjective one. The fact that the information is held confidential by a business and is not routinely disclosed to the public is a factor to be considered, but it's not dispositive. What is dispositive is that in order to be protected the information must be such that the business and the government can show that if it's disclosed

it's likely to cause substantial harm to the competitive position of the person or business that submitted it.

The exemption also incorporates protection of the governmental interest in obtaining information from private businesses. If an agency can demonstrate that the information at issue was provided voluntarily and that the submitting entities would not provide as much or as good information in the future, if they knew it was going to be disclosed, that is also a basis for exempting the information from public disclosure. Finally, agency promises of confidentiality are not enforceable. The fact that an agency - or an agency individual - has promised that the information will be treated confidential in order to obtain it, is a factor that will be considered in deciding whether or not it is legitimate to give it protection under the Act but it's not a dispositive determination.

The first lesson, as I mentioned, that we have learned in the application of this is how important it is to limit the scope of this exemption. For this reason I think the most dramatic instances of examples where freedom of information law has been extremely valuable to the public, because it has led to the disclosure of information concerning public health and safety or financial misconduct, almost always involved information that might be exempt if there was a broad exemption for commercial information. Let me just give a few examples of concrete things that have been obtained and become available under the American Act. Safety and efficacy data on medical devices is generally available under the American Freedom of Information Act, and let me give an example. You may be familiar with the fact that there has been a dispute in the United States about the safety of silicone breast implants. The government, at the behest of a private manufacturer, withheld data on the safety and efficacy of these devices that was up to twenty years old on the ground that the information that was being withheld ought to be protected as confidential commercial information. Upon reviewing that and applying the relevant standards the court found that position could not be upheld and ordered the information released, so it could become part of the public debate on this issue. Another area, in effect of drugs. The drug regulatory authorities in the United States collect a great deal of information on the safety and efficacy of drugs, and the Public Citizen Health Research Group using the American FOIA was able to obtain a list of 607 prescription drugs that although still on the market, had not been proven effective. This information provided the basis for a book, entitled 'Pills That Don't Work' and for petitioning the government for laws that would deny insurance payments for compensation for these drugs.

Another example - results of government tests comparing the safety of various airbags. You may be aware that this is a matter of some dispute in the United States and it turned out the American regulatory authorities had done tests on the comparative safety of various types of airbag design. They had video tapes and test results but at the behest of the auto manufacturers were withholding the identification information that would tell you which airbags performed well and which did not. When challenged in court, the government finally conceded that this is information that, under the substantial harm test, the government was obligated to release to the public and make available. Information on the safety of nuclear

power plants and the hazards that are involved. This is an area that is worldwide subject to great public debate and concern, and the information that has greatly informed this debate in the United States has come, to a great extent, from government reports on inspections, fines that were imposed and reports on safety violations made available under the American freedom of information law over protests by business that this information ought to be protected as confidential commercial information.

I would suggest that the US experience in this area shows that the vigorous protection of commercial information by business is often motivated by concerns other than the legitimate competitive aspects of protecting that information. Sometimes the zeal with which business protects its information is motivated, and keeps it confidential - the fact that it has been kept from the public - is motivated not so much by a concern that it will become available to competitors but by a concern that it will reveal corporate misconduct or a desire to just keep details of a particular problem from the public because of an awareness that the detailed information may help fuel the public debate in a way that is not helpful to the industry.

In this regard, let me draw on two examples of particular disputes that we have been involved with. There was an instance where the Westinghouse Corporation was accused of being engaged in giving improper bribes and gratuities to the Republic of the Philippines and officials under the Marcos government in order to obtain concessions to build a nuclear power plant there. We sought to have that information, which had been filed in court papers, unsealed and made available to the public and the Westinghouse Corporation vigorously maintained that they had maintained the confidence of that information and the court ought to protect it as well, keeping it from the public. They maintained this position so vigorously that they took us all the way up to the United States Supreme Court through several court's decisions against their position before they finally relented and agreed to have the information released. When the information was released, what it revealed was that there wasn't anything competitively sensitive, but there was a great deal of information that was somewhat embarrassing to officials of the corporation.

In another example, we sought to have information on a drug called Accutane - which is known to cause birth defects if given to women of child bearing age - released, so that the public could evaluate the position that the company had taken in getting this particular drug approved by the American officials. Again the company maintained that this should be protected as confidential commercial information and took us all the way up through the courts system to the highest court that they could go to before finally relenting. When the information came out it turned out that there wasn't anything to the disclosure in terms of information that a competitor could use, but there was information that gave details about the company's own awareness of the harms with respect to this drug and allowed that to be compared with what they had revealed to the American regulatory authorities, which indicated that it was less severe than the company was aware of.

All of which goes to show, I submit, that the subjective confidentiality decisions made by business may be motivated by things that are not interests that the law ought to protect in this

area. The records may show misfeasance or malfeasance or could be used to fuel public debate and for this reason the interests in confidentiality that are protected by the law ought to be limited to concerns about substantial harm to legitimate competitive interests that may result by virtue of the disclosure.

Beyond that, let me go on to the second lesson that is pointed up in this particular area, which is that the most dire of the predictions and concerns of the business community about this particular exemption have been worked out in practice as it has been implemented in the American law. First off, business was very concerned about agency discretion to release, in the name of the public interest, business information that might have a competitive disadvantage, and should be withheld. There was a concern that the agencies would let the presence of a 'public interest override' override legitimate business concerns and result in willy-nilly disclosure of information that ought to be withheld. In practice that has been shown not to be the case. The studies that have been performed, trying to identify how this is applied in practice in the various agencies, have found that the civil servants in the American agencies are quite responsible in the way they apply this, they are quite careful about it, and they strive towards making accurate decisions in this area. They are not indifferent to the concerns of business and it is only in the very rare instance when someone can point to an inadvertent disclosure that should not have taken place under the law.

A second area of concern that was quite vigorously presented by business was the concern that they would not have notice about disclosure of confidential information in advance, and in particular the current concern here was that if agency officials by themselves were making these determinations, they might not be sufficiently sensitive to why business would need to withhold the information and what the competitive concerns were. So they were very concerned that have advance notice when a request was submitted for information they had submitted and be able to make their case to the civil servants as to why the information ought to be withheld. The law in the United States did not - and still does not - provide in the statutory law for any kind of advance notice provision, but in point of fact the agencies most responsible for this information from very early on adopted a practice of giving advance notice, allowing the businesses to have their say, to make their case and then making decisions about whether or not the information ought to be withheld. In 1987 this advance notice requirement was made uniform across the government by way of an executive order which is legally binding agencies but of a different order of magnitude than a statute because it is imposed unilaterally by the president. But that has largely solved the problem of making sure that business are able to present their case with respect to the protection of business information.

A third concern of industry was that the restatement of privately provided information in government documents be protected under the law and the courts have adopted, through the interpretation of the statute, to make sure that when that occurs that information is protected just as if it was confidential business information that appeared in a document that was authored by the business or submitter.

Finally, businesses have also been very concerned about the predictability of decisions under this particular statute. The fact that the standard for deciding when disclosure would occur seemed to be somewhat vague and general gave them concern that they would not be able to tell in advance what type of information would be subject to disclosure and which types of information would not. This problem has been largely solved by virtue of the fact that over the years, through court decisions and agency regulations and even supplementary statutes, there have been identified categories of information that ought to be protected and categories that are not. Information that has been publicly disseminated in the past or is shared among industries in a particular business is generally not protected. On the other hand, it has become consistently recognised that under this particular exemption certain categories such as labour information, information on bargaining strategy or wage negotiations, payroll and wage data, information on profits, information on loans, information on consumer names are all going to be protected as part of a recognised category of business information, and when that type of information is submitted to the government businesses can do so in confidence that it is not going to be subject to any kind of general release under the freedom of information law. At the same time agencies have adopted regulations very clearly setting forth the types of information they regard as protected and the types that they regard as not protected. These regulations, or statements of policy, help clarify the situation for business as well as the application of the Act in practice.

In conclusion, what I think the American experience with this particular area of the law has shown is that the dire consequences about the effect of the freedom of information law on either the disclosure of confidential information, or on the ability of government to obtain information, has been largely solved by the implementation of the Act and a lot of the concerns were based on rhetoric and perception rather than the reality of how the law worked in practice.

Having addressed that let me turn to an area where I think it is conceded that the American law has been something of a failure in the way it has been implemented and has identified a problem which we need to work out and do a better job of in practice. And that is in developing an efficient mechanism for making information available. Under the American Freedom of Information Law the greatest problem over the past thirty years has been backlogs and delays in making information available. At the major agencies for example, the American State department or the Federal Bureau of Investigation which hold a large number of records which are subject to a great number of requests, although the law says that these records are to be made available promptly and for years said that the records were to be made available within 10 working days, in fact it can take years just to get a response to a request because of the backlogs. A government report that was recently issued summarised the situation like this: "Despite the intention of the Freedom of Information Act the public's access to government information is inefficient, ineffective and costly. Information is too difficult, expensive and time consuming to find and obtain. The records management system is too paper and labour-intensive and its decentralisation discourages public access. The public has little information about the FOIA process and the information provided is not written in plain English. Some employees do not view the freedom of information as an

essential part of their agency's mission." The American government has once again acted to try to change the law to address some of these problems and I cannot tell whether these proposed solutions will be effective in practice because they are to a large extent yet to be implemented but let me share with you what our legislature has come up with as an attempted way to address this problem.

First, they passed a new law which requires agencies to make records that are repeatedly requested available to the public without a request and to do so by expanding the depositories for access to records that are currently provided. Prior to 1996 there was a limited obligation for agencies to make records available without them actually being requested and that has now been expanded so that if an agency has reason to believe that records will be requested several times, or in fact there are several requests, they must make those records available at a repository that anyone can come into and examine the records. In addition for records created after 1996 that fall into this category the records must be made available publicly by electronic means so that people using the Internet or a bulletin board service or some other means can dial in and without ever having to submit a request obtain access to these records.

Secondly, that government has required that agencies compile and publish for the use of the public, indexes concerning their holdings. These indexes must include a list of the requests for documents that they have had repeated requests for, and in addition descriptions of their major information systems, so that an individual who is trying to discern what agencies may have information about a particular topic and how those records might be stored, can consult those sources of information and draft a more informed request for information, targeted towards the particular agencies that have it. This is of benefit to both the agencies and the public because it removes the problem of agencies having to deal with requests that are broadly framed or from individuals who do not understand how the agency record system is organised.

Finally, the law imposes a new obligation to expedite requests that fall into particular categories. Some requests from journalists seeking to obtain information about an urgent story must be expedited by the agency and put ahead of other requests. Requests having to do with safety concerns that pose an imminent threat to life or safety have to be dealt with expeditiously, as well as some requests that pose problems for a person's due process rights - and the disclosure is necessary in order to protect those rights - have to be placed ahead of the queue, so that they are responded to more quickly. The essential aspect of all these reforms is an attempt to initiate a kind of paradigm shift in the American Freedom of Information Act whereby the dominant mode is not of people submitting requests and having to wait for a response, but imposing an obligation on agencies to anticipate what types of information will be requested and put it out there so that it is available immediately to people without having to go through that process. In addition it is an attempt to understand that the freedom of information law is really just a part of a larger government concern with information management and to make sure that government takes advantage of new and more advanced technologies to make that information management more effective and more efficient. I hope those are lessons that will be useful to you in your consultations and deliberations on this particular proposal.

Sheena McDonald

Thank you very much indeed. That was very clear, very interesting and I'd be interested to hear Charles and Maurice's responses to that, but let's take responses first from the floor. There is a hand there, there, one there. Let's start with those three, yes? And then you Sir yes?

Mr Shepherd

In the late eighties and early nineties in the first post communist elections in Eastern Europe and Russia, President Bush and Douglas Hurd both said that the West would not recognise the resulting administrations or allow them to negotiate low interest loans from the West unless reasonable access to the media was granted to 'democratic political parties'. I believe the late Robert Maxwell donated some newsprint and I believe an American newspaper proprietor donated some money to the Foreign Office to be allocated to whatever are 'democratic political parties'. So far as I have been able to ascertain there are records that show that Maxwell bought into the East European media but not records of the allocation of the newsprint and/or money to the media. Since Maxwell met many victims, I wonder whether the MGM liquidator could use a breach of trust action to recover assets squandered by the late Mr Maxwell. In the case of - if I can ask one more? Well, it is a British example of abuse of trust, I don't know, and an American apparently investing in the Foreign Office for money to be used in pursuance of a trust, neither of which was apparently used for the trust purposes.

Sheena McDonald

Can you say anything about that?

Michael Tankersley

No, I am not familiar with that case and I don't really see where it would have implications under the freedom of information law.

Sheena McDonald

I'm sorry if that disappoints you. I don't know if anybody else? Not on this platform. Where was the hand behind you? Yes?

Mark Perkins, *Overseas Development Institute, and Library Association Councillor*

I have got one single question really. You mentioned the example of Westinghouse Corporation and the Marcos regime, and the basic corruption going on there - although corruption may be a word you do not want to use. In the US, that actually came out under the commercial confidentiality clause. In the UK proposed legislation, there seems to be a restriction for material that would damage international relations or endanger international relations. Do you think that would actually prevent things like this coming out under a UK Freedom of Information Act?

Michael Tankersley

I don't want to speak to that question. What I can speak to is how it would be handled under the US law, which is that information about misconduct of a private corporation in international affairs would not be protected. The way that it is handled under the US law is somewhat different than the proposal, in that for information on international relations to be protected, it must be covered by and Order on classified information which is usually limited to official communication of government entities or agents or officials, the disclosure of which would cause some kind of concrete harm to international affairs. Information like what I described about Westinghouse would not be covered by that and it would not be an area where anyone would be free to assert that kind of exemption under the American law.

Sheena McDonald

Thank you. Prash?

Prash Naik, *Channel Four Television*

Good afternoon. I'd like to ask Michael two very quick points. Firstly, are public service broadcasters covered under American legislation? And if so, how? And secondly, the question of attorney/client privilege. To what extent is that exempt under American legislation?

Michael Tankersley

Second one first because that is the easiest. Attorney/client privileged information is exempt under the American legislation. With respect to public service broadcasters, whether or not they are covered has to do with the extent to which they are a government controlled corporation. In any event, virtually all broadcasters are subject to very extensive regulation by the Federal Communications Commission and submissions that those broadcasters make

to the US regulatory authorities are covered by the American Freedom of Information Act so that a great deal of information about the programming, the financial arrangements and other aspects of broadcasters become subject to disclosure by virtue of that aspect of it.

Sheena McDonald

Thank you. Yes?

Charles Medawar, *Social Audit Limited*

I was glad Michael touched on commercial confidentiality. First of all because it wasn't mentioned this morning, secondly because my instincts are that it is one of the weaker parts of the white paper for reasons I have elaborated in evidence to the Cabinet Office. I wanted to ask you specifically about the exemption that is related to a disclosure which might inhibit the flow of information in future, because the British medicines control system is organised very much more on a voluntary basis than is the American system, where I think that by our standards you are over regulated, over codified. So is the implication that that test, if used, is going to lead to increasing regulation in this country? If not, how are we going to cope with it? I might say this is an explicit part of the code of practice on disclosure which exists at the moment, only an implicit part of the white paper proposals. Nevertheless I can see it being used as a suggested exemption in future and I think it spells trouble. Can you elaborate on that please?

Michael Tankersley

Yes. In order to explain this I have to go into some detail because the American law currently is something of two minds with respect to this. Information comes to the government either through the compulsory process, that businesses are required to submit it, sometimes it comes through a process whereby information has to be submitted if the business wants a government contract or something like that. For both of those kinds of information the test under American law with respect to this particular interest is if the government can show that it will not be able to obtain the same kind of information in the future, or that the quality of the information would diminish, or having to obtain it if the businesses knew it was going to be disclosed would in some other way impair the governmental programme, it may be protected under this exemption. With respect to information that is submitted completely voluntarily, it used to be until four years ago that the accepted test was that with respect to that information the agency had to show that disclosure would work some impairment in its ability to obtain the information. Four years ago one of the courts in the US adopted a different test under which if it is voluntarily submitted information then it is sufficient if the business can show that the information is traditionally treated as confidential and that they do not disclose it to the public. Under those

circumstances the information may be withheld without having to enquire into whether or not the government could obtain the information independently, or whether or not there would be an impairment. So at the present time there is actually a division in authority within the US law as to which test governs depending on which court system is following which type of decision. What has occurred with respect to this though is that the American government - and the Justice Department in the US is the one principally responsible for advising agencies how to interpret the law - has tried to keep that exception narrow so that it only arises in instances where there is truly a voluntary submission of the information. And under those circumstances they will advise agencies that the information should be withheld if the business itself maintains the confidentiality of that information.

Sheena McDonald

Thank you. Maurice Frankel, you wanted to add something?

Maurice Frankel

Yes, I just wanted to comment quickly on those three points there. The first one raises some questions about overseas investments and misconduct. As I read it, the public interest test in the white paper, the essence of any public interest test would be where there is misconduct the protection given by an exemption is likely to be removed - or must certainly be balanced against the misconduct. That would be the essence of any public interest test.

Second is the question asked about legal professional privilege. The American situation, as I understand it, is they have an absolute protection for legal professional privilege but they have a directive from the Attorney General saying that in practice they should apply a harm test; would the disclosure of the advice in fact cause harm, even though it is exempt? And that is what we would hope to see under the white paper, because at the moment we have effectively all legal advice excluded from the Act altogether, which I think is wrong. I think that when the government receives legal advice about a change in practice required by a new directive or new judgement we ought to be entitled to see it normally.

And the final thing is the voluntary flow of information. This is where I hope the substantial harm test will help us because we cannot, I don't think, simply have a test where if it is given voluntarily by a third party to the government, the expectation is it will be protected. There must be some showing that the disclosure of that will cause substantial harm to the government otherwise, the point that I made earlier, that we would have all this behind the scenes lobbying would be unchallenged because third parties would simply say 'All that lobbying was information given in confidence'. Well, what they are trying to do is to secure a benefit for themselves in terms of a change in the legislation likely to benefit them at the expense of some other interest. That process ought to be transparent.

Sheena McDonald

I'll take another point from the floor. Gentleman at the front, yes?

Harold Hillman, *Freedom to Care*

I'd like to ask about the American experience. In the last few years there have been major misdemeanours and illegal acts by this government and no doubt if a solid freedom of information act were in force in this country there will be even more. What experience do you have in the consequences of exposing illegal acts, very often, by the government? That is to say the government is not likely to take legal action when it has been responsible for the misdemeanours. How has the Freedom of Information Act helped to bring the government agencies or major misdemeanours to court?

Michael Tankersley

I would say that in a large respect it has not been as successful in bringing them to court but it has been successful in making them accountable and exposing decisions that have been made. The most dramatic examples have to do with misconduct by military officials or there has been in recent years a large number of disclosures about experimentation that was performed for radiation experiments or other purposes, a great deal of which the initial disclosure came about by virtue of requests under the Freedom of Information Act that were then enforced through the courts and the information came to be disclosed. What usually occurs in those instances is not so much enforcement in the courts but public investigations and changes in the law to address those in the future. It is also the case that sometimes this does lead to exposures that wind up in the court systems. One of the major uses for the Freedom of Information Act in terms of accountability is disclosure of misconduct in people who are receiving - by businesses or people - who are receiving government benefits in the form of insurance payments, government contracts, or other misconduct that occurs there whereby there is inappropriate compensation or fraudulent conduct and the evidence of that ultimately comes to be revealed by virtue of an investigative reporter or someone else pursuing that under the Freedom of Information Act.

Sheena McDonald

Thank you. I'll take one more, yes?

Norman Marsh, *former Law Commissioner*

I am an author of a book on the subject that we are talking about. The Freedom of

Information Campaign has congratulated the Government on the way it has dealt with appeals from the information commissioner, as I understand it. But if what is going to be created is in effect a sort of, a new basic civic right to information in the possession of the Government are we not coming very near to disregarding Article 6 of the European Convention on Human Rights and shouldn't we be considering how far the proposals of the Government in this white paper deal satisfactorily with the question of appeals? We are dealing with a very basic right, that is one of the great points about the whole campaign, that this is a new right which belongs to everybody. Well there is a general principle, not only in the Human Rights Convention, that has long recognised that with basic rights there must be a second opinion and particularly in such a delicate question as the balance which is involved in this whole operation. So, shouldn't we be considering the position of appeals in this procedure?

Sheena McDonald

I think Maurice, maybe that's more one for you.

Maurice Frankel

Norman, are you suggesting - Article 6 is the one that deals with the right to a fair trial, fair procedure and natural justice and so on. Is that right? Due process .....

Norman Marsh

Sorry, on the civil side it requires that there is a, by implication, there must be a right of appeal from... one person can't decide a basic right, there must be a second opinion.

Maurice Frankel

Well, the white paper proposes that the information Commissioner's decision should be subject to appeal by judicial review.

Norman Marsh

Well I didn't go into that because I didn't want to make the question too long. It is of course not the same thing at all as a right of appeal. I have no doubt, and if the Campaign for Freedom of Information thinks this is a rather good thing to limit litigation then I think they will have to think again because I think that barristers will leap at the possibility of demonstrating that they could squeeze out of the application for judicial review something

that in effect is a right of appeal. So that in fact it would add to litigation or complicate litigation rather than simplify it.

Sheena McDonald

Can I thank you for raising the point just now. There is some animation on my left in response to the point you have raised. So maybe there will be something from the platform on that and we can pick up on that later? For the moment then, Michael Tankersley, I'd like to say thank you because I would like to move on to Richard Thomas who is Clifford Chance's Public Policy Group's Director, because what you are going to say is I think associated with what Michael has been talking about in terms of confidential business information and we might have more questions and you might take some issue with what he said or continue that dialogue, so Richard Thomas over to you for a business perspective?

A Business Perspective

Richard Thomas
Director, Public Policy Group, Clifford Chance

Well, thank you very much, Madam Chair. I fear that the title in the programme is probably not transparent, inaccurate and certainly a breach of any legislation because what I'm going to do in fact is draw attention to the paper which I gave at the University of Cambridge Conference on constitutional reform two weeks ago which is in your packs and just bring some of the issues in that paper to life. You will see from that I have had a slightly unusual career myself and I thought what I would do is just reflect on the white paper from a number of different perspectives. I worked for the Citizens Advice Bureau as their lawyer, National Consumer Council, Office of Fair Trading and now at Clifford Chance so I was going to give you four perspectives, concluding with the business perspective.

At the CAB I was in fact the first full-time lawyer in the Citizens Advice Bureau Service and the people we were dealing with there, I would say perhaps the complexity of the problems was matched only by their lack of resources. I was there in the mid 70's and my experience in those days was that really the government at all levels was really part of another planet as far as most of the clients whom we saw in those days were concerned. It was very much the little man against the monolithic large state. Their dealings with the organs of government tended to be for the most part somewhat nasty, brutish and rarely short, whether that was dealing with housing departments, social security, social services, immigration or whatever. Too much there was a tendency to see the official side as remote, patronising, bewildering.

The idea that officials were accountable to the citizens of the Citizens Advice Bureau would have been treated as something of a joke and I think equally, that the citizens had a right to see information about themselves, or relevant to their lives would have been seen as somewhat incredulous. Now things have improved I think, perhaps the citizens charter has had some beneficial results, but I wanted to start off by making a very wholehearted welcome in principle to the white paper in the name perhaps of de-mystification, particularly improved access to personal files and information about matters affecting people's daily lives. I think above all, perhaps, the change of culture in the public service is going to be encouraged by these proposals and this perhaps will be the most lasting impact once legislation is in place.

The reversal of any lingering attitude that too much information is bad for the general public and the presumption in favour of disclosing rather than withholding information, I am convinced will improve the democratic process and promote concepts of informed citizenship. So I think the government probably is right to claim at the outset of the white paper that openness is fundamental to political health of a modern state and a legal right to information is - or certainly should be - central to a mature democracy.

In 1979 I moved to the National Consumer Council, the NCC, and we were in those days

involved in publishing a book which appeared at the beginning of 1982, 'Consuming Secrets', and that was really the consumer case for freedom of information. In that book, the two principle authors, Martin Smith and Rosemary Delbridge, they chapter by chapter pointed out the benefits of FOI, in housing, education, environment, planning, transport, product testing, social security, energy - a lot of the text of that still stands. I'm not sure that all the examples still stand. I simply don't know whether the results of MOT tests on cars more than 3 or 4 years old - in those days when a particular car was consistently failing the test on the same feature - that information was not public and there seems to be no defence for that approach whatsoever. So the consumer case was summed up in the opening page of that report: "The consumer case is a simple one. Within government there is a great deal of information which would be valuable to consumers if it was publicly available and whose collection has been paid for by consumers through taxation and rating. Consumers should have a right to such information unless there are good reasons such as national security, trade secrets, personal privacy against its release."

Now of course, things have changed since 1982. The government does publish more information. Section 2 of the Official Secrets Act has been repealed, legislation has been introduced allowing more access to personal files in particular sectors and the code of open government has been introduced but it has taken 16 years to get towards that legal right in reality. I think that it is going to be very much welcomed in the consumer sphere for the benefits it will bring to ordinary people in the conduct of their ordinary lives.

When I personally began to move my career, because I became a grade 3 Under Secretary in the Civil Service for 6 and half years in 1986, I saw things at the Office of Fair Trading, where I took responsibility for consumer affairs at the OFT, from, if you like, the position of a civil service regulatory organisation. That gave me some access to the Whitehall village, a better understanding of its culture, its procedures, its attitudes. We tried as far as possible to be very open in the way in which we conducted our affairs at the OFT. We invariably consulted on all our policy initiatives. We published all the surveys which we undertook. We had a fairly full programme of publishing information and advice for members of the public - and there I would say it's not so much just producing leaflets and so on which is important, it's the way in which you get them into the hands of the people - we found certainly just putting leaflets into town halls wasn't nearly enough. We had to engage the support of the BBC Radio One, BBC television, ITV, Channel 4; the media were fundamentally important in actually communicating information and getting it into the hands of the people who needed it.

But I think also as a regulator, I also saw the difficulty of striking the right balance because I think there were two competing public interests. There is the public interest in disclosure but let's not lose sight that there is sometimes a public interest in confidentiality. We had specific criminal offences hanging over our shoulders; under the Fair Trading Act or the Consumer Credit Act we would be guilty of a criminal offence if we disclosed information either without the consent of the business or which was obtained during the course of our activities. And we pushed the barriers of that. We published as much information as

possible about our regulatory activities. At the same time I would have to say that premature disclosure of investigations into for example, if a credit company is engaged in business practices which are unfair or improper and therefore was at risk of losing its license, I would say that if we were required to disclose that information prematurely, that would fundamentally undermine the effectiveness of the regulatory organisation. So what we did was, as soon as we had information which was sufficient to indicate that a company was not fit to be engaged in credit granting and so on, at that point we published the information, at that point we put on the public register that we were initiating formal action against the company. The company was entitled to put its case alleging that it was behaving correctly - that was all public knowledge but before that point, I think disclosure would have been in fact quite damaging to the work which we were doing.

Looking more generally across Whitehall, I'm not sure that all civil servants and regulators are going to welcome the white paper. I certainly start with a fundamental welcome to it but I think there will still be some who will fear that the balance overall tips too far in favour of disclosure and they will worry that their activities will become uncomfortably transparent and that excessive daylight may undermine the effectiveness and efficiency. For the most part, I think the more enlightened officials are sensing that a very important change of climate is underway and will have no great difficulty with proposals which, at the end of the day, will strengthen their accountability and credibility. But I stress that in every case there is going to have to be a balance drawn. I think that most of the public sector is going to welcome what is in the white paper in terms of good public administration. What is said in the white paper about encouraging the proactive release of information, sometimes overlooked but I think very, very important. The emphasis on explanatory material on dealings with the public, very important. The encouragement for giving reasons for administrative decisions, again that has been quite widely overlooked. Public lawyers sometimes agonise as to whether the courts are moving towards the position of requiring bodies to give reasons, well here the white paper says quite clearly that administrative decisions will have to have reasons volunteered, apparently in every case. For the most part I find the exclusion and exemption regime strikes about right balance. We can discuss and debate the detail of that but I think the approach probably goes further than many people expected and I think the balance is about right. I personally - for the reasons I indicated earlier - think it is inevitable that law enforcement activities are going to have to be, if not fully excluded, then certainly some exemption for law enforcement activities. And as for the simple harm test for policy advice, I think we need to look at that and think about the detail of that in more detail. But here what is really important I think is to get the balance right. On the one hand an automatic assumption that all disclosures of policy related matters would be harmful; that would be quite wrong. At the other extreme if you had such wholesale and premature openness, clearly I think the whole democratic decision making processes of government would actually become very difficult indeed. So the balance has to be struck there.

Well, five or six years ago I moved to my present position in the corporate sector. I am responsible for public policy at Clifford Chance, the international law firm. And that moves on to the business perspective as such. The first point I would make is frankly the business

community has not yet begun to wake up to these proposals. The white paper came out just before Christmas, didn't get that much press coverage if the truth be known; great victory for Maurice and those campaigning all the years for these proposals, but the business community has not woken up at all to what is going to be involved. So I am inevitably going to have to engage in some speculation. I think there will be a lot of people who will actually welcome what is in the white paper and not least because it is going to give the business community a lot of access to information which it previously has not had and may not even know about.

The white paper is quite clear that the right of access will be for any individual, any company or any other body. Frankly, large chunks of the business community are not well informed about how government conducts its affairs. If only they knew there is in fact a vast treasure trove of information inside the public sector which is valuable to their own business activities. Statistics, survey results, information about the cost of public services, factual analyses behind policy and so on. So there is a lot of information - and I missed the beginning of Michael's comments - but I suspect that Michael would say that the business community has been very active in using the rights under the American legislation, probably more active than public interest organisations.

Having said all that, I suspect there will be those in the business community who do see these proposals at least initially as more of a threat than an opportunity. As Michael said, businesses supply vast amounts of information to government, both voluntarily and compulsorily. I think there will be perhaps particular anxiety, I put it no stronger than that, at what I would call the retrospective effect of the white paper; not just a right of access to information as from day one but going back to whenever the information was supplied to the government and people will say we didn't know that there was any possibility this was going to be in the public domain, and we might have some interesting discussions about that.

I think businesses will primarily be concerned about three main categories getting their hands on the information, and they match what Michael was saying; the media, public interest groups, and I think above all, competitors. I think that is where the concern is going to be strongest. I think that when the privatised utilities, public sector contractors, companies carrying out statutory and other public functions, when they wake up to the proposals, there may be some concerns on that front.

My own view is that the commercial confidentiality exemption is on the right lines, however, what is said in the white paper doesn't by any means answer all the questions. When we see the draft bill we will get a clearer idea of the way things are going. But if I could just give some indication as to some of the issues which are going to have to be addressed. First of all, what is meant by commercial confidentiality. It is an easy phrase to trot out but much more difficult to be precise about. As Maurice and the Campaign have indicated there seems to be some quite sharply different views inside government at the moment as to what is meant by commercial confidentiality - some departments saying that they can give chapter and verse as to what outside consultants are charging for particular bits of work, other departments at the same time saying that is commercially confidential. Another example is MAFF refusing to

reveal the identity of incinerators where BSE cattle are being incinerated even though the information was in the public domain already, so that took 6 months before MAFF stood down on that particular one. I suspect that the *Guidance on Interpretation* of the existing open government code is going to be a starting point for defining commercial confidentiality, there is a couple of pages there describing if not defining what the government thinks commercial confidentiality means, but it is not clear whether that is going to form part of the legislation. Even a concept like 'trade secrets' which trips off the tongue but is a very difficult concept in practice, a complete book has been written on the law of trade secrets and the courts themselves can't always agree at the moment what is meant by that phrase 'trade secrets'.

Then how will the substantial harm test actually work in practice. One can quite easily speculate that there are going to be situations when there would be substantial public benefit in disclosure, disclosure for example of environmental risk assessments, but there would be at the same time substantial harm to the commercial interests of the company concerned, not least, for example, a plunging share price. And I think we have got to see how that is going to work in practice.

Another issue, how will those making the decisions about disclosure, how will they be aware that a company feels the information is confidential. The white paper leaves open whether a mechanism should be established to allow third parties to appeal against decisions to release information, a so called 'reverse FOI' action. I think the commercial community is going to argue very strongly that such a mechanism is absolutely essential and indeed they will probably be looking for some sort of duty on the public body to notify the third party of any relevant request and to invite representations before the decision is made, and I think that probably would be right in the interests of fairness and natural justice if you like. I think there may also be a case, this is not actually canvassed in the white paper, there may also be a case for some sort of machinery to be put in place so that a commercial organisation can make a formal signal to a public body that information which has been or is being submitted to the public body is, at least by the business, regarded as commercially confidential.

Well, I think that is about as much as I will say this afternoon, Madam Chairman. Just to sum up what I think are going to be the really important and sensitive issues looking at the white paper as a whole: I think the precise parameters of the policy advice exemption will be quite controversial; I think there will be anxiety about the retrospective effect of the proposals; as I have indicated, the precise elaboration of commercial confidentiality is going to be interesting; I am convinced there is a need for an effective third party appeal mechanism; the precise powers of the Commissioner, and indeed whether there should be some sort of immediate appeal from he Commissioner, will be controversial; and I think what hasn't fully been brought out in other comments so far, the role of the Courts in getting more and more involved in political activities. If the Courts are going to be the final arbiter, under judicial review, that is going to, in various ways, inevitably lead to the politicisation of the judicial process and that will be welcomed by some, others may have some reservations about it. But I think what I can say is that from every perspective, not just the business or the

citizens' or the consumers' perspective, from every perspective the landscape is certainly going to be very different. Thank you very much.

Sheena McDonald

Thank you very much. Michael Tankersley, would you like to pick up some of the points that Richard Thomas has made? I mean, in your presentation you said that rhetoric raised fears but in fact in America implementation and use and usage, I suppose, went a long way towards solving all the outstanding questions and quelled suspicions. The kind of anxieties that Richard Thomas is reporting there, do they sound familiar to you?

Michael Tankersley

A lot of things that he noted were things that I noted, that the American system had come to recognise as very important. That there be some mechanism for allowing businesses to obtain notice when public officials were considering whether or not to withhold or disclose information that they had submitted; that there be a mechanism whereby businesses could explain why it was they considered the information to be confidential and the development of that has proven very important I think in giving businesses more assurance that this is not a public right that is just opening up information willy-nilly but that there are civil servants that are giving very serious consideration to this and carefully considering their arguments for non-disclosure.

Sheena McDonald

He also at the end there touched on the role of the courts and worried about their potential politicisation in this country. Now of course the courts in America we might see as being already politicised to a degree, but are there parallels there that are useful to speculate on?

Michael Tankersley

I think that this is actually an area where it is a good example of the ability of the American courts to maintain an interest above politics because the issues that come up under the Freedom of Information law often involve politically sensitive questions about what type of policy deliberations ought to be subject to withholding and under what standards, and what types of information that may be embarrassing to a public authority should be subject to disclosure because it is in the public interest to know about that type of misconduct. If you look at the decisions of the American courts on those issues, I think it is among those that are in the highest tradition of the American court system in applying the law forthrightly.

Sheena McDonald

Thank you. Let me take a couple of points from the floor, some people we haven't heard from yet. Yes gentleman there and the one behind you.

Laurence Lustgarten, *University of Southampton*

I like Michael, your response to Richard Thomas' comment that the main beneficiaries of this legislation have been businesses which I think may raise some shivers in people around here. I wouldn't have thought that 20 years of campaigning for freedom of information to assist business companies to make more profits or to bid for privatisation contracts is what we were all working for.

Two other things related to this, you describe a number of cases in which companies fought the release of information up to fairly high levels of judiciary. Is this because the government had agreed to release the information and they challenged it? I wasn't quite clear why they were litigating rather than the government and does this process of third party appeals introduce a lot of delay into the release of information so the public has to wait for many years to hear it?

Michael Tankersley

Let me start with the first question, which is you asked me to comment on the observation that the main beneficiaries maybe business. I think you have to distinguish between the main beneficiaries and the main users. It is true that in the Unites States for some particular types of information, up to maybe half of the freedom of information requests going to certain governmental departments may be from businesses who are trying to get information that will help them in the competitive arena. That doesn't mean that they are the main beneficiaries because often the information that they obtain is information that is in fact beneficial to the public. If you think about public contracting, government contracting and the public's interest in making sure that that system operates in a way that is honest and fair and contracts go to the appropriate entities and bidders are not given out of favouritism or other means, the people with the greatest incentive for policing that are other disappointed bidders. And it turns out that that is one of the main benefits of freedom of information, that business also becomes involved in the process of holding government accountable for complying with the law. So it is true in some instances businesses are principal users of the Act but the public is often the principal beneficiary.

With respect to the questions about the litigation, the bottom line is that the right of third party appeals almost inevitably leads to some instances of delay. In the particular cases that I was identifying, it happens that those cases arose under a situation of access to court records rather than strictly a freedom of information act situation, although the standards were the

same and the same situation might apply. Usually it is the government who is the nominal litigant where business information is at issue but the principal interest and principal defender of the information is a business. So you may have a three-way dispute whereby the requester and the business are the principal adversaries and the government may be weighing in on one side or the other, but their interest in deciding whether or not it is competitively harmful is really very attenuated so that they are not the principal ones who are pushing the dispute or furthering the litigation. It is inevitable that sometimes that means go on longer than they might otherwise, but as an aspect of making sure that businesses are able to submit this information with some degree of comfort that they are not giving away business secrets, I think that is an inevitable consequence of the Act at some level.

Sheena McDonald

Thank you. Right, yes Sir?

Roy Price

Can I ask about the dissemination of technical information? It seems to me that the US government in terms of philosophy and concept have an enlightenment which is light years away from what we have experienced in the whole of Europe. I was looking at one of their publications and just vaguely thinking that, you know, the list of ministers in a particular government in 52 countries of the world, produced by the CIA, for a mere $52 is a snip for anyone as it were, but more particularly, I understand now that NTIS produce a complete list of new product information so in some ways it puts our Consumers' Association out of business, as it were. Could you comment about this sort of general dissemination of information?

Michael Tankersley

I don't think they have put anybody out of business yet. It is true that they are widely involved in the dissemination of information, including dissemination of information electronically. It is also the case that what results from that is other entities or businesses who are involved in information dissemination have, in order to remain active in that, to find ways to add value to whatever it is that the government is providing. The National Technical Information Service prices their products in such a way that they are actually pricing them to compete with private businesses who may be providing similar information and not simply making them available at cost. On the other hand, there are a number of instances where information is available from the government at cost and business entities are really involved in the enterprise of finding ways to compete with each other by making that information more accessible, making it more searchable, making it more useful to individuals and that's the way they run their enterprise. That is actually a very healthy development in terms of the

information community in the United States in spurring efforts by private industry to make information more accessible to the public.

Sheena McDonald

Thank you to Richard Thomas and Michael Tankersley who will stay with us. I should say that after the next two speakers we will have another opportunity for points and questions, and then after coffee we will hear from Charles Ramsden, from Jonathan Baume. Then with what time is left, for we will finish promptly at five, there will be a general free for all and Kevin Murphy will be back up here as well, so there is plenty of time for people whose hands I appear to have ignored thus far.

However, let's move on to an area which we have touched on a few times already today, which is where there are tensions or conflicts apparent - or suggested - with the incoming legislation; between that and existing legislation. Elizabeth France, the Data Protection Registrar, and she is going to address one of those potential tensions: the relationship between data protection and freedom of information.

The Relationship between Data Protection and Freedom of Information

Elizabeth France
Data Protection Registrar

Thank you very much and thank you for the opportunity to speak. Like everybody else, I think, I welcome the white paper. We must have, if we are going to move into the Information Age, have all the planks in place to make sure that we pick up the two words that I shall come back to and perhaps use differently than the Minister has used - confidence and clarity about our rights relating to information. And that applies both in respect to how open we should be about it and how much we should respect each other's information. It is a necessary tension as we move into an age where increasingly information is the source of an awful lot of power. It is considered to be an asset by companies now, in a way that it never was before, and government itself uses information very differently from the way it used it when I first became a public servant, simply because it is so much easier now to obtain, match and get value from information in a way which we never dreamt would be possible at the cost that it is now possible.

So it's very important that as we go into the next century we have in place both a clear understanding of what is held and how open we can be about it, but also a clear understanding of what our rights as individuals are about how information about us might be used. So I want to focus, in a way that perhaps we haven't done, on individual information. We have heard a lot about commercial information, we've heard a lot about government information, as we have gone through today. My role leads me to ask you to focus for the next twenty minutes at least on information held about us as citizens, and it's important that I stress that. It's the individual information about us in our private capacities, that my concern relates to and how that fits into the freedom of information framework and how the potential legislation in that area sits with existing and proposed data protection legislation.

Perhaps I ought to begin, without making an assumption that you all understand anything about data protection law and just say a very, very little bit about where we are and where we are going. I will keep it brief, though I can answer questions. I heard this morning reference to data protection and privacy as though they were two separate things. Those who have heard me before will know that I don't like to hear that distinction. It seems to me that data protection is an aspect of privacy. I don't pretend the two are synonymous but I do get concerned when people get up and tell me that I would be better not using the 'p' word. Privacy is a fundamental right, not an absolute right, and it's important that we understand that data protection helps us in understanding how to look at that aspect of our privacy, that which relates to information. It isn't just about keeping things hidden, it isn't that meaning. When we talk about privacy, we think well that means the data protection registrar wants all information locked up and nobody must have access to it and therefore there must be a tension with freedom of information legislation. That isn't the point at all. Data protection

law has a wide brief of course. It looks not only at the confidentiality of information. It looks at its accuracy, it looks at how much is held and why and who should have access to it. But particularly when we look at the tension, or the potential tension, of freedom of information legislation, we need to focus on a right within data protection law wherever you find it, the right to see what is held on you as an individual.

You currently have a right in the United Kingdom to look at anything held on you by any organisation on computer, and that is the starting point. There are exemptions, but there are no class exemptions. When we look at the FOI white paper, we see proposed class exemptions, and I hear talk about the law and order exemption, and I know John Wadham is going to talk about those further. But in current data protection law, you are given the right to see anything. That is the starting point. And then on a case by case basis, there may be exemptions. So you might say, "Don't we have the access we need, without freedom of information law, to personal information?" Well currently it is limited to computerised - well not computerised - automatically processed information. That is wider than computerised because it includes anything that is kept in digital form, but it is narrower than the area that would be covered by freedom of information law in that sense.

However, the Data Protection Bill introduced by the government to the House of Lords on the 15th of last month, and to be debated today in the House of Lords, actually extends the coverage of data protection law to manual records. Now those of you who are interested, I will be happy to try and define, or sorry, to try and interpret the definition in the current version of the bill of manual records and it isn't straight forward. Nevertheless, it does extend into manual records, and, believe it or not, a lot of the people who have been kicking and screaming about the problems they will have in seeing it extended to manual records, are those who will be hit by FOI legislation and therefore find no hiding place from extending the sort of rights of access that they currently have to give to computerised records, to manual records. So there is clearly going to be an overlap, because under section 21 and the principles of the present data protection law, you have a right to that information. That now appears again in the new Data Protection Bill and you have increased rights under the new Data Protection Bill to compensation where things go wrong, or indeed where you are damaged by any inaccurate information or any information that is held or used unfairly or unlawfully.

Why then do we need to see personal information also referred to in freedom of information legislation? I think it is inevitable that we should. In all the jurisdictions that we look at elsewhere, freedom of information legislation and data protection legislation - or its equivalent - do overlap. We need to make sure there are no holes, no information that falls neither under one nor the other. And I think therefore we are bound to find definitions appearing in both sets of legislation. The difficulty I think we need to avoid is finding that we define things in a way that leads to an unnecessary and unintended tension between the two pieces of legislation. It is quite clear that one man's privacy on occasion will be another man's freedom of information and we need to make sure that the balancing tests are drafted in a way that doesn't actually make it impossible for the individual to get his remedy. The

last thing I want to find is that we are bouncing citizens between their rights under freedom of information law and their rights under data protection law, confusing them thoroughly and leaving them with actually no real right. We can avoid that if we are sensible about the way that the law is drafted. Now everybody has been very complimentary about the drafting of the white paper and I wouldn't like to sound any note of discord, but I do find some difficulty in sitting chapter 3 against chapter 4 when we are looking at personal information. Chapter 3 seems to still be applying the harm test and the substantial harm test to whether you disclose information, whether or not it is personal information but chapter 4 seems much more clearly to state that data protection law will take precedence when we are talking about personal information, and that must I think be the case. It cannot be right that you apply a harm or a substantial harm test before deciding whether you reveal my medical records. You just do not reveal my medical records without my consent or in certain limited circumstances. You do no apply the harm test even to something as basic as 'Have I completed a tax return?' It is none of your business. Whether I've completed a tax return or not is between me and the Revenue Commissioners unless, and there will be exemptions, I am some sort of public official who maybe being subject to some questioning about proprieties in other directions. But it should be that way round. When we are talking about personal information, the presumptions must be those of data protection law. Now that isn't to try and drive a coach and horses through FOI legislation. We just have to be sensible about our approach. And there is a difference between, let's take my own example, between me as Data Protection Registrar and me as Elizabeth France, citizen, and clearly any information that might be available about me in my public capacity should be disclosed to anybody who has a right to see it under FOI legislation, but that does not extend to information about me, normally anyway, as an individual. Of course, there will be grey areas, grey areas as I say when we are looking at misdemeanours or potential misdemeanours by public officials, but on the whole we need to draw a distinction between personal information and other information that we might find.

We have to look, as well, at making sure that we are careful when third party information is involved. We have already had a reference from the floor to due process. If my information might be disclosed in a package of information which would otherwise be covered by FOI then clearly - and the white paper does make this clear - that third party should have a right to give their consent to that in certain circumstances. Where it is the sort of personal information I have been talking about, that right must be a clear right, there must be consent if it shouldn't otherwise be disclosed, and that brings us into the whole area of rights of appeal and I do think the white paper will need to be looked at quite carefully before it is turned into a draft bill. It seems to me, and I think this picks up the point that was made, that if an individual's information is going to be disclosed then there is a risk of breach of Article 8 of the ECHR and I think we must then have the rights of appeal that Article 6, which was referred to earlier would require, what I think for shorthand is usually called 'due process'. So we can't be quite as efficient perhaps as the white paper might like to suggest the Information Commissioner can be in dealing rapidly with the cases put to him; there will have to be rights of appeal, particularly when we are talking about personal information.

Can I go back to the importance of public confidence. The Chancellor of the Duchy mentioned public confidence this morning. He mentioned public confidence when he talked about the proposals for better government. Public confidence is very important in public bodies if we are to make the best of information available and public confidence works for having both FOI and Data Protection protections. The public need confidence because they need to be able to see what is held in the broadest sense, the sorts of issues we have been talking about. They need to see anonymised data about the efficiency of public bodies. They need to see personal data that has been turned into statistical form. They need to see a wide variety of public information if they are to have the confidence about the way some of us are performing our public functions. But similarly, if they are going to trust government and deal with government electronically, and again the Chancellor of the Duchy was very keen to show how good the Cabinet Office are in using electronic media, then the citizen will also have to have confidence that others don't have access to his personal information. So the confidence word is going to be very, very significant as we look at better government. And I think means that we need to play up the individual's rights both to privacy and to access where it is appropriate.

But the poor citizen needs some clarity and really I think this is my one problem with the way that we are currently seeing the proposals. That I don't think we have thought that through sufficiently carefully. You heard the Parliamentary Commissioner say this morning that he was concerned about the number of people there are involved in looking at citizens' concerns about public administration. That is very different, and that was accepted, when you have a small jurisdiction like the Republic of Ireland or New Zealand where it is easier for colleagues to get together, and my opposite number, I know, talks a lot to the Ombudsman in the Republic of Ireland and I am quite sure they will be able to resolve the issues that are put before them. It is more difficult for us, given the volume of cases we are dealing with, given the extent of our responsibilities. My office dealt with 4,000 complaints of potential breaches against the Data Protection Act last year, roughly speaking, and that's going up all the time. We know that if we went in for the public awareness which we are encouraged to do in a bigger way than we do now, we would be inundated. We have to try keep a balance between raising awareness and encouraging so many complaints that we can't cope with them. That makes it quite difficult then to think that we have to then find our way carefully around the boundaries of our responsibilities, and make sure we offer a service to the citizen rather than finding that we begin an investigation, only finding that half way through we either have to pass it to the Parliamentary Commissioner or the new Information Commissioner. I do think that we have got an opportunity here, in the name of better government, to actually try and simplify rather than make more complex the interface for the individual citizen when he is dealing with information about himself. Quite how we do it, I'm not sure and I think we have to think it through together. My preference, I think, would be to see the individual having a one-stop opportunity to ask for information about himself from the government department or public body and for the officials concerned to deliver that regardless of whether the request was made under the right piece of legislation, and for the resolving mechanism to be one which allows some overlap. Now that could be difficult. I'm a creature of statute. The Information Commissioner will be a creature of statute. As my lawyers are

forever reminding me, I can only do exactly what the law says I can do and no more, and I must do what the law says I must do. And if we are not careful in our drafting, the citizen will find that he hasn't got an easy opportunity to exercise his rights because some definitions are slightly different, some emphases are slightly different, some resolving mechanisms are slightly different and we end up bringing into disrepute something that could be of great benefit to individuals. I'm really only putting up warning flags because I don't want that to happen. I think the individual has quite extensive current rights under data protection law for his own information, and I would have thought that, on the whole, we could bring the rights into line with each other. We will have to see how this goes forward but one of the suggestions I am making in the paper that you have seen is that there should be some closer working if there are to be different bodies between those bodies. I think that it is very important that we see clarity at the end of the day.

I also just want to go back for a moment to this business of class exemptions from either freedom of information or data protection. You see in the white paper, some clear proposals for class exemptions, and because it leads into what I know John Wadham is going to say, I just want to talk about that for a moment. I said we didn't have such exemptions under data protection law. We are in danger of having one in the Bill now before Parliament. I think that signals the fact that we have all got to be alert to the fact that, as Richard said, maybe not all public bodies welcome the extension of the rights of individuals that we are seeing in the proposed legislation. Because, as a total surprise to us, we found an additional clause in the bit of the new Bill which deals with what were case by case exemptions from rights in the Data Protection Act. Currently, under what is section 28, for the benefit of crime prevention and detection, and in order that people like the Inland Revenue can do their job, there are case by case exemptions from your right to see your information, and case by case exemptions by the fair processing requirements of the current law. Under the Bill now before Parliament, there is a new sub-clause which would allow the Secretary of State to make an order exempting a whole class of data from those requirements, apparently put in, I am told, at the request of the Inland Revenue. I have since had a meeting with them and I am not sure they had appreciated the extent of the coach and horses that might be driven through data protection legislation if that were actually on the face of the Bill.

But I do think we have to be vigilant, because there is a danger of what we think is making progress actually leading to deadlock in certain areas, or to one piece of legislation cancelling out what another appears to be trying to achieve. We need to be clear which pieces of law have precedence in which areas. As I say, chapter 4 appears to say that data protection law should have precedence in the area of personal information, and I think that has to be right. It isn't only data protection law of course, because the common law duty of confidence, and some of the other laws of confidence that arise similarly can't be overridden easily by an FOI requirement. It is an interesting tension, a tension that I think can be constructive in making sure that as citizens we have our full range of rights, but we do need to watch as the detail of the Bill is drafted to make sure that we only have those tensions which are constructive and not ones that we never intended to be there. Thank you.

Sheena McDonald

Thank you very much indeed, Elizabeth France. Well, as you have been here all day, you will know that you are in a room of vigilantes. So I will take a couple of questions before we move onto the next speaker, preferably from people we haven't heard from yet. Yes?

Helen Phillips, *Department of Health*

I wanted to ask the previous three speakers, with regard to third party notification, do they think that the contents and discussion with the third party should be made available to the applicant, and what the procedure is at present in the United States on this?

Sheena McDonald

Michael, do you want to start?

Michael Tankersley

The answer is, with respect to privacy information, there isn't generally a provision for third party notification in the United States. It does exist for business information, and the submissions made by whoever is trying to protect the information are made available, to the extent that they don't reveal the confidential information.

Sheena McDonald

I will let one of you speak, given that time is at a premium.

Elizabeth France

I think it is difficult to know how much detail you should give. I think some of you will be more familiar than I will with the case of Gaskin, which I think is a case that led to, well partly led anyway, to the inclusion of a reference to the third party, which was a case that got to Europe and was about the disclosure of information I think in the health sector, but others may know more about the case than I do. But I think clearly you have got to give individuals some information about the fact that third party information has been sought. It can be difficult to get the consent. Sometime it has been pointed out to me that it will be difficult to find the person to obtain the consent, but I think the presumption has to be in favour, in that case, of non-disclosure unless there is a clear public interest. I think that it is the other way round from the harm test. If it is personal information that is being disclosed then there needs to be an overriding public interest, as opposed to a harm test if you can't get consent.

Sheena McDonald

Thank you. One more point. Yes, Sir?

Rama Gupta

Since Michael is on a platform of Freedom of Information, would it spoil our special relations with America if we go free and give more information out to the public?

Michael Tankersley

No, I don't believe so.

Sheena McDonald

Thank you very much indeed. Right, our next speaker is John Wadham who is Director of Liberty and who is going to be addressing another exemption, or possibly more than one. John, off you go.

Access to Law Enforcement Information

John Wadham
Director, Liberty

Thank you Sheena. I of course, would like to compliment the government on this white paper but you have heard enough compliments, and I am going to be concentrating on some of the problems I see with the white paper. I think I should first say that freedom of information I think is probably the missing human right. You all know that the government's proposals in relation to rights of the citizen are not just about data protection, not just about the white paper on freedom of information but also about the incorporation of the European Convention on Human Rights. But there is very little in the European Convention on Human Rights which is about freedom of information. A lot about freedom of expression, but very little about access to material that other people have and when those other people won't give it to you. There are of course, some considerable discussions that have been held right back till, at least at the UN level back to 1948, and at the Council of Europe level for many years where those international treaty organisations have been trying to develop freedom of information rights but they haven't done so and they haven't been anywhere near as successful as those treaty organisations have been in relation to the other civil and political rights, the right to life, the right to privacy, the right to a fair trial, freedom of expression etc. So we haven't been forced to adopt freedom of information legislation into this country and I think that has been a real problem. And it has taken us until 1998 to get to where we are.

The difficulty for me with the *Right to Know* white paper is the two sets of exemptions. The first is which bodies will be covered by freedom of information. You will see that at page 5, paragraph 2.3, it says, "A very few public bodies because of the nature of their role will be completely excluded from the Act. Parliament whose deliberations are already open and on the public record will be excluded." I will leave that to politicians to decide whether that is a good or bad thing, whether we want to hear anything more on what they say or do. But more importantly, for me, "We are clear that the security service, the secret intelligence service and the government communications headquarters and the special forces could not carry out their duties effectively in the interests of the nation, if their operations and activities were subject to freedom of information legislation. These organisations and the information they provide will be excluded from that Act as will information about these organisations held by other public bodies." Those last two sentences I don't think follow neatly one from the other. Of course, it must be true that if you a spy perhaps working for Saddam Hussein at the moment wandering around London collecting up information, it would be crazy for any freedom of information legislation to allow you, the spy, to apply to Whitehall to see your file. It is also crazy to think that anyone would ever do that. Because, I mean, presumably one of the key issues about being a spy is to ensure that other people don't know. If you make a freedom of information application to MI6, GCHQ or MI5, they are probably going to think, 'what is this person up to?'

So the first thing we should look at is what the reality is. And the reality is that particularly with MI5, they collect up a lot of information about individuals. They collect a lot of information about individual citizens of this country and sometimes, as we know from revelations, they collect up information about individuals who are no threat to this country. Well, when I say no threat, I was really thinking of Peter Mandelson and Jack Straw - it is a matter for you as to whether you think they are a threat. But seriously there are considerable files on a considerable number of people. Now I know that the Data Protection Registrar has being trying to hack into their computer for some time to get access, but I think what we should be looking at is the key issue of 'contents' versus 'class'.

You may remember from the Scott enquiry that there were considerable concerns about what are called 'Public Interest Immunity Certificates', certificates issued in the course of litigation which prevent people having access to the disclosure that ordinarily they would be entitled to, as part of the right to a fair trial. And the problem was that people were claiming class claims. People were saying, "Any file that we hold is a secret file. Any piece of paper that we have is secret." Now of course, there are files which are secret and would damage national security if they were disclosed. But there are lots of other files, policy files that the security services hold, particularly perhaps old files too - that at the present time they are deciding to destroy - which could be available in the public domain. Now I don't know which files should be disclosed and which shouldn't. But I don't think there is any justification for a blanket ban on any disclosure in any circumstances. I want to see the Information Commissioner making that decision. I am afraid to say I think it is an inadequate system for us to trust the security services, or in fact the politicians, to make that decision. I want somebody independent to look at those files and say, "Well this one can be disclosed and this one can't be disclosed." Now that I think, that radical approach, is something that this government has not accepted.

Ironically it has actually done this in practice. To take an example, my client, David Shayler, who used to work for MI5 and is alleged to have revealed a lot of information in the *Mail on Sunday*. I say 'alleged' because he is outside the jurisdiction and he may have to come back to answer the charges. But he said that Peter Mandelson has a file, that Jack Straw has a file, and he said something, allegedly, about what is in those files. Now the *Mail on Sunday* published this information and then they wanted to publish a second article. They wanted to publish a second article about the extent to which the Security Service, MI5 that is, was told in advance that there was going to be a bomb in the Israeli Embassy in London. And this is clearly very, very highly damaging to national security. Now of course, what happened, is that the *Mail on Sunday* approached the government, approached Jack Straw, and of course Jack said, 'Well I have seen the article and I don't think it is damaging for that information to be disclosed.' He said it was true, but the person didn't know the whole truth, so in fact they didn't have the information on whether or not the Israeli Embassy was going to be bombed. But the key issue is that this government has said that material held by the security service can be disclosed without damage to national security. They had a blanket injunction so there was no difficulty for them saying no. But they didn't. They said yes. So therefore it seems to me obvious, even in a difficult area like that, in relation to national security we can have a contents claim but not a class claim.

Now that's important because the current remedies for individuals who are or believe they are subject to surveillance by 5, 6 and GCHQ are very, very inadequate. There has never ever been one case upheld by any of the tribunals, including the telephone tapping tribunal since 1985. So there clearly seem to be difficulties about you as an individual getting access to your material or complaining, I should say, about unnecessary or unlawful surveillance. So we do need to have a better system with those security services, and I'll come back just briefly at the end to talk about the Official Secrets Act which is clearly part of this process. I should also I suppose just add that in relation to this process of disclosure and the destruction of MI5 files, the government has said in an answer to a parliamentary question, they are going to destroy files and they have given us some information about which files they are going to destroy and which they aren't. So there is a piece of paper, presumably in MI5's offices, which is just about 100 yards down the road - and I'll show you if anybody wants to see afterwards - but in there somewhere there is a document which gives them some policy on which files they are going to destroy and which files they are not going to destroy. Now that policy, it seems to me, that piece of paper which sets out that policy, is an important document. I am absolutely certain that there is nothing in that document that is going to breach national security. We, the public, I think are entitled to see that document. Under these provisions that document will remain closed forever. Of course, it may be that MI5 will disclose the document themselves. It may be that the politicians will, but we won't have a right to it.

Moving briefly on to the other problem I think I have with the freedom of information white paper is the issue of the police. You will see in the white paper itself that the police will be covered, but only their administrative functions will be covered. Now I don't take any exception to the fact that of course, the investigation and prosecution of crime does require some secrecy. Of course, it is to use the ridiculous example again, it is very rare for people who are involved in some complicated conspiracy or drug trafficking to actually knock on the door of Whitehall and say, 'Oh by the way can I see my file. I think you've got a file on me, I'm a drug trafficker.' People don't do that of course, but nevertheless even though that is the case, of course there will be some files that should not be disclosed because they will prejudice effective law enforcement. But not every file will be. I don't understand the difference between police administration and police operations, and policy and enforcement. But what I do know is that when the government decided, when the police and the government decided to start to use CS spray, we tried to get access to the information. Is CS spray dangerous? Does it have any long term effects? What are the policies of the police going to be on how they use it? In fact there was a ACPO, that is the Association of Chief Police Officers, guidance on how they should use CS spray and of course, a lot of it was very good information. It was about using it to defend police officers when they are under attack. It hasn't always been used by police officers in that way. Sometimes it has been used in some dubious circumstances. But I think I as a member of the public am entitled to know how CS spray is being used. Now I can't see, and maybe I'm wrong, I can't see that this gives me the right to see that code of practice. It was in fact revealed, the world hasn't ended, police officers are still able to use CS gas spray. There isn't a real problem. ACPO itself, of course, is a problem. The Association of Chief Police Officers is a quasi trade union

but also in fact a key part of policing in this country. I don't know whether ACPO is going to be subject in itself, as a body, to these provisions. And I don't know whether it is going to be able to use the prevention of crime, issues about the investigation of crime to exempt itself completely. I want somebody like Elizabeth France to be able to go in to these organisations and say, well that one is damaging if you disclose it and that one isn't. That seems to me the key. We need to have a contents process not a class process.

And lastly, we need to look very carefully at the Official Secrets Act. The Official Secrets Act does have different tests of harm. In fact, for people who are members of MI5, 6 or GCHQ, it is a criminal offence to disclose anything about your job, even, to use an example that we were all using in the '80s, even the colour of the carpet in the office 100 yards down the road, if revealed by an officer, an MI5 or 6 or GCHQ officer, is a crime and there is no defence. I know this because I have just represented somebody working for MI6 who is now in prison as a result of disclosures. He did reveal a little more than the colour of the carpet, but nevertheless when we were trying to advise him on whether he could disclose anything at all, we had to say, 'You disclose anything, you are bang to rights, there is nothing we can do.'

The government, this government I should say, when it was in opposition in 1988, was very opposed to the provisions in the 1989 Official Secrets Act. They went to the wall, they pushed the vote through the Commons, they argued and argued and argued against it. There are no proposals whatsoever, so far as I know, to reform that Act. In fact, as I say, they have already begun to use it against individuals. It seems to me that we need to look at some of the more difficult issues with this white paper. Of course, there are difficulties when you are disclosing issues which go to the heart of the national security of the state, go to the hearts of issues relating to drug trafficking, protecting police officers by the use of CS sprays etc. But that's the difficult issues, and I want to see the government tackle those difficult issues in a way which is productive in the long term for freedom of information and doesn't just say, 'We can't deal with those difficult issues, there should be a whole series of exemptions.' Thanks.

Sheena McDonald

Thank you very much indeed. Because Charles Ramsden is going to speak later, if he wants to include a response to any of those very specific provocations in his remarks, I'll let him do so then. If there is anybody out there who has something that is particular to what John has just said, speak now. Apart from Mr Shepherd who we have heard from three times, so I'm not going to call you again. Gentleman at the back.

Robin Robison, *Society of Friends*

I just wanted to confirm that in the United States the CIA is not exempt from the FOIA. As far as I know it is not exempt, and indeed I have seen lots of information that has been disclosed under their Act from the CIA.

Sheena McDonald

Michael?

Michael Tankersley

The answer is that they are not exempt in the manner that the white paper proposes making entities exempt. They do have broad authority to exempt particular types of material that is within their possession, so a great deal of information about their activities is not disclosable under the Act, but they are not exempt as proposed in the white paper in making an entire body exempt.

Sheena McDonald

Fine, thanks very much. We will take a coffee break there. We will start again at quarter to four and we will have a veritable telegraph line of panelists and we will go into our final session. Thank you.

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Sheena McDonald

We have heard several comprehensive sets of *tour de raison* of this whole theme and beyond. Could there be yet more to say? Well, yes there is and we are going to hear from two very important people as far as the proposed legislation and its implementation go. First of all, Charles Ramsden ,who has been with us all day and who is Head of the Freedom of Information Unit in the Cabinet Office. He has already spoken in response, but is now going to initiate what he sees as the things we should be thinking about and why the white paper is as it is and where we go from here. Charles.
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Freedom of Information and Decision Making

Charles Ramsden
Head of the Freedom of Information Unit, Cabinet Office

Thank you. I know that it has become a bit of an afternoon tradition, Maurice, for the speakers to announce that the title they are speaking under isn't in fact the one that they have chosen. And I wouldn't like to break the tradition so when my session 'freedom of information and decision making' is titled in that way, what I had in mind to talk about was a slightly odd and unusual side aspect of decision making which has emerged in the white paper, although as we will see it is by no means a new concept within government, which is making decisions about to what extent one edits pieces of recent history for the disclosure of factual and background information. I am prompted to focus on this particular topic by the, as far as we are concerned, very recent - indeed still just about current - work on the project, which Dr Clark mentioned this morning. The fulfilment of the commitment in the white paper to publish a substantial amount of background information on its development. This has turned out to be a slightly strange exercise which has made us - at any rate in the FOI Unit - think about questions such as why, how and what longer term implications there are of what we have been doing. And so on. I ought also to say that I am conscious of speaking here this afternoon, that we haven't yet published this information. The exercise is still on consultation to government departments, so if there are any government departments here who have faxed to us this morning a fundamental objection as to the entire exercise that we are undertaking, perhaps you had better put your hand up now. No need to announce who you are but I will adapt or modify the later stages of my talk accordingly. Oh good. I wasn't looking forward to the last minute wedding ceremony type intervention there. Pleased to see that we don't have one.

Well, why are we doing this particular exercise in openness, or perhaps I might suggest, why are we doing this particular exercise in terms of an openness substitute, which has been around for a long time, as I mentioned and which we will see from evidence in a moment, but which has somehow got injected into the FOI bloodstream, even though the climate of disclosure of information has changed very considerably indeed since its first known appearance, the Croham Directive.

Now Maurice, with his comprehensive knowledge of everything to do with this subject, may be able to trace it back further than the so called Croham Directive, which was a letter from the then head of the civil service, subsequently Lord Croham, to permanent secretaries. This wasn't a private matter. It was announced in response to a written question in the House on the 26th January 1978 and in fact a substantial letter, from which this commitment came, was read into the answer, read into Hansard several columns, two and a half columns of Hansard in 1978 about openness, with the critical point that henceforth the working assumption should be that as much as possible of the factual and analytical material used as the background to major policy studies will be published. Now that commitment obviously dates from a very

long time ago. I suppose it is something that in the - what is it, 15 or 16 years - between my joining the civil service and my starting to work on openness issues I had actually heard of the Croham Directive, which is encouraging, but it wasn't at all clear, as the 1980s went by, what it was all about and what should or what was being done under it.

There were a number of problems with the concept of making factual and background information available in large quantities to follow up announcements. One of the most significant has always been the cultural one, which is nothing primarily to do with openness, but is the problem that essentially nobody wants to stay behind in class working, labouring away on papers to do with the last initiative when all their chums have rushed off and are busy doing more interesting things on the next initiative. When I was in the Department of Transport, up to the 1992 election, I was offered two choices at that point. One was to stay in the Department of Transport for a bit writing up the official history of the Trust Ports privatisation, of which I had been on the Bill team, and the other was to leave the Department of Transport, go back to Cabinet office and become policy coordinator and advisor in that sense to William Waldegrave, taking up a range of interesting duties as Chancellor of the Duchy of Lancaster. Well the choice didn't take very long to make, and the history of the ports privatisation certainly never got written, at any rate by myself. Whether anyone else wrote it or not, I don't know. But it is indicative of the sort of difficulty of following up an announcement with a great mass of work which may take a long time to produce. There are other issues which I will come onto in a moment, but let's just trace the history of where we have been going since 1977.

We take a substantial jump to 1993, and we come across the Fisher Bill, sorry the Right to Know Bill, which was always known as the Fisher Bill after the Member of Parliament, now a minister who introduced it. And this proposes that, essentially, information which would otherwise be exempt from disclosure within the Bill, policy information of one sort or another, is not to be exempt if it consists of factual information or analysis, interpretation, or evaluation of projections based on factual information, which is getting quite complicated. And then expert advice on scientific, technical, medical, financial, statistical, legal or other matters. So there you have in a sense the point written up in essentially the same concept, but written up in greater detail. Then we go on.

We next come to the Code of Practice on Access to Government Information, from 1994. Drafted with an eye to the Fisher Bill, the then government's response was to say, 'We don't want legislation on FOI, but we are prepared to make a commitment within the Code that departments and public bodies should "publish the facts and analysis of the facts which the Government considers relevant and important in framing major policy proposals and decisions; such information will normally be made available when policies and decisions are announced."' So, once again, we have the same sort of thing but with the words sort of slotted around slightly differently again, and on we go.

The Parliamentary Commissioner for Administration, the Ombudsman, Select Committee report on open government in 1996 recommended that "in all internal documents there should

be a clear separation made in the drafting between factual analysis and research on the one hand, and sensitive policy advice on the other. In other words, drafting of all documents should be so undertaken as to allow maximum disclosure." Well, the then government gave a sort of temporising response to that, to the effect that it was perfectly prepared to encourage departments to think in these terms, but a direct 'yes' requiring departments to operate in this way was not something that it saw as completely practicable. And then finally ...

The family tree brings us to Your Right to Know: "We are keen to ensure that as much factual and background information as possible is made publicly available." In addition, the white paper also repeats, more or less word for word, and it may be absolutely word for word, the commitment in the Code of Practice towards publication of background information relating to policy announcements once these have been made.

Now if one looks at this series of different approaches, it may be seen that probably we are talking about two different things. I say probably, because I'm not sure if anyone has done an analysis of this. The commitments, certainly in the Croham exercise and in the Code of Practice, have been related to the publication of background information which accompany or follow major policy statements, in order to explain more fully to the public at large, the world at large, what are the factors that have influenced government thinking in coming to the decision that has been made. The alternative approach, which we come across more forcefully through the Fisher Bill and also the PCA Select Committee report, is a concept that you would have disclosable material which is stripped away from its original context, with the advice or analysis which it originally accompanied presumably removed, or redacted as it is called in the trade. So on the one hand you have a commitment to publish, on the other hand you have proposals that the government should be prepared to disclose more information of a factual and background nature in the context, let us say, of a request, and the Select Committee propose that documents should be divided up in a way that would facilitate this. The current exercise that we have been undertaking in respect to the FOI white paper is essentially an example of the first and not the second, so we are primarily looking in terms of fleshing out the white paper in a way, not that sets out more collectively agreed policy - because this is background material - but certainly in a way which it spells out in more detail the sort of information which influenced the government's thinking in arriving at its collectively agreed policy in the white paper.

Well, there are difficulties inherent in all the different versions of this concept. As I have said, a very long standing one has been that it is counter-cultural to an organisation which, like any other, and for all the stick-in-the-mudness sometimes associated with the civil service, is anxious to get on, move on to new and interesting challenges and has problems sticking its head down in the books for several months in order to fill out something, a statement that has already been made. But there are one or two other problems as well. The worst, or the most acute, problem I think is in looking at the concept of factual material. Facts and backgrounds, we have seen they seem to be rather interchangeable in some of these approaches. Let's look at factual material for a moment. This raises an immediate problem or question.

Well it seems sort of philosophical or academic, but it isn't actually as you discover when you start work in this area. What is a fact, what is something that is built onto a fact? When does a fact stop being a fact and become, I won't say fiction, but something that is essentially analytical or advisory or whatever? Facts, in my view, the concept of homing in on factual information is problematic because of two main reasons. The average piece of policy advice which is flying around Whitehall doesn't actually contain much information that can be described as factual from a strict interpretation. Now obviously that bears out what you always expected, that it's all made up. Now I'd say no, that is not the interpretation of this. The point is that you don't in, shall we say, putting a submission to ministers, addressing an issue in correspondence with another department or whatever, don't often end up rehearsing the point back to first principles, and everything that has ever happened. You tend to start from a given body of information which will have emerged over a period of time beforehand, and you simply build up the arguments on where you are at the moment. So in other words, there is not a substantial piece of rehearsal of the facts, in many cases, before you begin to set out the particular view or the recommendations, whatever it is that may form the bulk of the document which you are providing.

This leads on to a second issue or problem which is that many facts, in themselves, maybe inherently contentious items of information, especially when linked, or indeed unadorned or unlinked, with other facts. So you for example, point out in the FOI context, as we did, that, let us say, the Australian or the Canadian freedom of information Act has produced 'x' hundred or thousand requests over a period of such and such a time and that the cost has been estimated as 'y'. Then you run out of information at that point, and you divide one by the other, you look at the implications of this, and perhaps the implications of this are not very clear. So you make an assumption about why, shall we say, the Australian Act does differ from the Canadian Act. Now at that point of course you are moving away from facts, you are moving into assumptions and into territory which if we are talking about the word fact and factual may not be appropriate. And this, of course, is in an area which is really very uncontentious because all you are ostensibly setting out to do is merely talk about what has arisen in overseas FOI jurisdictions. It is not a particularly sensitive issue within the discussions themselves, yet here you are having left the facts behind and you are already starting to speculate about them. Now obviously a legitimate argument, sorry, territory for legitimate argument, if background information is provided where the facts are sparse or appear to be sparse, or they are treated with a cavalier attitude as somebody might see it, so that after a very small factual basis, a very slight factual basis, arguments start to build up which you disagree with, well obviously in one's own perception the issues haven't been taken properly on board ,and perhaps this is an issue that needs to be registered with government. So these are legitimate arguments, but there are certainly problems in identifying straight forward factual information.

Background - the word background, the concept of background, though not perfect is a great deal easier description to live with. The background to a discussion, a decision, a policy announcement, is capable of much wider and much more flexible interpretation than what is a

fact. So against this background we have been basing our work in filling out the white paper on Freedom of Information, and over the Christmas period we examined the papers held by the Freedom of Information Unit which were generated in the preparation of the white paper, and we discovered a certain collection of categories of paper.

The categories here, well the ministerial committee which the Chancellor of the Duchy was referring to this morning is called CRP-FOI. There is an abbreviation for it within the department, or rather not an abbreviation but shorthand for it. But Constitutional Reform Programme-Freedom of Information sub committee; now inevitably, as with all these committees, this committee exercise generates two types of document. One are the papers which go to inform the committee, in this case produced very largely by the Freedom of Information Unit ourselves. In one or two cases with the active involvement of other departments as well, so that is one source or one identifiable type of paper. CRP-FOI minutes, the minutes of the discussions, decisions that the sub-committee are a second type. Inter-departmental correspondence which flies around, that is an identifiable third sort, the workings of Whitehall, one bit of it with another. Internal Freedom of Information Unit material; obviously we generate a lot of material within the Unit which doesn't get certainly beyond the department and in many cases beyond the Unit, and then miscellaneous information, by which I mean notes of overseas visits and bits and pieces which for one reason or another don't fit into any of those categories.

Now the work that we have been doing is based at the moment, as I say not yet published, but we are looking forward to a publication which will be largely based on a digest of the CRP-FOI papers. This we think fulfils, in a reasonably informative but not excessively sensitive way, the approach in the white paper. It doesn't go straight into the question of ministerial decisions and the discussions of the committee. It is not the fragmentary, occasionally tetchy, but certainly difficult to understand story that one gets from inter-departmental correspondence. It's not the completely irrelevant position of FOI Unit material, but a lot of our material will just be briefing the Chancellor of the Duchy of Lancaster for this talk, telling the head of the Freedom of Information Unit to get his facts right when he does this, that or the other, commenting on other people's proposals. That is extremely fragmented, a vast amount of editing needed to get it into any sort of shape that would mean anything to most people, even if they had read the white paper. And then the miscellaneous, well interestingly even the overseas experience has its problems, because if you take minutes of meetings that are attended by people from overseas, officials and such like, then as a courtesy you really ought to send them all back and ask these people whether they have any objection to you publishing it. It can be done. It takes rather a long time. If they want to rewrite some of the minutes, it takes even longer.

Well what are the longer term implications of all this. I am personally not at all clear what those implications are and it will be interesting to see how this approach, how and well this approach in government develops. Certainly we are looking at this as an exemplary approach, but whether it will be precedent setting in any way remains to be seen. More importantly, in the future there will be a need to determine the extent to which there is a

commitment towards this approach in the legislation itself. I'm assuming at the moment that there is likely to be a statutory commitment in the sense of publishing background material to announce decisions ie. back to the Croham and Code line, legislating around the Croham commitment. We have arrived at statute for that, and we will put that in the Bill, I think, in a way that makes as much sense as possible. I don't think it is likely, or so likely at any rate, that we will be seeking to frame legislation along the lines of the Fisher Bill, where there is a direct separation between policy and analysis and factual material in the legislation itself as far as harm tests are concerned. I may be wrong. That may be misguided. The consultation process may show that that is not acceptable, but that would be my assumption at the moment.

Certainly a systematic separation of fact, or indeed to a lesser extent, background from other material within individual documents along the lines proposed by the select committee as a technique running all the way through government seems to me fairly unrealistic. Not least because even if it were possible to do this in a sensible way, it would certainly provide very substantial scope, in any case, given the nature of the material that I have described, and even leaving aside any question of questionable practice for categorising almost everything as advisory material, virtually nothing as "factual or even background material" and thus making it potentially non-disclosable.

So I tend to see an approach where government papers, policy advice will continue to be drawn up roughly the same way as it is now. In many cases a broad separation between background and recommendation, but not rigidly put into separate categories, and that the government machine, certainly the departments and agencies, people who generate a lot of this sort of material, will need to look more carefully at how they are splitting up their advisory material, but not absolutely rigidly, no proposal for a rigid approach of separation and certainly nothing that presupposes that material above a certain paragraph is automatically disclosable and anything else below that paragraph and further on will be kept confidential. I think it is more complicated and more subtle than that, but it will be nonetheless interesting to see whether our approach with the Freedom of Information white paper, when it is published, points the way to taking this forward and how government policy and its publication of background explanation develops as a result of that. Thank you.

Sheena McDonald

Thank you very much indeed, Charles Ramsden. That was in all sorts of ways fascinating, not least for the revelation that FOI legislation introduces a counter-culture, not because Whitehall is secretive but because it is work-shy. I thought that was useful. I know Maurice Frankel will want to respond to that, given what he has said at the beginning of the day about the need to see analysis of policy, and I am very interested to hear what Kevin Murphy has to say about the situation in Ireland. But most of all - not least because he is on the programme - I want to hear what Jonathan Baume, who is General Secretary of the FDA, the Association of First Division Civil Servants has to say, also in the light of Richard Thomas' observation

earlier that there isn't perhaps more disquiet in Whitehall than anywhere else about what is coming. Whatever that is and you can judge and comment for yourself on what you think Charles Ramsden said, or thought he said, after this.

The View from Whitehall

Jonathan Baume
General Secretary, Association of First Division Civil Servants

Thank you Sheena. The FDA is the union that represents the more senior levels of the civil service, and also incidentally the majority of chief executives of NHS Trusts, and we have an interest that extends considerably beyond the civil service on this matter. Now I sometimes have a hard time explaining to journalists why the FDA actually supports freedom of information. And for those in the audience that are not aware, the FDA has been associated with and supporting Maurice's campaign for the past 15 years, and throughout that time we've never had a critical motion at the conference, and I think more importantly neither have my predecessors during that time actually faced any criticism in terms of the sort of individual private comments that might have been made, and certainly since I became General Secretary last year, I have not had any problem being raised by members about this.

I think partly it's about the fact that the civil service has changed so dramatically since the Croham Directive, since the late 1970s. I think outside commentators often look at the old episodes of 'Yes Minister' to get their attitudes to how the civil service responds. But these were recorded and written 15 years ago or more. During that whole period, really since the Conservatives took over in 1979, there has been major reforms of the civil service, and I think that we have in the senior civil service and in the grades below that we represent, a new generation of people who actually do understand the importance of an open culture in government. I should also add that we have had the Labour Party committed to open government for a number of years - Mark Fisher's Bill that Charles has just referred to. Frankly, there has been an opportunity, particularly since the implementation of the Code of Practice, for people to actually come to terms with what the idea of open government means. I think the simple fact is that many civil servants genuinely believe that more open government will be better government, which is why this white paper is actually so important. I think everybody in the room has welcomed its publication, I mean the government pulled off what I think we all thought was going to be impossible: on the one hand getting the fulsome support of the Campaign, together with, actually, the support of many civil servants. I think these proposals are genuinely not only some of the most liberal in the world, but they do manage to pull off that trick of protecting policy advice to ministers. And we have argued consistently in the Campaign, in fact we organised a seminar about three years ago, at which both government ministers at the time and what were then opposition spokespersons took a part in. We did say that this was essential if the Act was actually to work in practice. I'll come back to this issue.

Firstly though, where do we go from here on this? Well the FDA, along with other organisations, is submitting its response to the white paper and actually it's not a very lengthy document. Our Executive Committee went through it twice and did not find great points of detail with which to argue with the government. In many of the paragraphs we are actually

content to endorse the approach that the government is taking. I think like everybody, again we will want to look at the wording of the legislation.

There are issues of concern. I think we will be pressing the government to severely restrict and limit the range of commercial confidentiality. I think, frankly, the use of commercial confidentiality over the last few years has been a disgrace. It was used, frankly, politically to block scrutiny of an increasingly large number of operations undertaken by private companies on behalf of government, and that was very damaging for the unions, in terms of our access to information, as well as people more generally. I certainly think that in all contracts - and you may have a particular financial threshold implemented - but I think all contracts, in principle, awarded by public bodies should be open for inspection. That should be signalled in advance when tenders are invited. I should say that we, on a number of occasions, raised this message with the previous government and were told by the Cabinet Office, in fact, that there were no barriers to contracts actually being made public. It was just that on almost every occasion where we then asked in practice, commercial confidentiality was invoked on the particular contract or privatisations or contracting out exercise we actually wanted to get to grips with.

Now I accept that the present government has broken away from the ideological commitment of the old government that private sector provision must always be better in principle than in public, and that was a view that they made no secret of. But it has also made clear in its dealings, with us certainly, that it has no particular preference for the public sector either. In practice what we are going to see is an increasing plethora of partnerships, the buzzword for so much of what the government is doing. Where the lines between public and private provision of government services will become increasingly blurred. If you are going to have an increased accountability of the public services, then that must also be extended into the private sector in such ventures. And then contractual relationships, including all of the financial aspects, must be available for scrutiny, and not only 2 or 3 years down the track by the NAO. And as has already been mentioned, that actually significantly assists public bodies in actually obtaining best value for money.

Now we have also been particularly pleased with the decision to appoint an independent Information Commissioner. I don't accept the argument that it should be the same person as the Ombudsman. Not because of any criticism whatsoever of the Ombudsman, but I do think this is a particular role and what will be a very major task to take on. Now a small point, but one that Maurice didn't touch on earlier, but in Maurice's submission to the select committee, the initial response, he did actually make the point that not only should this post be filled under the public appointment rules, I think we all take that now for granted, and a decision reached in agreement between the Prime Minister and the Leader of the Opposition. I do think there is a parliamentary role here. Rhodri Morgan is not with us now, but I don't think it should just also be a matter for the chair of the Public Administration Committee. I think actually we ought to be thinking about going down the route of confirmatory practices, as we do see in the United States, whereby select committees, MPs, can actually consider the actual nominees for the appointment for this particular post, because this post will be important than

any other single decision that is taken as to how this Act is actually implemented. Certainly for the first few years. Getting the right person for that first major few years as the Act starts to work through I think will be crucial. And I do think there is an argument about how that person is appointed.

There is another point that has not been picked up about charging. Not whether or not there should be a charge, but actually the white paper talks about tiers of charging. It talks about commercial on the one hand, and private on the other. Now the FDA, as with the Campaign, and other bodies I know in this room, are certainly not commercial as we know them, but neither are we individuals. I think there has to be a concept, if there are to be charges, there has to be a concept of a not-for-profit organisation, because if organisations like my own are linked in with commercial organisations, then it could become quite onerous.

Now Charles has also spent most of his talk highlighting the problems raised by paragraph 3.13. I welcome the government's wish to protect opinion and analytical information, not the raw data. But as Charles has gone into in some detail, it is extremely difficult to actually start to draw the line here. It's a very, very grey area and I'm not going to stand here on the platform today and say we have actually got the answer to this because I don't think there is a single answer about how you deal with this. I certainly don't envy Charles in having to draft the legislation. Civil servants will certainly need very very clear guidance as to how to interpret this aspect of the proposals. I do think that there is no doubt that this legislation will lead to greater openness of policy advice. The harm test talks about the particular context, the particular issues, that are being looked at. But frankly there will be an element, as David Clark said, of progression, as the culture starts to change. And I think it will change quite quickly. Then people will be able to draft in a way that actually takes account of the needs of the legislation, and actually people will be become more used to the fact that advice that is going forward, some of that advice is going to come into the public arena quite quickly.

I think part of the answer is actually not in the legislation, it is about the way that government actually draws together policy, and there is all kinds of policy of course in government. There is the policy of immediate response, there is policy about how the Foreign Office and other government departments deal with the situation in Iraq. But there is also longer term policy about how you deal with freedom of information, and a whole range of other matters. And I think it is actually quite positive that the government is being adopting the approach that says, and I am sad to have to say this in a sense, but the civil service no longer has the monopoly of policy advice. It is a fact that we have to live with and come to terms with. The situation has changed and it has been part of that process of change over the last twenty years. In that context, having much greater involvement at the early stages, through review groups, through task forces, is actually a very useful development because it brings in a greater input at those crucial early stages - and I should add of course it has an impact on leaking and that kind of thing. If more people are involved at the early stages of drawing up policy, then in a sense more of that debate is held in the open from the start, rather than at the point at which decisions are announced and proposals been made.

Going back to the question of policy advice. In the end, the issue is not about the civil service. There has been a great deal of talk during the day on and off about the civil service. Very little has actually been said about ministers. The reason that policy advice is going, as it were, no further than the white paper proposes is that, frankly, I don't believe the white paper would have come up before us, because ministers would have blocked it. There is an issue about protecting the anonymity of civil servants. There is an issue about insuring - particularly in a culture where we have a fairly low level of press - that people don't confuse the work that individual civil servants do with their own individual attitudes. I don't want to go down the route of civil servants being answerable for policy. That is not how the British system works. But in practice the real problems lie for politicians, because in the end all that the civil service can do is put forward the best possible advice it can provide. In the end politicians have to take the decision and there are occasions when that conflicts with the advice that they are given. It is the politicians as much as the civil service who are really concerned about what aspects of the advice, that they may well have ignored or turned over - quite properly that is part of what they are there for - coming out into the public arena.

But over and above those particular concerns about the white paper itself, I think our main worry - or our main area that we would want to explore - are the practical steps that are going to be taken to implement the legislation over the coming months, and when the legislation is on the statute books in about two years time. I do believe that what is now required is early and very clear guidance across the civil service about how the government believes this will work. The white paper itself draws a reference to implementing this culture prior to the legislation coming into place. If the civil service is to deliver open government then there are many practical steps that we will need to take as soon as possible. The white paper recognises the need for effective records management standards. There will need to be guidance for the civil service, in particular about the storage of information technology and data records. I think if this problem isn't tackled quite quickly then there will a gaping hole in practice in the legislation, particularly when you look at this in the context of government's commitment to the electronic delivery of services.

There are resource issues, both in terms of staffing and in terms of accommodation. Training and open government needs to be built into career development of all, certainly of FDA's members as well as that of more junior staff, quickly and that should begin sooner than later. The white paper talks about the government considering the inclusion of FOI awareness in its monitoring of departments training and development. I don't think there can be any question about that. That has to be done if this is to work. There is a problem about cataloguing and indexation. Something that has not been talked about, but actually a lot of the paper, a lot of the information that is held is not in any way easily accessible even within government at the moment, and certainly not for people trying to approach it from outside. And if you are a civil servant trying to respond to information requests you have to know where this information is and it may well be scattered across a range of departments. And all of these areas have to have common practice adopted across the civil service. Actually at a time when the legacy of the last 18-19 years has been for delegation which has undermined effective mechanism for drawing up common approaches and implementing them.

But then that brings along to the wider concern. I am confident that we will achieve common standards of practice across the civil service, but the danger then is that you will actually have different practices in other areas of the public sector. I think the Freedom of Information Unit must be a body that can translate central government standards and practice, which is the function that is set out largely in the white paper, but actually then translating that to every other area covered by the legislation. That includes local authorities and the National Health Service. And I think moreover with the blurring of the boundaries between different public sector organisations, this will become particularly acute, particularly if we get as well much more of the partnership approach between, say, central and local government, or a greater enabling role from regional government. Similarly again, I'm sure the people in this room know the fine print of this, but if you've got issues relating to health matters then documents will lie partly in central government, in the NHS Executive, maybe in a regional office, also at a Trust level - which of course are independent public sector bodies - and possibly even with local authorities. Now if you take it a step further, if Manpower, or whoever, are delivering the New Deal, as they are helping to in some parts of the country, then some of their records may well need to be open to public scrutiny. So actually the Cabinet Office, as the lead within the civil service, actually has a major job on its hands.

I think there is a further question about the relationship between the FOI Unit and the Commissioner, because there will be a question about the longer term - if the FOI Unit is the body that in a sense is developing all this training and guidance and reviewing that - that is still part of a central government department, and it may raise questions if you had a government elected which was not particularly sympathetic to the legislation. I honestly don't know what the Conservative Party's view will be of this legislation. So far, they have not to my knowledge made a sort of formal for or against, but it may well be that future governments are not so sympathetic, and if they are in charge of all the training and guidance, that would cut across the independence of the Information Commissioner. These are not insuperable by any stretch, but I do think there are questions that need looking at.

Finally though, I do think that with political will all of these problems can be overcome. Going back to the original point, why does the civil service - I genuinely believe - support this legislation? The government is concerned about disenchantment with the political process. Part of that disenchantment, I think, is the behaviour of politicians, but actually a lot of it lies in the excessive culture of secrecy that David Clark talked about earlier. It's bedevilled the civil service, it's bedevilled government for far too long. If the public is to trust government, then it must understand how government works and why government acts as it does. And if the public trusts the government more, which I think open government will assist in, then it will respect and trust the civil service. I'm not so naive as to suggest that every civil servant is standing up with glee at the prospect of the legislation, or that individuals may find their jobs more difficult in the short term. Some people will feel unhappy about this, but I do believe that the overwhelming majority of members that certainly the FDA represents, and the civil service more broadly, do believe that this legislation is a major step forward, and it actually can do nothing but enhance the reputation of Britain's civil service.

Sheena McDonald

Thank you very much indeed Jonathan. You have raised a lot more questions which we won't have time to go into in the remaining time. Maurice Frankel, I'd like to say I think you have designed a very mature conference. When we started the day we had, I suppose, the equivalent of a brand new house and everyone was very excited, and here at the end of the day we have got onto the bits that we didn't notice when we bought it - the wonky washers and the blocked drains, and the infestation and the subsidence which have to be dealt with because that's real life. Before I ask you to do some kind of up sum and indeed open it up to the floor for final comments, I wonder if Michael Tankersley and Kevin Murphy have anything to offer in the way of experience and advice on this particular issue we have been looking at in this last session, policy advice.

Michael Tankersley

Trying to wrestle with the question of fact versus analysis is a perennial one that there is no easy way out of. Other than that, what I think you find in practice under the American Act is that the law does make this distinction that factual information is subject to release and advice may not be, but overriding that is an encouragement towards the government to release even deliberative material, unless it is that the release of that really will result in some harm. So rather than trying to make these very difficult distinctions, what you have is a much more constructive exercise of encouraging the government to just simply identify and think hard about whether or not there is anything that they can't release about the deliberations and only withhold that, and to release analysis generally, as long as there is no overriding concern or justification for withholding it. And that is, I think, a much more constructive exercise.

Sheena McDonald

Thank you. Kevin Murphy?

Kevin Murphy

Yes, if I could just make one or two general points after listening to Charles. I mentioned this morning - and some of you may have been surprised at it when I compared the recommendations of Ombudsman and the legal determinations of Information Commissioner - I expressed a view there, and partly that view arose from the fact that the experience in Ireland is that all the administrative tribunals and so on that have been set up with a view to taking things and making them less legalistic have all been captured by the legal profession. And one of the fears I have, and I think it was a little reinforced listening to Charles, is that this piece of legislation may become very legalistic and the parsing and analysing of words will occur. The second point I'd make is that the exemptions, with one or two exceptions, do

not have to be used. The mere fact that you can categorise, take it out of factual and put it in…, does not necessarily mean… and one has to apply a degree of common sense here. I have had for some years responsibility for the [environmental] access to information regulations. In the UK the appeal mechanism is, I think, the County Courts, and I was asked as Ombudsman do this, and my experience with County Managers, as we call them, they are chief executives of local authorities, was that they looked at the regulations and the exemptions and they pleaded all of them. Basically we had to sit down with them and say look we have got to use common sense here. If you released this information, would it do any harm? And we found that there was a change in culture.

And I think that leads me on to something we haven't really discussed today, and that is there is provision in the Irish legislation but also in the white paper for mediation. Now one has to strike a careful balance here as Information Commissioner. At the end of the day one is making determinations. There is an exhortation, if I can put it that way, to try to use mediation, to arrive at a final determination and I certainly would hope to use that with my colleagues, if you like, in the public bodies.

Finally point, just about the Irish legislation. In this area of policy advice, basically it uses the term 'deliberations of public bodies', it talks about various things like opinions, advice, recommendations, consultations but goes on, "and the granting of the request would, in the opinion of the head, be contrary to the public interest", so there is a strong public interest test there. It also goes on to exclude, as Charles was saying, factual information and various investigations about effectiveness and all sorts of things. I would expect that this question of 'contrary to the public interest' will figure largely, but I think here one will have to weigh the whole direction of the Act, and the fact that so much emphasis is given in the Act to disclosure rather than withholding, that will be a major factor. And I would hope, and I've said this to permanent secretaries, that there is an obligation on them, when they are making the initial decisions - or their staff - to take the public interest into account at that stage. Then, if there still is a refusal, when it's appealed internally, which is the second stage, the public interest again has to be taken into account. I have indicated to them that if and when it comes to me as an Information Commissioner I will expect that that public interest has in fact been examined, that it hasn't been brushed to one side, with the Department of Finance saying, "Well the public interest is the Maastricht criteria", or the Revenue saying, "The public interest is enlarging the revenue." That there will be an actual real attempt at those stages to take the public interest into account.

Sheena McDonald

Thank you. I think Maurice, now might be time for you to talk about how the platform and the floor have expanded on some of the hopes and fears that you outlined in your overview at the beginning, and perhaps as the unspoken, but I thought implicit, suggestion in Jonathan Baume's comments that there may be an element missing here, which is those advisers who don't have a formal role as covered, at least in your programme today. Perhaps you should

have invited Mr Alastair Campbell and Mr Charles Whelan to explain how they see FOI affecting them.

Maurice Frankel

I think we would have been delighted to invite them if we thought there was any chance of them appearing. My first response is to say how refreshing I thought it was to hear Charles and Jonathan speak in the terms they did about these issues. Really, to hear these issues discussed in such a positive way, and not have the kind of recital that one would have expected, would probably have had, a few years ago, of all the obstacles and why none of this could be done and so on. I think that was terrifically helpful and positive.

I think, reacting partly to the approach that Charles outlined towards the background papers was this: that I know for myself when I am writing a paper if I find it very very difficult, boring to write, the chances are that I am not writing anything that anybody wants to read. And the question is, if producing all these background papers is such a slog and requires such careful editing and consideration, are we actually getting at the material that is the genuine, at the heart of the issue concerned here, or is this a sort of post-factum writing which is missing the essential issues?

Now actually, part of my problem with policy advice is that every Sunday newspaper you read gives you the inside story about the actual concerns going on over key decisions. Two weeks ago we read about the differences between Gordon Brown at the Treasury and John Prescott for Transport, Environment and the Regions, about the funding of the Tube. Nobody is allowed to go on the record and say, "This is our view, this is the Treasury's view and this is Transport's view about it." But somehow these views found their way onto the front page of the Observer or the Independent on Sunday. So here we began to get some insight, but the problem is that the way in which the discussion under freedom of information goes is always on the grounds that one must not find out about disagreements within government, as if somehow one is striking at the heart of government by revealing these disagreements. Now if that is true, how come we see them every Sunday in our Sunday newspapers? And if the politicians themselves are prepared to express their views, because obviously it comes from them or through their special advisers on their behalf, how is it we are not allowed to find out in a proper way until 30 years? So really, I would like to know more about the actual underlying argument, as it is at the time. I don't mind, okay, we will have it delayed a bit, but the argument as it was at the time as opposed to rewritten after the event to take account of the sensitivities that need to be covered over at that time.

We have the experience of the New Zealand Freedom of Information Act, where there is a presumption that after the event you will see the advice as it was at the time, sometime after the event. And I would be much happier looking at that. Now to be fair, at the time the New Zealand legislation was drafted nobody said, "This is what we are going to do, this is what its going to be", it evolved. So you know, Kevin Murphy is suggesting and Jonathan is suggesting, probably Charles was suggesting as well, we may see evolution in this direction

as well, which I would very much like to see.
But the analytical material that I want to see is the scientists explaining what their true view is about the risks of maternal transmission of BSE. That is what I want to see. It is not some reconstructed background analytical view, it is the actual views they are expressing at the time. That's the kind of material that I hope we will come to see, and I think the concept of 'actual harm' is, and I'm pleased to hear Kevin Murphy say, you know if somebody comes to me and says the only reason is candour and frankness, I'll expect good evidence about why that should be the determining feature. Because I think it is true, as one would imply from Jonathan, most of the civil servants are not worried about expressing their views, but they are worried about the politicians' reaction to their views being expressed, and to any contradiction between the two. These are some of the issues which I think we are still to explore but I think one has to accept government is terrifically sensitive about this and it can't be pushed too far otherwise it would go right into its shell.

Sheena McDonald

Any final thoughts from the floor. The gentleman at the back.

David Lowry

I do research and write for *Environment Business* news briefing. My question is to do with the way in which commercial confidentiality is going to be interpreted, not so much in terms of government departments but in terms of nationalised industries and quangos. At the moment, in parallel with the consultation for the white paper, there is a consultation going on, sponsored by the Environment Agency, into a proposal by British Nuclear Fuels to expand one of its operations at Sellafield to build a new plutonium fuel production plant. BNFL provided information to consultants of the Environment Agency on the economic appraisals of this project and that document is now open to consultation. The problem is that they have excluded all the key information from that document on the economic appraisal on the grounds of commercial confidentiality. So we are in a rather ridiculous situation of a public consultation exercise taking place on a document that really has no financial or factual economic details in it at all. How can the new Freedom of Information proposals address this problem? It won't solve this particular consultation, but for the future consultations, surely something must be done about this situation.

Sheena McDonald

Charles, do you want a shot at that?

Charles Ramsden

Obviously there has been a lot of discussion today about commercial confidentiality in one or another aspect. I'd have been fairly surprised if there hadn't been. I assume that the approach that will be adopted in the legislation will be that whatever approach to commercial confidentiality - which is essentially the substantial harm test - but like the other specified interests, this will be, the interest of commercial confidentiality will be defined to some extent in the legislation. So there will be certain factors to be taken account of in determining, by those who make the decisions, whether substantial harm is likely to be caused by the disclosure or not. As far as I can imagine, the Act will make similar provision of this sort for all the bodies that it covers. So in other words, there wouldn't be a number of provisions that apply to certain types of commercially oriented public sector organisations, others to private firms etc. There might be, perhaps, a certain amount of differentiation within the specified interest, but I don't know. We will have to think about that. But essentially there will be a number of factors to take into account. There is to be, in due course, work done within government to address - actually primarily in the Code context first before we look at FOI legislation - the question of trying to ensure greater consistency over the use of 'commercial confidentiality' in the information that the government supplies. So consistency is the message but there is nothing that I would want to say in particular about the nationalised industries.

Sheena McDonald

Thank you. I said we would finish at five on the dot, in fact we will finish at five past five. Dr Lowry particularly, is asking a question from the particular but about the general. But on the particular that he mentions, Michael Tankersley, that's safety of nuclear power plants, that's something you identified as American FOI legislation having dealt with very well in this context of commercial confidentiality. How did you get it right?

Michael Tankersley

Under the tests that the American statute has set out, which is similar to what is proposed in the white paper, safety information with respect to nuclear power plants or environmental safety is releasable and subject to release under the statute. The fact that it is obtained from a commercial entity and is kept confidential by business is not sufficient to withhold the information under the American Act

Richard Thomas

Just to add one rather more general comment here, which seems to me that when we come to look at what is commercially confidential information genuinely, one needs to distinguish

between that which applies in a competitive market, where there are commercial competitors, and that where there is a monopolistic supplier, in other words a quasi part of the public sector. That is one quite important distinction to take into account here.

Sheena McDonald

The gentleman with the yellow shirt.

Stefan Goldstein, Medical Research Council

The matter of scientific advice received by government has been mentioned a couple of times, and just now in relation to BSE. What I would like to know very simply is, does the proposed legislation not pose a risk of premature disclosure of scientific research information? Now this is not just in relation to BSE obviously, but in relation to research findings in general. Yet there may perhaps be pressure to publish prematurely or to provide information before it is properly published.

Sheena McDonald

Yes, we did touch on premature disclosure earlier in the day. Would anyone like to tackle that one? Charles, thanks.

Charles Ramsden

There is, in 2.26 of the white paper, that in the context of gateways to the Act, looks at applications for information which will be or is intended to be published at a future date. The public authority, and this is within the context of being able to refuse to disclose on the spot as it were, would need to give an indication of the plans for publication. I know that somebody this morning objected to, Bob Worcester, objected to the implications of this sort of approach, that it might very easily lead to government departments stalling for months and years on publication plans. Obviously that is something that will need to be addressed as we move through to the legislation. But in the sense that the white paper takes it, certainly there is written in something about the issues that you might need to face in trying to ensure that premature publication is not forced out. One thing that nobody has mentioned today so far in terms of BSE, and other related areas, is a consultation paper recently from the government - I forget whether white or green, there are rather a lot of them around at the moment - on the new food standards agency, which proposes that the policy advice of that body to ministers will be made public, and that may have a bearing on the sort of area of debate that you were talking about.

Sheena McDonald

Thank you, yes?

John Swan, Sunderland City Council

Regarding clause 3.12. Is it envisaged that the simple harm test for decision making and policy advice will apply to local government as well as central government, and if not, why not? Just by way of personal explanation…

Sheena McDonald

Well actually, I think we will just answer the question if that's alright, simply because of the time factor.

John Swan, Sunderland City Council

Quite.

Charles Ramsden

Wording written into that: "Protection of this interest may well also be necessary for other records such as confidential communications between departments and other public bodies." In the production of the white paper, we were conscious of avoiding the impression that what was being looked at here was, could be seen as, some sort of self-serving protection mechanism for central government alone, and that therefore the same arguments might very well apply in the public sector more generally. But it will be for the results of the consultation process and the drafting of legislation, and then further consultation process on that draft, to determine exactly how far the spread goes and what the protection mechanism is.

Sheena McDonald

So submit [your comments], and finally at the back, yes?

Susan Pipes, Friends of the Earth

Charles Ramsden clearly set out that there are good positive government policies that are improving access to information, but there is still a lot of contradictory policies that state that

government agencies have to charge for their data, and that leads us to a situation where if you want to get *Rivers for the UK*, it costs £18,000. And that's not the quality of the water in those rivers, it's just their location. If we want land use data it's £18,000, and that's for data set that's 10 years out of date, right up if you want to get detailed information from the monopoly of the Ordnance Survey. Their catalogue states it's £32 million. Isn't the Freedom of Information white paper an opportunity to actually give guidance to the government departments on what constitutes a reasonable cost, particularly if the information is being used in the public interest?

Maurice Frankel

Well, my reaction to that is that it seems to me to be a classic argument for dual pricing, so that public interest groups wanting to use it for a limited public interest purpose should not be charged the commercial rate that would be charged to a commercial customer. I know that Friends of the Earth's experience of Ordnance Survey and data is a classic example of this and I would hope that we can find between the Crown Copyright Green Paper and the Freedom of Information white paper some way of not charging tens of thousands of pounds for people who want to publish pollution maps which are not to be further commercially exploited by other parties.

Sheena McDonald

OK, a lot more to talk about and there is still almost a month to submit. I'm going to give the final word to you, Maurice, because we have run out of time.

Maurice Frankel

First of all I just want to say how remarkable I think the audience has been. For so many people to have sat through such a long experience; we are all tired and I can see that you are all tired as well. Sheena says they are all waking up at the thought of getting into the pub!

Sheena McDonald

I didn't say that!

Maurice Frankel

No, I put that into your words. But of the people who are here and tired, I think some are more tired than others, and of those probably the people in the Campaign's office who have

been near killing themselves in order to get this conference put together, particularly Andrew Ecclestone who has done an enormous amount of work in a very short time, helped by Jonathan Hardy and Roma Scott in particular, and the volunteers who have been helping the Campaign out, Simon Canter and Diana Frampton, I want to thank them. I particularly want to thank the sponsors who have sponsored this event today, not just for their support for today, but for their support for the Campaign over a long period of time. That is the Consumers' Association and UNISON and the Joseph Rowntree Charitable Trust, who have really been solid friends of the Campaign at times when this did not look like it was a real prospect, so we are very grateful to them. I am grateful also to the speakers here who I think have done a terrific job in coming along and doing short, simple presentations of very complex important subjects, everyone on the platform as well as those who had to leave or are still in the audience.

Sheena McDonald

Thank you very much and I suppose - well you have said it - thanks to the speakers, also to the Minister and to Sheila McKechnie. And a huge 'thanks' to Maurice Frankel. I think there is no doubt that without his personal commitment over a long period, we would not be so well informed, the white paper would not be in the state it's in, we certainly wouldn't be here so thank you. And thank you for coming.

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