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COMMENTS ON THE DRAFT 'GOOD PRACTICE' CODE

Response to the draft code of practice
to be issued by the Lord Chancellor
under section 45 of the Freedom of Information Act 2000

14 February 2002

Summary

The comments below refer to the draft of the code of practice to be issued by the Lord Chancellor under section 45 of the Freedom of Information Act 2000.[1] The code is intended to set out "desirable" practice under the Act. One of the Commissioner's duties will be to promote compliance with it.[2]

In many respects the draft code is helpful. We particularly welcome:

- the positive approach to the Act's duty to advise and assist applicants (page 5);
- the suggestion that all decisions on disclosure, including those involving issues of public interest should be taken within a 20 day period (page 7);
- the fact that the code discourages authorities from too readily agreeing to accept information in confidence (though we think this provision should be further improved) (pages 8-9).
- that authorities are advised to ask third parties for their consent to disclose exempt information, rather than assume that such information cannot be disclosed (page 10)

However, we believe the code:

- does not do enough to prepare authorities for a major shift towards openness (pages 2-3);
- should give greater prominence to the need for staff training (pages 3-4);
- should advise authorities to monitor their handling of FOI requests – the failure to promote monitoring is a serious shortcoming (page 11-12);
- should correct a misleading impression about applicants' rights of complaint (page 13);
- should set time limits for the handling of complaints by authorities (pages 14-15);

[1] Available on: www.lcd.gov.uk/foi/codesprac.htm
[2] Freedom of Information Act 2000, section 47(1)(b)

- should not encourage authorities to prohibit contractors from disclosing exempt information; the unnecessary secrecy caused by inappropriate contractual references to the Official Secrets Act should be addressed (page 17-19);

- should provide guidance on the charges that can be made for information (page 20).

Purpose of the legislation

The code should start with a clear account of the Act's purposes and benefits. The current draft contains only this studiously low-key statement:

> "It is the Government's intention that the Freedom of Information Act will further the Government's stated aim of greater openness in the public sector. Conformity with the Code will assist this."[3]

This will not indicate to authorities that any significant change in culture or practice is intended. The previous draft of this document was slightly more positive, stating that the government intended the Act to be "a catalyst for a change of culture within the public service" – but this phrase has been dropped.

The Home Secretary's Advisory Group on Openness in the Public Sector recommended that the legislation:

> "will need to be presented in a way that encourages public sector staff to take a positive view of Freedom of Information. They need to recognise that the empowerment of citizens and the critical questioning that can result can enhance the efficiency and effectiveness of public services by improving decision making and ensuring that the public sector provides relevant and improved services".[4]

The code is an obvious place for such a message, and indeed other statutory guidance is used in this way. DTLR guidance on the new local authority executive arrangements, states that the aims:

> "are to make decision making more efficient, transparent and accountable so that local authorities can be more open and responsive to the needs and aspirations of the communities they

[3] Foreword to code, paragraph 2
[4] Advisory Group on Openness in the Public Sector, Report to the Home Secretary, December 1999, Paragraph 5.31

> serve….there will need to be effective access for the public to decision making and decision makers…All decisions of a local authority…will need to be made in accordance with…a presumption in favour of openness".[5]

A draft of the code to be issued by Scottish Ministers under the proposed Freedom of Information (Scotland) Bill goes beyond the draft UK code, noting that:

> "the disclosure of information both proactively and in response to specific requests, serves to strengthen government and increase public involvement in decision-making"

The former Home Secretary, Jack Straw, has provided a better example of the kind of statement that might be used, stating that the Act would:

> "help transform the culture of Government from one of secrecy to one of openness….By doing so, public confidence in the processes of government should be raised, and the quality of decision making by the Government enhanced."[6]

Former Home Office minister Mike O'Brien, said the Act would:

> "enable members of the public to question decisions more closely and ensure that the services provided by the public sector are more efficiently and properly delivered…We need a much deeper cultural change and a new spirit of openness among public authorities."[7]

The code should also encourage authorities to approach requests for information in a positive spirit. They should provide information wherever possible, and not treat requests legalistically, seeking possible grounds to resist disclosure.

Training

The foreword to draft code highlights the fact that all written requests for information must be dealt with in accordance with the Act, and emphasizes the need for appropriate staff training.[8] But this provision only appears in the foreword, which is not part of the code itself.

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[5] *Local Government Act 2000. Guidance to English Local Authorities. Chapter 7, paragraphs 7.1 and 7.3.*
[6] The Home Secretary, speaking at the FOI Bill's second reading 7/12/99, col 714.
[7] Foreword by Mike O'Brien to the report of the Advisory Group on Openness in the Public Sector, December 1999.
[8] Foreword to the draft code, paragraph 10

The distinction is important because certain of the Commissioner's powers can only be exercised in relation to matters covered by the code. Unless training features in the code itself, the Commissioner cannot issue an "information notice" to require the authority to explain what training it is providing[9] or a "practice recommendation" to persuade an authority which is doing no training at all to provide it.[10]

One of the principal reasons cited by the Government for its damaging decision to delay the FOI Act's right of access for four years, until January 2005, is the need to for authorities to train staff. In light of this, any failure to give training a high priority in the body of the code will be incomprehensible.

Limitation on the duty to assist

Section 16(2) of the Act provides that an authority is deemed to have complied with its duty to provide advice and assistance in any case where it has conformed with the code's provisions.

One specific passage in the draft code appears to be a reference to this provision.[11] However, the code is silent as to whether or how this restriction might apply elsewhere. Authorities might interpret section 16(2) to mean that where they have complied with *any code suggestion* about advice or assistance they cannot be required to do more. Since most of the code's provisions do not appear to be exhaustive, this would be a major loophole.

This conclusion may be reinforced by paragraph 5, which states:

> "Every public authority should provide advice and assistance *(as set out below)* to those who propose to make, or who have made, requests for information…" (italics added)

The italicised phrase might be taken to mean that in circumstances where the code makes no suggestion about assistance, no duty to assist exists. This could be avoided by inserting the phrase "including but not limited to the steps set out below".

The code should make clear that:

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[9] Freedom of Information Act 2000, section 51(1)(b)(ii)
[10] Freedom of Information Act 2000, section 48(1)
[11] Paragraph 9 outlines the steps that an authority should take to assist an applicant in clarifying an ambiguous request and adds "If following the provision of such assistance, the applicant has failed to describe the information requested in a way which would enable the authority to identify and locate it, the authority is not expected to seek further clarification".

- the duty to advise and assist applies in all circumstances, regardless of whether they are specifically mentioned in the code;

- the limit of this duty is what is "reasonable" – the test in section 16(1) – and not whether or not the code mentions a particular course of action;

- the code limits that duty only where it expressly states that to be so.

Assistance in making applications

The specific advice and assistance proposed in this section is extremely helpful. We particularly welcome:

- the steps authorities are advised to take to help requesters identify what information exists, which include giving access to indexes and catalogues;

- the indication that where officials discuss the scope of a request with applicants they should not seek to determine their aims or motivation;[12]

Clarifying requests

This section of the code dealing with ambiguous requests[13] could be strengthened by encouraging authorities to contact applicants *as soon as possible* to ask for further details, to avoid adding to delay in dealing with the request. The code might follow the Irish Government's 'FOI Manual' which advises officials to:

> "take immediate steps to contact the requester, preferably by phone, fax or e-mail…such contact with the requester…should take place immediately on receipt of the initial request…and certainly not later than 2 working days subsequently"[14]

[12] Paragraph 8
[13] Paragraph 8
[14] www.irlgov.ie/finance/publications/foi/foiman01.htm

Contact details

The draft code states that authorities should publish an address and if possible an e-mail address which applicants can contact for assistance.[15] It should also encourage authorities to publish a contact name and phone number.

Applications by the disabled

Where an applicant cannot make a request in writing the draft code suggests that an official should take a note of the request on the telephone, send it to the applicant for confirmation, and act on it once the applicant has verified and returned it. Asking the applicant to return the note may be excessive for someone who, because of illness or disability, cannot make a written application in the first place. It should be sufficient for them to confirm by telephone that the note adequately describes their request.

Provision of information to applicants

One specific implication, which we think the code should mention, is the need for staff *to draw the Act to the attention to applicants who appear unaware of it.* The first element of the duty to advise and assist should be to ensure that applicants know of the existence of the Act and the rights it confers.

Section 17 of the Act already requires an authority to cite the Act when refusing information.[16] The code should encourage authorities to do so in relation to all written requests for information. Even where an authority assumes that it has provided all the requested information, this is often not the applicant's perception. Anyone seeking information from an authority should be told that their request is subject to the Act and that the authority's response can be challenged under it.

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[15] Paragraph 6

[16] Section 17 requires authorities to justify any refusal to provide information which is held by citing the exemption relied on, the reasons why it is believed to apply, the reasons why disclosure is not being made on public interest, and notifying applicants of their rights to complain to the authority and to the Commissioner.

‘Prompt’ responses

The code should remind authorities that they are required to deal with all requests “promptly”[17] and are not entitled to wait until the end of the 20 working day period if the information could be provided earlier.

Deadlines for ‘public interest’ decisions.

We welcome the statement that authorities should aim to reach a decision on the public interest in disclosure within the same 20 working day period allowed for decisions on whether an exemption applies.[18]

Where this cannot be done, the Act requires authorities to give an estimate of when the public interest decision will be made.[19] The draft code suggests that authorities:

> “are expected to comply with their estimates in *the majority of cases*” (our italics)[20]

This is an unacceptably low target. An authority which sought to meet its deadline only in the “majority” of cases could exceed them 49% of the time. The frustration to applicants, whose requests remained unanswered perhaps months after the authority’s own deadline has passed, can be imagined.

The code should advise authorities:

- to set realistic estimates and *always* aim to comply with them;
- to provide applicants with an apology and explanation when they do not meet them;
- to keep records of any failure to comply with their estimates;
- where estimates are exceeded more than occasionally, to identify and rectify the problem.

[17] FOIA 2000, section 10(1)
[18] Paragraph 13
[19] FOIA 2000, section 17(2)
[20] Paragraph 12

Reasons for refusals

When notifying applicants that exempt information has been withheld, the Act requires authorities to state which exemption is involved *and why the exemption applies.*[21] The latter provision is easily overlooked, and should be highlighted in the code. It should stress that the provision requires more than merely paraphrasing the words of the exemption.

The Act also requires authorities, when refusing information (other than under an 'absolute' exemption) to set out their reasons for concluding that the public interest in maintaining the exemption outweighs the public interest in disclosure.[22] The code should also highlight this requirement – which again may easily be overlooked - and advise authorities to specify the public interest factors both for and against disclosure which they have taken into account.

Transfer of requests

We welcome code's provisions on the transfer of requests for information which is held by another authority.[23] These will be helpful to applicants.

One situation which is not explicitly mentioned is where an authority holds a *copy* of a record which has been produced and supplied to it by another authority. The guidance should make clear that the authority is not entitled to transfer the request to the originating authority.

Information in confidence

We are pleased to see that a passage has been added to the latest version of the draft code discouraging authorities from accepting information in confidence unless the information is necessary to their functions.[24] A further condition should be added. Authorities should only agree to accept information in confidence if *it would not otherwise be provided.*

Paragraph 30 of the code would then read:

> "A public authority should only accept information from third parties in confidence if it is necessary to obtain that information in connection with the exercise of any of the authority's functions *and if the information would not otherwise be provided."*

[21] Freedom of Information Act 2000, section 17(1)(c)
[22] Freedom of Information Act 2000, section 17(3)(b)
[23] Paragraphs 14-20
[24] Paragraph 30

This would discourage authorities from offering to accept information in confidence without first establishing whether the supplier of the information would provide the information in any case.

Confidentiality may sometimes be requested or offered simply out of habit, not because it is an essential condition. Requiring authorities to test this assumption should lead to greater openness. This is what has happened with the responses to public consultation documents. Because authorities have encouraged respondents to allow their comments to be made public it is now rare to find respondents who insist on confidentiality.

On the other hand, lobbying that takes place outside the formal consultation process still takes place in confidence. We have had the experience of being shown responses received by a government department during a formal consultation period, while being denied related submissions on the same issue made outside that period. The only difference was that the later/earlier responders had not been warned that their responses could be made public.

Authorities should advise those lobbying for decisions favourable to their own interests that they should expect to do so 'on the record' and not assume that their submissions will automatically be treated as confidential. These bodies are promoting their own or their clients' interests, and are unlikely to abandon these efforts, and live with the status quo, merely because their representations could become public. More openness would counter the growing assumption, fostered by incidents such as the Ecclestone affair and concerns about links between Enron and the Government, that commercial interests are securing advantage through improper influence.

Information about such contacts, and correspondence or submissions, should only be withheld where:

- disclosure would prejudice the submitter's commercial interests *and* be contrary to the public interest (the test under section 43(2))[25], or

- the information is necessary to the authority's functions and would not be provided unless the authority agreed to hold it in confidence (the two-stage test proposed here).

[25] Or, alternatively, meet the tests under some exemption such as those for personal information or national security.

Consultation with third parties

We welcome the code's emphasis that authorities should seek the consent of third parties for the disclosure of information affecting their legal rights, rather than assume the information cannot be disclosed.[26]

However, the relationship between 'legal rights' and the Act's exemptions is not made clear. For example, paragraph 21 refers to "the right to have certain information treated in confidence" and rights under Article 8 of the ECHR (private and family life) but makes no reference to the Act's exemptions in these areas. We had assumed that such rights would be expected to be addressed in the context of relevant exemptions such as sections 40 (personal information), 41 (actionable breach of confidence) or 44 (statutory, Community or court prohibitions on disclosure). If this is correct, it would be helpful to say so.

The code mentions three circumstances where consultation may be *unnecessary.* These are where (a) the authority does not intend to disclose the information anyway (b) disclosure is either required or prohibited by other legislation, or consultation would cost too much.[27] A fourth situation should be mentioned: where the information indisputably could not be withheld under the Act's provisions.

We welcome the draft code's statement that the fact that a third party has not responded to a consultation about disclosure does not relieve the authority of its duty to disclose.[28]

The code should also state that the fact that a third party has *refused* consent should not in itself be regarded as *a veto* on disclosure.[29]

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[26] Paragraph 21
[27] Paragraph 22
[28] Paragraph 25
[29] None of the third party exemptions in fact permits a veto. In the case of personal information to which the *section 40* applies information may be disclosed, despite a refusal of consent, without breaching the first data protection principle (likely to be the main basis for exemption) if one of the conditions in paragraphs 2-6 of Schedule 2 of the Data Protection Act 1998 is met. In the case of sensitive personal data, one of the conditions from Schedule 3 would also need to be met.
For third party data contained in personal information about the applicant, section 7(4)(b) of the Data Protection Act permits disclosure despite a refusal of consent if this would be "reasonable in all the circumstances".
For information which may be exempt under *section 41* (information provided in confidence) disclosure without consent would be possible where the common law exception for disclosure in the public interest applies.
For information which may be exempt under *section 43* (commercial interests) disclosure without consent would be required if the authority does not accept that prejudice to a third party's commercial interests would occur, or under the section 2 public interest test.

Monitoring of requests

The draft code's provisions on monitoring are seriously deficient. The code suggests that only *complaints* about refusals to disclose should be monitored.[30] It is vital that the *refusals* themselves should be monitored.

The Home Secretary's Advisory Group on Openness in the Public Sector, made it clear that *refusals* and not just complaints should be monitored:

> "the essence of monitoring on Freedom of Information is to identify cases where information is not provided in response to an application, and establish whether the reasons for not doing so are sound and the number of decisions overturned."

> "Monitoring should be undertaken…within an authority so that senior managers can determine whether requests for information are being dealt with satisfactorily. This can be done by requiring staff who refuse a request for information to forward details to a central point in the organisation and also monitoring the complaints received about applications for information that have been refused…"

> "It would be useful to have a regional or national picture of requests for information that are refused by authorities and allowed after consideration by an authority's own complaints system. This would enable targets to be set for improving performance."[31]

We accept that there may be difficulties in monitoring *all* requests, given that any written request for information will have to be treated under the Act. However, this is also the case under the open government code, and code refusals *are* monitored.

For monitoring purposes, the definition of a code request is one:

- which specifically mention the Code; or
- for which a charge or standard fee is paid; or
- for which information is refused under one or more Code exemptions.[32]

These criteria could also be used for FOI requests.

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[30] Paragraph 37
[31] Paragraphs 2.45 to 2.47
[32] Lord Chancellor's Department. Code of Practice on Access to Government Information, Monitoring Report for 2000, paragraph 8

Unless such monitoring is done, neither the authorities themselves, nor the Commissioner will know how well the Act is being implemented. The picture obtained from complaints alone is bound to be inadequate. Experience under the code is that only 3% of refusals lead to requests for internal review.[33] The majority are abandoned after an initial refusal. Applicants may assume that that they have no grounds to challenge the authority's initial decision. They may abandon requests because it is already too late for them to use the information. Some may assume that they will not get a fair hearing at the hands of the department which refused the information, and do not have the patience to pursue a complaint through the two stages needed to obtain an independent adjudication from the Ombudsman.

If the majority of FOI refusals also go unchallenged, then even serious failures to comply with the Act will be undetected.

The Government has apparently accepted the need to ensure that "rigorous" monitoring takes place.[34] There are only two options for securing it: require all publication schemes to provide for it, or deal with it under this code.

In Ireland, although some monitoring takes place the absence of more specific data has concerned the Information Commissioner.[35] The problem has been even more acute in Canada.[36] Even less monitoring is likely to be done in the UK. Rather than wait for the inevitable problems the code should address this issue. Scotland's Justice Minister has recently agreed to amend the Freedom of Information (Scotland) Bill to add a statutory requirement that the Scottish good practice code deals with monitoring. [37]

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[33] Home Office, Open Government 1999 Report. This figure includes requests from solicitors refused by the Health & Safety Executive. If these figures are excluded, the percentage of refusals which lead to internal review is 20%

[34] On 2/7/01 at col 45, Michael Wills, the Parliamentary Secretary in the LCD said in a Parliamentary Answer, "The Government are discussing with the Information Commissioner what is the best way of ensuring that the rigorous monitoring of the Code of Practice is retained when the provisions of the Act replace the Code and extending the monitoring to all of the bodies covered by the Act."

[35] Ireland's Information Commissioner has written "…I point to the apparently high rate of refusal of requests and I recommend that public bodies gather further statistics to enable the most common reasons for refusals to be identified and, if possible, further action taken to increase the release of information." An investigation by the Information Commissioner into the practices and procedures adopted by public bodies generally for the purpose of compliance with the provisions of the Freedom of Information Act, 1997, July 2001, page 5

[36] Canada's Information Commissioner has written: "As described in these reports year after year, the problem of delay in answering access requests is pervasive, serious and chronic. To a large extent, the problem has been hidden below radar detection because the government does not collect and report the damning statistics to Parliament, though the Access Act says it should.

Rights to complain

The code misrepresents the legal requirement under section 17(7) to notify applicants that they have two rights of complaint, to the authority *and to the Commissioner.*

Paragraph 32 states:

> "When communicating any decision made in relation to a request under the Act, public authorities should provide details of their complaints procedure, including how to make a complaint."

Paragraph 40 states:

> "Where the outcome of a complaint is that an initial decision to withhold information is upheld, or is otherwise in the authority's favour, the applicant should be informed of his right to apply to the Commissioner."

These passages wrongly suggest that authorities need not mention an applicant's right to complain to the Commissioner until *after* they have dealt with a complaint under their own procedures. This is misleading and should be corrected. Section 17(7) requires authorities to notify applicants of *both rights* of complaint at the time of an initial refusal.

This is not just an academic question. If people are led to believe at the initial stage that their only right of appeal is to the authority, many will abandon their complaints. They should be told from the outset that they will ultimately be able to complain to the Commissioner

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For his part, the Information Commissioner can only monitor and report his own statistics on the number of complaints of delay. Departments chastised by him, on the basis of high numbers of complaints, have defended themselves by comparing the number of complaints with the total number of requests they had received. Using this comparison, the magnitude of the delay problem always looked manageable, if not insignificant…Last year the Information Commissioner decided to get to the heart of the matter: to find out exactly how often departments met deadlines, complaint or no complaint. The results of a study of six departments established that the extent of non-compliance with the law was alarming.,,,From 44 per cent to 74 per cent of requests received by those departments were not answered within statutory deadlines…Those results shared with the departments had a sobering and motivating effect. It attracted the attention of senior management and engendered a flurry of activity designed to diagnose the reasons for the poor performance and find solutions." *Information Commissioner of Canada, 1997-98 Annual Report*

[37] Freedom of Information (Scotland) Bill, section 60(2). A commitment to amend this provision to refer to monitoring was made by Jim Wallace the First Minister, during the Stage 2 debate on the Bill on 12/2/02.

Internal complaints procedures

Paragraph 31 says that authorities should establish complaints procedures. This is *not* a legal requirement, but the code could point out that in the absence of a complaints procedure applicants will be entitled to complain directly to the Information Commissioner, without raising the matter again with the authority.[38]

Internal complaints and delay

The internal complaints process can be a source of delay and frustration to applicants. Experience under the open government code indicates that the internal review process led to decisions that were at least partly favourable to the applicant in about 18% of cases.[39] However, subsequent complaints to the Ombudsman favoured the applicant at least in part in *70-80%* of cases.[40]

A complaint to the authority is therefore a relatively inefficient remedy. Its main benefit may be to protect the Commissioner's office from being overwhelmed by untested complaints. But it may subject the applicant to substantial delays, without eliciting more information. Nearly half of all internal reviews under the code exceeded departments' own deadlines.[41] A recent internal review of one of the Campaign's code requests took nearly 11 months.[42]

Anticipating such problems, Canada's Information Commissioner has vigorously opposed the introduction of an internal review provision into the Canadian FOI legislation.[43]

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[38] FOIA 2000, section 50(2)(a)

[39] Decisions that were at least partly in the applicant's favour were reached in 9 out of 48 internal reviews in 1999 and 9 out of 50 cases in 2000. (See Home Office, Open Government 1999 Report, page 21 and Lord Chancellor's Department, Code of Practice on Access to Government Information, Monitoring Report for 2000, page 15.) Ombudsman decisions at least partly favourable to the applicant were reached in 17 out of 21 cases in 1999 and 9 out of 13 cases in 2000 (pages 7 and 6 of the same reports).

[40] Home Office Open Government 1999 Report page 24

[41] Only 58% of internal reviews were completed within departments' own deadlines in 2000 (Monitoring Report for 2000, page 6), which are typically 20 working days.

[42] The Campaign asked the DTI to review its decision not to release the identities of staff seconded from the private sector on 17 August 2000. The outcome of the review was notified to the Campaign on 2 July 2001.

[43] "Our Access to Information Act is too important, with the basics too well-crafted, for us to tolerate a wolf-insheeps-clothing package of reforms. Here are the elements of such a package which would terribly undermine our rights of access...13. a requirement that dissatisfied requesters exhaust a departmental review process before making a complaint to the Information Commissioner" Information Commissioner of Canada, Annual Report for 2000-01.

The draft code does not do enough to address these problems. It states that complaints procedures "should be capable of producing a prompt determination"[44] but allows authorities to set their own target times.[45] The code should instruct authorities to deal with complaints within 20 working days. This is the target which most departments have adopted under the open government code[46] and is the statutory deadline under the Scottish Freedom of Information Bill.[47] It is longer than the 3 week statutory deadline permitted under the Irish FOI Act.[48]

'Exhausting' the complaints process

The Act allows the Commissioner to refuse to investigate a complaint if the applicant has not "exhausted" any complaints procedure established by the authority.[49] The code should state that if an authority's own target for dealing with an internal complaint has passed without a decision, the applicant will be considered to have exhausted the complaints procedure and be free to complain to the Commissioner.[50]

Definition of a complaint

The draft code does not specify what is meant by 'complaint'. It should state that any written response by an applicant expressing dissatisfaction with an authority's reply to a valid request for information is a complaint, even if the applicant does not designate it as such.

The onus should then on the authority to channel such a response through its own complaints procedure. If it ignores the letter or merely repeats or defends the original refusal it should be considered to have completed its complaints process leaving the applicant free to approach the Commissioner. Applicants who may not know of their rights should not be permitted to engage in long correspondence about a refusal, only to later be blocked from approaching the Commissioner on the grounds that they have not gone through the 'formal' complaints procedure.

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[44] Paragraph 33
[45] Paragraph 37
[46] Monitoring report for 2000, pages 32-36
[47] Freedom of Information (Scotland) Bill, section 21(1).
[48] Freedom of Information Act 1997 [Ireland], section 14(4)
[49] FOIA 2000, section 50(2)(a)
[50] The applicant may of course not wish to do so, particularly if the authority has explained that it is close to completing its investigation, or indicates that it is minded to support the applicant's case.

Review of top level decisions

The code should specify that where an initial decision has been taken by someone so senior (eg a minister or chief executive) that it cannot realistically be reviewed at a higher level, applicants should be free to approach the Commissioner directly, without internal complaint. (The former Home Secretary, Jack Straw, encouraged this practice in relation to decisions which he himself had taken, eg in refusing information about the Hinduja brothers' passport applications.)

Learning from errors

The draft code states that where an authority discovers that it has failed to follow its own procedures it should take steps to *"reduce the likelihood"* of the error being repeated.[51] This is too considerate of bad practice. Authorities which fail to follow their own procedures should be told to "*prevent*" the error recurring.

Contracts

The draft code contains helpful provisions about public sector contracts. However, these concentrate on the need for authorities to avoid unnecessary *restrictions* on disclosure. The code should go beyond this and stress the need for authorities to actively *promote* openness about contracts.

It should state that authorities remain accountable for providing information to the public about contracted-out services, that contracting-out should not reduce the availability of information, and that contracts should include clauses explicitly protecting the authority's right to obtain information from the contractor for this purpose.

The current guidance on the open government code adopts a helpful approach, and some of its provisions should be copied over into the present code. For example, the guidance states:

> "Functions performed by contractors on behalf of departments, agencies or public bodies fall within the scope of the Code and are not excluded from the commitments to provide information or protect confidences…

[51] Paragraph 39

> Departments should consider reflecting in contract terms the contractor's obligations to provide information either directly to the public or to the department…
>
> Ministers remain accountable to Parliament and the public for the functions provided by contractors. There should be no loss of transparency as to the quality and effectiveness of services delivered. Departments should always ensure that they are in a position to provide information in accordance with the provisions of the Code. In cases where contractors have direct dealings with the public the provision of information directly to the public may be among the obligations of the contract. In other cases it will be for the department to provide the information concerning the contracted functions, and departments will need to ensure that necessary information is available from contractors.
>
> There are some situations where contractors may properly protect information about themselves because it is commercially confidential. But commercial sensitivity should not extend to the concealment of the sort of information about performance or service standards which the public would have if a service were delivered directly by a Department."[52]

The code should also reflect the statement which appeared in the 1997 white paper that

> "openness should be the guiding principle…in the contractual arrangements of public authorities".[53]

Disclosure by contractors

Paragraph 29 states:

> "Except where paragraph 30 below applies it is for the public authority to disclose information pursuant to the Act, and not the contractor."

It is not clear how paragraph 30 qualifies this statement. It may be that an intended reference in paragraph 30 to the possibility that some contractors may be designated as public authorities in their own right[54] has been omitted.

The statement itself is unnecessarily restrictive. Although contractors are not subject to the Act, those who provide services directly to the public should be encouraged (or, where

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[52] Code of Practice on Access to Government Information – Guidance on Interpretation. 2nd Edition, 1997. Part IV. Functions Delivered by Contractors. Paras 1-5
[53] *Your Right to Know*, Cm 3818, paragraph 3.11, sub-paragraph 4.
[54] Under section 5(1)(b) of the FOIA 2000

appropriate, contractually required) to provide information to the public about their standards of service so long as this does not detract from the authority's own obligations.

Prohibiting disclosure by contractors

The code suggests that authorities may need to impose secrecy terms on contractors prohibiting them from disclosing *"information which would be exempt from disclosure under the Act"*.[55]

This is far too general a statement. If the intention is that a contract may need to identify specific information *provided by the authority to the contractor* which the latter should not disclose, this should be stated. It may also be necessary to require contractors to process personal data in compliance with the Data Protection Act. However the guidance should not include the general assertion that authorities may bar contractors from disclosing exempt information.

This is likely to be damaging, because;

- The Act's exemptions are *discretionary:* they *permit* information to be withheld, but do not *prohibit* disclosure. To translate the exemptions into contractual obligations to withhold information distorts the purpose of the exemptions.

- As contractors are under no positive *duty* to disclose information under the Act, creating explicit *prohibitions* on disclosure of exempt information would be disproportionate..

- Contractors will have little understanding of how the exemptions operate, let alone the public interest test. The chances are they will simply refuse to answer all questions put to them about the services they deliver to the public.

It should not be assumed that as long as *authorities* are required to provide information about contract performance there is no need to allow access directly from the contractor. Much of the information which authorities obtain from contractors will be supplied to them in confidence and be exempt from disclosure under section 41.

[55] Paragraph 29

Contractors and the Official Secrets Act

The danger of increased pressure on contractors to withhold information can be seen from the damage already done by unnecessarily requiring them to 'sign' the Official Secrets Act.

Many government contracts refer to the Official Secrets Act 1989, even where the contractor has no access to information covered by the Act.[56] In the mid 1990s, companies invited to bid for a contract to build new tennis courts in Regents Park were required to sign the Act.

This is not an isolated problem, nor one that is generally so entertaining. Recently a private landlord providing accommodation to asylum seekers failed to notify the police about a possible risk to asylum seekers because his contract with the Home Office warned that disclosure of information could be an offence under the Official Secrets Act. In fact, the information involved – nor any other information relating to the contract – would have been subject to the Act. [57]

The Government should review the way in which contractual references to the Official Secrets Act are used to unnecessarily deter contractors from providing information to the public. It should certainly not permit the present code to exacerbate the existing problem.

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[56] The 1989 Official Secrets Act applies only to information about: the work of the security and intelligence services; information harmful to defence or international relations; information supplied in confidence by foreign governments or intergovernmental organisations; information likely to result in the commission of an offence or to impede law enforcement; and information about warrants relating to the interception of communications or the work of the security services.

[57] According to a West Yorkshire police sergeant: "I became aware that asylum seekers were being housed in the one of the inner city areas we cover when several of their houses were attacked and windows were broken. The asylum seekers had been placed in a run down, deprived area where the only other ethnic minority residents were a few Asian shopkeepers who were already being subjected to racist abuse.

Leeds United Football Club had just played Galatasaray in Turkey, and two Leeds supporters had been killed. Local youths mistakenly identified the asylum seekers as Turkish, and this significantly increased local racial tension. These unique circumstances led to a planned, sustained attack. Several asylum seekers' houses were damaged and people were assaulted. For their own safety, a number of confused Kurdish men, who could not speak any English, fled to one address where they all stayed overnight. The next day a number of them went out into the estate looking for help, where they were found by a local Police Officer.

After a lengthy, difficult investigation, their private housing provider moved the asylum seekers into a different area, resolving the situation in the short term. I felt that if local communities and agencies had been consulted in advance, this type of situation might have been avoided.

The private landlord didn't inform us they were there because he'd signed the Official Secrets Act and therefore thought he couldn't."

Quoted in "Dispersed, A study of services for asylum seekers in West Yorkshire, December 1999-March 2001." Ruth Wilson, Joseph Rowntree Charitable Trust, June 20001

Fees

The code should provide some guidance on the charges that may be made for information under the fees regulations, which are now available in draft.[58]

In general, the draft fees regulations appear helpful. However, the following points should be made in the guidance:

- the regulations do not permit authorities to levy a minimum application fee for all requests;
- fees should not be charged where the cost of administering and collecting the fee exceeds the amount that would be recovered;[59]
- the "prescribed costs" can only take account of costs "reasonably incurred" by the authority in identifying, locating and retrieving information etc. It will not be "reasonable" for an authority whose records are chaotic to pass on to the applicant the excessive costs of searching for information caused by the absence of effective records management;
- fees should not be charged for information that would have been provided free of charge before the Act came into effect. For example, an authority should not be able to charge for explaining to someone the reasons for a decision in his or her own case. The guidance on the open government code describes the information which authorities should provide without charge as part of the "fair and accountable" performance of their functions. This should be incorporated into the present code.[60]
- Fees should be reduced or waived where they would otherwise prevent the release of information whose disclosure would be in the public interest. This provision will be

[58] The draft Freedom of Information (Fees and Appropriate Limit) Regulations. Available from www.lcd.gov.uk/foi/secleg.htm

[59] Section 47(6) of Ireland's Freedom of Information Act 1997 expressly prevents fees being charged in these circumstances.

[60] The Guidance on Interpretation of the Code states: "Departments should not charge for the provision of information which it is necessary for the public to have as part of fair and accountable performance of their functions. Information explaining: benefits, grants, rights and entitlements; the standards, and availability of services; the reasons for administrative decisions made in the applicant's case; the ways in which the citizen may exercise rights to appeal or complain about a decision; regulatory requirements affecting affairs of a business or commercial interests; and the main points of existing departmental policies or initiatives, should usually be available free of charge." (Cabinet Office, 2nd edition, 1997, Part 1, paragraph 72)

particularly important in relation to requests which may exceed the appropriate limit, when the full costs (over and above the first £550) may be charged to applicants.[61]

Duplication

At present some near-identical passages appear both in the foreword to the code and the code itself, and some editing to avoid duplication may be helpful.[62]

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[61] Regulation 5 of the draft Freedom of Information (Fees and Appropriate Limit) Regulations.
[62] For example, paragraphs 4 and 8 of the Foreword are repeated almost word for word in paragraph 3 of the Code itself.