

The Campaign for Freedom of Information

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DELAYED IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT

House of Lords Debate 5.12.01

Hon. President: Godfrey Bradman
Co-Chairs: James Cornford, Neil McIntosh
Director: Maurice Frankel

Parliamentary Co-Chairs: Helen Jackson MP
Archy Kirkwood MP
Richard Shepherd MP

Summary

- **The Government has announced that the right of access under the Freedom of Information Act 2000 will not come into force until January 2005 – an astonishing delay of more than *four years* from Royal Assent.**

- **The date represents a major retreat from the original timetable, which would have applied the right of access to government departments *in summer 2002*, with other types of authority phased in at 6-monthly intervals.**

- **Lord Falconer told peers that government departments would be covered by the Act “*as soon as the Commissioner indicates that she is ready to enforce the legislation*”.¹ The Information Commissioner recently said that a realistic date for central government to comply with the Act would be 1 October 2002.**

- **No other country has required anything like 4 years to implement their FOI laws: in most cases this has been done within 7 to 12 months.**

- **The Act’s provisions on ‘publication schemes’ which will be phased-in from November 2002 are a relatively minor aspect of the legislation, and are no substitute for the long-delayed individual right of access.**

¹ Hansard, Lords debates 20/4/00, col 829

The Lord Chancellor recently announced the right of access under the Freedom of Information Act 2000 would not come into force until January 2005. This is a delay of more than 4 years from the Act's Royal Assent, on November 30 2000.²

The original timetable: government departments first

Ministers had previously intended to phase-in the right of access, starting with central government departments, in spring or summer 2002, with other authorities following at approximately six monthly intervals thereafter.

Because government departments have already had 7 years experience of complying with the open government code of practice³, it has always been accepted that they would be the first to be subject to the new right of access. A House of Commons Library research paper, issued just before the Act's Royal Assent, stated:

“An implementation timetable is being prepared by the Home Office. Government departments and Non Departmental Public Bodies currently within the jurisdiction of the Code of Practice on Access to Government Information will be in the first tranche of public authorities to be included within the scope of FOI. **Currently this is planned for April 2002**, followed by local authorities and other public bodies at six month intervals thereafter.” (emphasis added)⁴

The start date later moved to summer 2002. Speaking at a conference, Mike O'Brien MP, then Parliamentary Under-Secretary of State at the Home Office said:

“Central government, which already applies the discretionary code on access to government information, ought to be able to gear up for implementation of the Act more quickly than other authorities which have no obligations to disclose information at the present time...we don't simply want to travel at the speed of the slowest bodies: to do so would hold back the progress of openness which we want to see. Therefore there will be a phased implementation with bodies coming in in tranches. The first group will comprise central government and other bodies already operating the information access regime contained in the Code of Practice on Access to Government Information. There will be a gradual roll out across the rest of the public sector...”

² Hansard, Lords Debates, 13.11.01, col 457.

³ The code, introduced in 1994, provides a right of access to information held by central government, subject to a series of exemptions and a public interest test. Complaints about non-disclosure can be investigated by the Parliamentary Ombudsman.

⁴ House of Commons Library, Research Paper 00/89, 23.11.00, The Freedom of Information Bill, Lords Amendments.

My expectation is that we apply the Act to central government some time in the **summer of next year** if all goes to according to plan. But that's a forecast and not a commitment." (emphasis added)⁵

This timetable was also reflected on the Information Commissioner's web site, which stated:

"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.**" (emphasis added)⁶

Summer 2002 represented 18 months from Royal Assent, a timetable referred to on the final day of the bill's Commons committee stage when the Parliamentary Secretary to the Lord Chancellor's Department told MPs:

'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.**'⁷ (emphasis added)

Government departments have clearly been working to meet this timetable. For example, even before the FOI bill was introduced in Parliament an internal bulletin circulated by the then Department of Social Security stated

"Home Office currently anticipates that government departments will be subject to the new regime **by July 2002.**" (emphasis added)⁸

A Health and Safety Executive Board paper written in 1999 described HSE's plans to prepare for the Act, noting that these:

"assume FOI Royal Assent in November 2000 and Act coming into force **July 2002**"⁹

⁵ Mike O'Brien MP, Speech at a conference on Freedom of Information at Canada House organised by the Canadian High Commission, 5 March 2001

⁶ <http://www.dataprotection.gov.uk/dpr/foi.nsf>

⁷ Mr David Lock, Parliamentary Secretary, Lord Chancellor's Department, Standing Committee B, 10/2/00, col 478

⁸ DSS, Freedom of Information, Bulletin No 1.

⁹ HSE Board Paper, HSE/01/PO13. http://www.hse.gov.uk/foi/hse_board/2001/papers/b013.htm.

Government departments covered “when the Commissioner is ready”

Lord Falconer, then Minister of State in the Cabinet Office, said at the bill’s Lords second reading:

“I can assure your Lordships that there will be no backsliding. Central government already operate an openness regime. I expect that **central government at least will be covered by the Bill’s provisions as soon as the commissioner indicates that she is ready to enforce the legislation.**”(emphasis added)¹⁰

The Information Commissioner, Elizabeth France, recently made clear that she would be ready to the enforce the Act in relation to central government by *October 1 2002* and for other authorities at six monthly intervals after that.

In a letter to the Lord Chancellor (see Appendix) written before the final timetable was announced, she wrote:

“It seems sensible to me to implement the Act in tranches, bringing public authorities onstream sector by sector. This will enable us to concentrate on groupings of public authorities operating in similar areas, with broadly comparable responsibilities and often holding similar classes of information...

I would suggest that a realistic and comprehensible timetable for implementing the Act would be as follows:

- 1 October 2002: Government Departments and others under Schedule 1, part I
- 1 April 2003: Local Government (Part II)
- 1 October 2003: National Health Service (Part III) and Police (Part V)
- 1 April 2004. Maintained Schools and other Educational Institutions (Part IV)
- 1 October 2004: Other Public Bodies and Offices (Parts VI and VII)

This would provide for a logical, phased implementation, largely following the structure of Schedule 1. It strikes a balance between the need for sufficient preparation time and a desire to see the Act fully implemented well before the final date (30 November 2005) laid down by Parliament in section 87(3).¹¹

In the Commissioner’s view therefore it would be ‘realistic’ to bring the right of access into force well ahead of the Government’s timetable, in some cases by as much as two years.

¹⁰ Hansard, Lords debates, 20.4.00, col 829

¹¹ Letter from Elizabeth France, Information Commissioner, to the Lord Chancellor, 18 October 2001. The references to ‘Parts’ are references to the parts of Schedule 1 of the Act, and the list of authorities subject to the Act.

The Lord Chancellor

Before the decision was taken, the Lord Chancellor himself made clear that he favoured phased implementation of the Act:

“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.”¹²

“So many bodies are to be covered that I do not think that a "big bang" approach is practicable.”¹³

Is the Government implementing the Act “11 months early”?

The Lord Chancellor stated that by bringing the right of access into force in January 2005 the Government is implementing the Act “*11 months before the timetable set out in the Act itself*”.¹⁴

This is a reference to the deadline in section 87(3) of the Act, which states that any provision of the Act not implemented earlier automatically takes effect 5 years after Royal Assent, that is, on November 30, 2005.

However, ministers have always insisted that this did *not* represent their own timetable. In Lord Falconer’s words, this was “*a failsafe provision*”. He added: “*It is the Government’s intention to bring the legislation into force as quickly as possible*”.¹⁵

The Home Office has said that the five year limit was there “*to provide reassurance*” and that “*there is a clear intention that the Act will be implemented more quickly than that*”.¹⁶

¹² Evidence to the House of Commons Home Affairs select committee 16/10/01

¹³ Hansard, House of Lords, 25 June 2001, col. 121

¹⁴ Hansard, Lords Debates, 13.11.01, col. 457

¹⁵ Hansard, Lords Debates, 20.4.00, col. 829

¹⁶ Paper by the Home Office to the Advisory Group on Openness in the Public Sector, Paper AGOPS 13/99

David Lock, the then Parliamentary Under-Secretary at the Lord Chancellor's Department said:

"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"¹⁷

Finally, according to the Home Office:

"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.**" (emphasis added)¹⁸

Overseas FOI laws

No other country has required anything like four years to implement its FOI legislation. The government argues that the UK Act is not directly comparable to these laws since (a) it is fully retrospective and (b) it applies across the whole public sector, not just to central government. However, although many overseas laws apply mainly to central government they are generally retrospective. The retrospective right of access to central government records generally came into force 7 to 12 months after the law was passed – a fraction of the 4 years and 2 months proposed for the UK.

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

¹⁷ Col 479

¹⁸ Submission by the Freedom of Information Unit of the Home Office to the Public Administration select committee, 3rd report, 1998-99 session, 'Freedom of Information Draft Bill', HC 570-I, Annex 6, Q. 103.

years. There was unlimited retrospective access to personal files.

- **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 year¹⁹
- **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.

Moreover, UK government departments should find it far easier to comply with the law than overseas departments, since they have been subject to the open government code for 7 years. None of the above countries had any comparable disclosure experience. As the Cabinet Office's background material to the FOI white paper 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.”²⁰

¹⁹ 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.

²⁰ Cabinet Office. ‘Your Right to Know – Background Material’, January 1998, para 227

Publication schemes

The Government's timetable provides for the phasing-in of so-called 'publication schemes' starting with central government in November 2002, with other authorities following at intervals up to June 2004.

Section 19 of the Act requires every authority to adopt such a scheme setting out classes of information which it publishes or intends to publish. Schemes must be approved by the Information Commissioner, or be based on approved model schemes.²¹

Once information is listed in a scheme an authority will be obliged to publish it. However, authorities will be given substantial freedom to decide for themselves what to include in their schemes. There is little guidance in the Act itself.²² A consultation paper issued by the Information Commissioner in June 2001 implied that schemes might merely describe *existing* publications – rather than lead to the disclosure of previously *unpublished* material.²³

Although potentially useful, publication schemes are not an essential element of the Act. There is no reason why they need to be in force *before* the individual right of access takes effect. The schemes could just as easily come into force *with* the right of access – or even after it. In her proposed timetable, the Information Commissioner suggests that publication schemes come into effect for each tranche of authorities at the same time as the right of access.

Electronic records management

The Government says the implementation timetable allows departments time to implement the proposed programme of Electronic Records Management, due to come

²¹ Section 19(1)(a) and section 20(2)

²² Section 19(3) merely states that in adopting a publication scheme an authority must "have regard to the public interest (a) in allowing public access to information held by the authority and (b) in the publication of reasons for decisions made by the authority".

²³ For more information see the Campaign's response to the consultation paper on publication schemes, at www.cfoi.org.uk

into force by the end of 2004. By this date all new records created by government departments will be 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.
- Moreover, the ERM programme applies only to *government departments* and not to the many other authorities subject to the Act.²⁴
- Government departments' record management arrangements are currently capable of responding to requests under the open government code and, indeed, to Parliamentary Questions. There is no reason why FOI requests could not be dealt with under these arrangements.

MPs

In the House of Commons a total of 173 MPs have signed an early day motion (No 296) calling on the Government to bring the right of access into force for central government before the end of 2002.

The consequences of delay

- **There will be a substantial loss of momentum, particularly from government departments who have been working towards a summer 2002 start date.** Departments have in some cases been preparing for implementation since *before* the Act's Royal Assent.²⁵
- **A 'big bang' approach removes the opportunity for authorities to learn from the experience of early implementers.** Many of the issues faced by authorities will be

²⁴ The Public Record Office has produced 'model action plans' to help authorities prepare their records for FOI under the original timetable. The model plan for central government was published in March 2001 and that for local government – which assumed that local authorities would be covered by the Act by the end of June 2003 – was published in August 2001

²⁵ The Foreign and Commonwealth Office set up a steering group of senior officials to oversee implementation in August 2000, before the Act received Royal Assent. Hansard, Commons, Written Answers, 21.11.01, col 332W

identical, involving issues of interpretation, likely to be addressed in the Commissioner's early decisions. (For example, what if any information about public sector contracts should legitimately be exempt? What kinds of factors should be taken into account in the considering the Act's public interest test?²⁶ What constitutes a 'vexatious' request?²⁷) Phasing the Act in allows the later authorities to learn from early experience. Implementing the Act for all authorities on a single day, as now planned, will create the maximum uncertainty for the greatest number of authorities.

- **The Commissioner's office is likely to be swamped.** If the right of access comes into force for all authorities on a single day, all *complaints* are likely to start coming in to the Commissioner's office at the same time, exposing staff to the maximum pressure. Until recently, ministers had cited the need to avoid this as one of the principal reasons for phasing-in the right of access.
- **Delay gives a damaging signal about the government's commitment to the legislation.** This is bound to be 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.*"²⁸

Campaign for Freedom of Information
December 4, 2001

²⁶ Section 2(2)(b)

²⁷ Section 14(1)

²⁸ Cabinet Office, 'Your Right to Know – Background Material', January 1998, paragraph 226

APPENDIX

The Information Commissioner's letter to the Lord Chancellor

18 October 2001

Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

The Rt Hon Lord Irvine of Lairg QC
House of Lords
LONDON
SW1A 0PW

Dear Lord Chancellor,

At our meeting on Wednesday 10 October you asked me to let you have a paper setting out my views on a timetable for the implementation of publication responsibilities and access rights under the Freedom of Information Act. In doing so you asked that I take account of the resources I have to devote to my responsibilities under the Act and the importance of a timetable which would be comprehensible from the standpoint of the citizen. I am pleased to have this opportunity to let you have my views.

It seems sensible to me to implement the Act in tranches, bringing public authorities onstream sector by sector. This will enable us to concentrate on groupings of public authorities operating in similar areas, with broadly comparable responsibilities and often holding similar classes of information.

It further seems logical to follow the provisions of Schedule 1 of the Act when considering the phasing of implementation by tranches. Thus the first tranche would be the authorities in Part I of Schedule 1, the second those in Part II, etc. I would be content with that, although I believe there is some expectation that the Police (Part V) should not be so far towards the end of a phased implementation. They could be brought in at the same time as either the National Health Service or Maintained Schools.

Another point of principle on a phased implementation programme which has been raised in the past is whether to make a distinction between implementing the duty to adopt and operate a publication scheme and implementing the duty to respond to requests for information not included in a publication scheme. One model would be to have, say, a 3 month period elapsing between publication responsibilities being introduced and individual rights of access coming onstream. Whilst this might be convenient for public authorities, further reflection suggests to me that it would be confusing and possibly frustrating for the citizen. If information for publication has been identified and is

available under a publication scheme, surely the public authority ought to be ready to deal with individual requests for other information. Citizens will not understand why they can have information referred to in a publication scheme but cannot be told whether they can have other information.

The argument in favour of separating the implementation of a publication scheme from the implementation of individual access rights was, I think, based on a premise that there will be an influx of demand for information once a publication scheme has been issued. I am not sure that there is any evidence to support this line. Furthermore if, as is envisaged, the vast majority of information obtained from public authorities is accessed using the internet, the human resource implications for public authorities will be minimal.

I would therefore not favour splitting the implementation of a publication scheme from the implementation of related individual access rights.

Taking all these factors into account, I would suggest that a realistic and comprehensible timetable for implementing the Act would be as follows:

1 October 2002:	Government Departments and others under Schedule 1, part I
1 April 2003:	Local Government (Part II)
1 October 2003:	National Health Service (Part III) and Police (Part V)
1 April 2004:	Maintained Schools and other Educational Institutions (Part IV)
1 October 2004:	Other Public Bodies and Offices (Parts VI and VII)

This would provide for a logical, phased implementation, largely following the structure of Schedule 1. It strikes a balance between the need for sufficient preparation time and a desire to see the Act fully implemented well before the final date (30 November 2005) laid down by Parliament in section 87(3).

I hope this is of assistance. More important than the detail of the proposals, from my perspective, is a clear timetable which we can help to publicise and which will give a firm foundation to our plans to build up staff and phase our work with the various public authorities. I look forward, therefore, to an early announcement.

Yours sincerely,

Elizabeth France
Information Commissioner