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GOVERNMENT TO ABANDON FREEDOM OF INFORMATION TIMETABLE?

It has been reported that the Freedom of Information Act right of access may now be held up, and not come into force until late 2004 or even 2005. The government's original timetable had envisaged phasing-in access from summer 2002. This would suggest the government is going out of its way to delay freedom of information.

The delay would contradict what MPs were told as the Act went through Parliament and would defer the new rights of access beyond the point that anyone imagined possible. It would also be the least practical of all the available solutions, likely to magnify the potential difficulties of implementation both for public authorities and the Information Commissioner.

The original timetable

The Freedom of Information Act must be fully in force no later than 5 years after Royal Assent (30 November 2000) that is by 30 November 2005.[1] However, the government has always said that it planned to phase it in much earlier, starting with those bodies already subject to the open government code. The intention has been to implement the right of access for central government 18 months after Royal Assent, ie by summer 2002, with other authorities phased in at intervals thereafter.

[1] Freedom of Information Act 2000, section 87(3)

The 18 month timetable has been frequently cited informally by officials and ministers at conferences, and this is reflected in the advice the Information Commissioner has been giving to public authorities. Her web site states:

> "Whilst details of the timetable for implementation have yet to be announced, the Information Commissioner has worked on the assumption that the likely approach would be to bring groups of public authorities within the scope of the Act in stages**, starting with Central Government in Summer 2002.** The timetable is expected to be announced in July 2001. The Commissioner's guidance will then be revised accordingly." (emphasis added)[2]

The 18 month start date was referred to in Parliament. On the final day of the bill's Commons committee stage, the minister (David Lock) said:

> 'The Bill already sets certain targets. Certain provisions will come into force at Royal Assent or shortly afterwards. The Bill does not envisage a start **until 18 months after Royal Assent**.'[3] (emphasis added)

He added:

> "Five years is a long stop; that is the last possible date on which the last possible public body—with no doubt the maximum operational difficulties and working in a most difficult environment for a culture change—will have to comply…No final decision has yet been taken, but it seems sensible…for the Bill to be implemented in stages by extending coverage gradually by type of organisation. It would make sense to start with central Government and it is right that central Government should provide models of good practice"[4]

Finally, in its evidence to the Public Administration select committee, the Freedom of Information Unit of the Home Office said:

> "It is not correct to say that most of the Act will come into force five years after Royal Assent. That is just a fall back to ensure that anything not brought in earlier does come into force at that time. **We estimate that three years is the most likely period by which all authorities will fall within the scope of the Act**."[5]

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[2] http://www.dataprotection.gov.uk/dpr/foi.nsf

[3] Mr David Lock, Parliamentary Secretary, Lord Chancellor's Department, Standing Committee B, 10/2/00, col 478

[4] Col 479

[5] Public Administration select committee, 3rd report, 1998-99 session, 'Freedom of Information Draft Bill', HC 570-I, Annex 6, Q. 103. Emphasis added.

Timetable overruled

It appears that the then Home Secretary, Jack Straw, had proposed this phase-in timetable earlier in the year: its announcement was expected in March 2001. Each class of authority would first comply with the Act's duty to produce a publication scheme,[6] and then with the right of access. However, this approach was apparently blocked by the Prime Minister. When the Lord Chancellor, Lord Irvine, took over responsibility for FOI after the election he tried to reinstate the original timetable. A document obtained by the Guardian newspaper under the open government code states:

> "Previously HO [Home Office] had timetabled June 2002, but this has been abandoned in favour of across-the-board implementation, supported by the PM. However, the Lord Chancellor had taken over responsibility for FOI after the Election and was reported to be reconsidering the earlier timetable (with a small shift to reflect the time lost for the Election period)."[7]

It has now been reported (Guardian 30/10/01) that the Lord Chancellor has been overruled. The new plan is apparently to phase-in publications schemes over the next 2-3 years, and then bring the right of access into force for all authorities simultaneously – the so-called 'big bang' approach. Under this approach, the right of access would probably not come into force until the end of 2004 or some time in 2005.

The Lord Chancellor has made clear that he favours phasing-in the right of access:

> "There is a powerful case for not going for a big bang, for doing it gradually, and modulating how you go according to readiness in particular areas."[8]

> "So many bodies are to be covered that I do not think that a "big bang" approach is practicable."[9]

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[6] Section 19 of the FOI Act requires every public authority to maintain a publication scheme specifying classes of information which it publishes or intends to publish, specifying how the information is published, and what if any charges apply. Each scheme must be approved by the Information Commissioner. The Commissioner can also prepare or approve model schemes, and any authority adopting such a scheme does not need individual approval.

[7] Minutes of the Fifth Meeting of the Access to Information Programme Board, Department of Environment, Food and Rural Affairs, 3 August 2001, ATIPB(01)25. *Guardian* 26/10/01

[8] Evidence to the House of Commons Home Affairs select committee 16/10/01

[9] Hansard, House of Lords, 25 June 2001, col. 121

Delay makes no sense

The logic behind a 'big bang' approach is difficult to understand:

- **Central government has been subject to the open government code – which in outline is similar to the FOI Act - for more than 7 years. It could adapt to the Act relatively quickly and certainly does not require *four years* to prepare**. The government's original 18 month preparation time should be more than adequate for Whitehall departments. NHS bodies (which are subject to a separate open government code) and local authorities (which are subject to open meetings legislation) could follow some time later, while bodies like schools, universities and the police (who have only limited real experience of openness legislation) could be given longer to prepare.

- **A 'big bang' approach removes the opportunity for authorities to learn from the experience of early implementers.** Phasing the Act in allows the later groups of authorities to learn from earlier experience. If the Act itself throws up new difficulties, Whitehall departments will be well placed to develop practical solutions, which other authorities could adopt from the outset. Under a 'big bang' approach, any problems will be experienced by *all* authorities simultaneously, causing maximum inconvenience.

- **Government has already been preparing for implementation: this work will be wasted if the timetable is set back.** Some government departments have taken on new staff to implement FOI and let contracts for training officials. This momentum will be lost, and much of the work already done will be wasted if FOI is held back till 2005.

- **The Commissioner's office is likely to be swamped.** If the right of access comes into force for as many as 70,000 authorities[10] on one day, all *complaints* about refusals are likely to start coming in at the same time too, exposing the

[10] Apparently the latest official estimate – which takes account of the fact that the Act applies not only to central government bodies but to all local authorities, schools, all NHS trusts and health authorities, and all individual GPs, dentists, pharmacists and opticians amongst others.

Commissioner's office to maximum pressure. Until recently, ministers had cited the need to prevent this as one of the principal reasons for phasing-in the right of access.

- **Delay would give the worst possible signal about the government's commitment to the legislation.** This is bound to noted by officials and will inevitably be reflected in their own approach to FOI. As the Cabinet Office itself acknowledged in 1998: **"the longer the phasing-in period, the greater the criticism that the Government is reluctant to abandon secrecy and face up to the demands of openness."**[11]

- **The fact that the Prime Minister himself is apparently responsible for the delay would suggest that he has abandoned his one-time commitment to FOI.** In a 1996 speech at the Campaign for Freedom of Information's Awards he said:

> "It is not some isolated constitutional reform that we are proposing with a Freedom of Information Act. It is a change that is absolutely fundamental to how we see politics developing in this country over the next few years….It will signal a new relationship between government and people: a relationship which sees the public as legitimate stakeholders in the running of the country and sees election to serve the public as being given on trust…It is part of bringing our politics up to date, of letting politics catch up with the aspirations of people and delivering not just more open but more effective and efficient government for the future."[12]

Unpersuasive arguments

None of the possible justifications for delay are particularly persuasive:

- *The Commissioner's office will not be ready for earlier implementation.* We understand the Commissioner had no problem with the original timetable and has been expecting the Act to come into force in October 2002.

- *More time is needed to prepare publication schemes.* Nothing in the Act requires publication schemes to be introduced *before* the right of access. They are a relatively minor aspect of the Act, and could easily *follow* the right of access. In any case, the only indication which the Commissioner has so far given of the likely approach to publication schemes suggests that they will not prove demanding.

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[11] Cabinet Office, 'Your Right to Know – Background Material', January 1998, paragraph 226
[12] The full text of the speech can be read at: http://www.cfoi.org.uk/blairawards.html

- *The right should be delayed until the introduction of electronic records management, at the end of 2004*. From the end of 2004 all new central government records are expected to be created and maintained electronically. However, the new system will only apply to *newly created* records, not to the great mass of paper records which are now – and will continue to be - in use, and which will be subject to the Act. In practice, delaying FOI until this deadline will make no difference to the majority of requests.

- *The fully retrospective nature of the UK Act creates unique problems*. There is no reason to believe this. Other UK access regimes were introduced without delay despite being fully retrospective:

  - the *open government code* was fully retrospective from its introduction by John Major's government in April 1994. It came into force on the day that the final version was published.

  - the *Environmental Information Regulations 1992* which implement an EU directive apply to all public authorities at all levels and are fully retrospective. They were approved by Parliament on 18 December 1992 and came into force two weeks later.

Overseas FOI laws

- **Australia's** Freedom of Information Act 1982 came into force **9 months** after it was passed and provides retrospective access to records created during the previous 5 years. There was unlimited retrospective access to personal files.

- The **New Zealand** Official Information Act 1982, which is fully retrospective, came into force **7 months** after it was passed.

- **Canada's** Access to Information Act 1982 came into force **one year** after it was passed, starting with partial retrospection (for the previous 3 years) and extending to

full retrospection by the third year[13]

- **Ireland's** Freedom of Information Act 1997 (which is not retrospective, except for personal files) came into force **one year** after it was passed, for central government, and has been phased in since. Local authorities and health boards were brought under the Act after 18 months, hospitals after two and a half years, and broadcasters (such as RTE) after 3 years.

The UK Act, because it applies to public authorities at all levels, has a wider scope than many overseas laws. However, UK government departments could implement the Act far more easily than their overseas counterparts – since they have been subject to the open government code right of access for 7 years. None of the above countries had any such preparation. As the Cabinet Office's own background material acknowledged:

> "through an FOI Act, UK government will be moving from one system of openness (mainly Code of Practice-based, but with some limited statutory provision) to another; not from a "pre-openness" situation to an openness regime, as has happened in some other countries."[14]

The Data Protection Act factor

A document also obtained by the Guardian also made it clear that the Cabinet Secretary, Sir Richard Wilson, was concerned about the impact of the Data Protection Act 1998, which has extended the right of access to computerised personal files to include *manual* files.[15] The document refers to:

> "Sir Richard Wilson['s] general concern about interaction of information legislation"

and says that cabinet office discussions about implementing the FOI Act had been

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[13] On commencement, records prepared in the 3 preceding years were available. After a year, retrospection applied to the 5 years before commencement. After 2 years, the Act was fully retrospective, subject to a test of whether obtaining records more than 5 years old would 'unreasonable interfere' with a department's operations.

[14] Cabinet Office. 'Your Right to Know – Background Material', January 1998, para 227

[15] Until this month, the DPA applied to *computer* records only. From 24 October 2001, the right was extended to *manual* records which are part of a 'structured set' of records. For public authorities, the FOI Act will extend this right further by allowing people to see 'unstructured' manual data (eg passing references to themselves contained in files other than their own personal file.)

widened to include consideration of the implications of the DPA.[16]

The DPA may have become a factor following a number of unexpected requests for personal files from high profile individuals, believed to include the Conservative party treasurer Lord Ashcroft. It had been assumed that the DP right of access would be used by the ordinary citizen seeking access to social security, employment or medical records. These more contentious requests appear to have taken government by surprise, and have highlighted the fact that the DPA contains a more limited set of exemptions than the FOI Act. (For example there are no exemptions for policy advice or international relations. The DPA results from EU legislation, which does not permit exemption on these grounds.) However, delaying the FOI Act does not affect these existing rights, which have already been extended to manual records.

November 2, 2001

[16] ATIPB(01)01, 12 March 2001