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Dear Maurice

I am writing in response to your letter to Elizabeth France dated 13 September. I apologise for the delay in your receiving a full response. As you know, Elizabeth France ceased to hold office as Information Commissioner on 30 September and her successor Richard Thomas will not take up the post until 2 December. It therefore falls to me to reply as Deputy Commissioner.

May I say at the outset that there is no misunderstanding on the part of this office as to the extent of the Commissioner's legal powers under the Act in approving publication schemes under section 19. The Commissioner's powers in approving publication schemes are not qualified by the Act. The Act sets out, in section 19, the basic legal requirements of a publication scheme. The Commissioner cannot alter those. However, in exercising his power under section 19 to approve a publication scheme, the Commissioner is subject to the same public law principles of any public authority including the duty to exercise his powers reasonably, or at least not in a way which is "Wednesbury" unreasonable.

In considering the exercise of the function of approving schemes the Commissioner has taken account of a number of factors which have emerged since the time when the legislation was passed, as well as the points made while the draft legislation was being considered. The former include the timetable announced by the Lord Chancellor in November last year for the phased implementation of the Act over a number of years and the Commissioner's observations and understanding of the steps being taken by various public authorities and representative organisations in preparation for taking on their responsibilities under the FOI Act.

An incremental approach to embracing the spirit of the legislation, while complying with the letter, is clearly coming through. Many authorities who are in the first waves of those required to adopt and maintain are meeting the basic requirements, but in getting to that position have identified the possibilities for expanding their schemes to cover further classes of information in the near future. The relationship between the general right of

access under section 1, and the exemption under section 21, when the Act is fully in force, should also be instrumental in encouraging public authorities to add to their schemes. It seems to us that this voluntary approach to developing publication schemes is preferable to any compulsory requirement imposed across the board by the Information Commissioner at this stage.

Much has been said about freedom of information requiring and itself promoting a culture change within the public sector. This has been a frequently raised theme in the deliberations of the Lord Chancellor's Advisory Group, the ministerial roadshows and numerous conferences. In our view such a culture change will not be promoted by forcing public authorities to include certain material in their first publication schemes.

The Commissioner has therefore taken the view that this office should not be prescriptive beyond the requirement of section 19 when considering public authorities' first schemes for approval. This is not to say that the power to be prescriptive is not available to the Commissioner. It is clearly understood that the Commissioner has that power and consideration of the use of that power in any particular case has not been excluded. It could not be.

I recognise therefore that the use of the words "cannot be prescriptive" in paragraph 6 of the document "Feedback and Observations from Local Authority Pilot Publication Schemes" is open to misinterpretation, although the qualifying phrase "further than the requirements of the Act" clearly would embrace the requirement of the public authority to obtain the approval of the Commissioner. I will address the issue of clarifying this point with colleagues as soon as possible.

The position with regard to model schemes needs a specific mention. Where the Commissioner approves a model scheme for a particular type of public authority this will set a minimum standard for content in respect of publication schemes for that type of public authority. The Commissioner would be unlikely to approve a scheme which fell short of that standard, but again, on public law principles, he must consider what is submitted by each authority for approval.

I note what you say about re-badging information already published and agree that, although it may be helpful for a scheme to provide a one-stop-shop for published information, simple re-badging will not significantly improve access. However, the legal

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duty to publish in accordance with an approved scheme will prevent the removal from the website of information within a particular class. In addition, the Commissioner's requirement to see alternative means of publication other than via a website should extend access. Also our requirement that authorities specify, when seeking approval, what new information they are publishing and that they justify the absence of anything new or the exclusion of anything previously published should alert us to any schemes which do not increase the amount of published information. We will be able to consider these on a case by case basis.

Good practice in the form and content of publication schemes will emerge quickly from the time when the first schemes are approved and put into practice. Equally examples of poor practice and impracticality in operating schemes will be revealed. The Commissioner will use this experience to inform future guidance. In my view, guidance based on actual experience of the UK legislation in practice will be more persuasive and effective in ensuring that public authorities improve their arrangements for providing access to information. The opportunity to use co-ercive measures is in the Act and will be used if necessary.

I hope this letter clarifies the Commissioner's position. I do not think we disagree on the interpretation of the law, although I recognise that you are disappointed with the approach. The thinking behind the approach is that it will be a better way of encouraging public authorities to embrace a culture of openness willingly rather than feel that they have been brow-beaten into submitting to an openness regime. If this proves to be unfounded, a more prescriptive approach to publication schemes in the future may well be appropriate.

Yours sincerely



GRAHAM SMITH
Deputy Commissioner