Access to Policy Advice under a Freedom of Information Act

A Discussion Paper

Campaign for Freedom of Information

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Part 1

INTRODUCTION[1]

How much public access to internal 'policy advice' might be possible under a Freedom of Information (FOI) Act? This paper sets out the context to this question. It also reviews the approaches adopted under the Freedom of Information Acts of Australia (page 8) and New Zealand (page 16) and the way the Parliamentary Ombudsman has dealt with policy advice under the UK's Open Government Code of Practice (page 23).

The traditional view has been that nothing which reveals the internal discussions relating to the development or direction of policy within government should be revealed. To disclose such material, it is held, would prevent frank advice being offered, or the government from 'thinking privately', thereby damaging the quality of resulting decisions.

A powerful convention guarantees the secrecy of policy advice. Its object is not to protect specific information whose disclosure might be harmful while permitting other information to be released. It is to ensure that *all* policy discussion takes place in the *certainty* that confidentiality would be maintained. Attempting to distinguish between what could and could not be disclosed would undermine that certainty: *no* information within the class of internal advice, analysis, consultation or deliberation could be revealed, regardless of its contents.

This point was forcefully expressed in Lord Reid's 1968 judgement in the case of *Conway v Rimmer*, where he said:

> "I do not doubt that here are certain classes of documents which ought not to be disclosed whatever their content may be."

That applied, he said, not merely to Cabinet minutes but to:

> "all documents concerned with policy making within departments including it may be minutes and the like by quite junior officials".[2]

But is it today appropriate to regard the entire body of policy making documents as a single undifferentiated class, stretching from cabinet minutes to the jotting pad of the most junior official, and subject to a single convention on confidentiality? Does an approach designed to protect tentative discussions, at a high level, on the most sensitive of political questions also need to be applied to, say, the professional advice of a government statistician on a technical matter? Advice anticipating the likely reactions of various parties to a negotiation (including negotiations with other government departments, like the Treasury) may be highly sensitive to

[1] I am grateful to Roma Scott for the research underpining this paper.
[2] [1968] 1 All E.R. 874

disclosure (particularly to the Treasury) whereas consideration of how to implement a publicly announced decision so as to minimise disruption or cost, may not.

What is currently regarded as a single class of policy documents could equally be seen as sets of separate classes, some of which might normally be disclosed. One approach, suggested in the draft policy advice exemption proposed in Part 5 of this paper is to exclude certain classes of information, including factually based analysis and expert advice, from the scope of the exemption - as also suggested in the Right to Know Bill in 1993.[3] Exclusions of this kind are common in overseas FOI laws (see Part 6).

The government has recently retreated from the traditional view, that the entire class of advice - not just the recommendations given to ministers, but all internal discussion, analysis, consultation, and expression of opinion on a policy related matter - should be protected, regardless of their contents. The Open Government Code of Practice, introduced in April 1994, envisages that internal advice *may* be disclosed where in any particular instance this can be done without harming the 'frankness and candour of internal discussion' or where disclosure is in the public interest.

It is not entirely clear how deliberate this shift in approach was. The original Cabinet Office guidance on the Code noted that it was:

> "not the intention to change or undermine the long-established conventions protecting the confidentiality of the internal decision-making process".

Nevertheless, the Parliamentary Ombudsman, who supervises the Code, took the literal text of the Code as the basis for his recommendations, and the government subsequently amended its guidance to fall into line (see pages 24-5). Yet the "class" approach has not been completely expunged. The guidance states:

> "2.12 Exposure of differences between Ministers, between Ministers and their civil servants or between civil servants, could prejudice working relationships and effective discussion of policy, especially if it led to dissenting or different views being quoted in political argument to attack the policy or action which had eventually been decided..." [4]

However, it continues:

> "2.13 It is not the intention, however, to withhold this class of information *only* where internal differences and disagreements would be revealed, or where it concerns with matters of particular sensitivity. It is important that reasonable expectations of confidentiality are preserved when opinion, advice and deliberation are put on record."[5]

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[3] The bill, which was drafted by the Campaign was introduced by Mark Fisher MP and debated for a total of 21 hours on the floor of the House and in committee.

[4] Guidance, paragraph 2.12

[5] Guidance, paragraph 2.13

A second explicit move away from the "class" approach was made in December 1996, in response to the Scott Report. The government has announced that it will no longer make PII claims for policy advice based on the argument that, because a document falls within the class of advice, its disclosure would *by definition* be harmful.[6]

To date the impact of the Code on the disclosure of advice appears slight. In the three years in which it has been in force the Ombudsman has dealt with only a handful of cases involving advice and has not yet had occasion to recommend its disclosure. He has however dealt with, and dismissed, a number of cases in which departments invoked the exemption for material that did not constitute advice at all. In two cases the advice has been contained in a Cabinet Committee report to which the Ombudsman *himself* has no right of access: one of these investigations was abandoned altogether as a result, and the other could not be fully investigated (page 26)

Robert Hazell, who studied the FOI laws of Australia, New Zealand and Canada in 1986-7, the period immediately after their introduction (see page 34) concluded that the policy advice exemptions

> "had proved highly effective in protecting those matters which the government has needed to keep confidential"[7]

The Australian experience suggests this may have been achieved by stifling the disclosure of virtually all internal working documents, though more recent New Zealand experience indicates a far more radical approach.

If advice does prove disclosable, how likely is it that its candour would suffer? It should be recognised that advice may already be recorded with the prospect of disclosure in mind. The ever present possibility of a leak means that confidentiality is never guaranteed. The publication of Cabinet discussions in the Crossman diaries and the flood of ministerial memoirs that followed has also undermined any guarantee. Moreover, long before arms to Iraq, the courts were prepared to override claims for public interest immunity (PII) and order advice to be disclosed in the interests of justice. Investigations by the Comptroller and Auditor General or the Parliamentary Ombudsman may provide another window into this no-longer quite closed world.

Even if disclosure *does* affect candour, is it necessarily harmful? Openness may presumably sometimes also lead to better advice, the prospect of external scrutiny encouraging a more thorough and balanced presentation of argument. Faced with PII certificates, even judges

[6] "Under the new approach, Ministers will focus directly on the damage that disclosure would cause.The former division into class and contents claims will no longer be applied. Ministers will claim public interest immunity only when it is believed that disclosure of a document would cause real damage or harm to the public interest...The new emphasis on the test of serious harm means that Ministers will not, for example, claim PII to protect either internal advice or national security material merely by pointing to the general nature of the documents. The only basis for claiming PII will be a belief that disclosure will cause real harm." *Sir Nicholas Lyell, Attorney General, 18/12/96, col 949-950*

[7] Public Administration 67, Summer 1989, 189-210

have (though only rarely) rebelled at candour claims. In a case brought against the Department of Health by haemophilia sufferers who had contracted Aids from contaminated blood, Lord Justice Bingham said:

> 'The weight of this consideration depends very much on the subject matter in question. It does not seem to me to have substantial weight in relation to the subject matter with which this case is concerned; indeed, apprehension that these documents might become public before expiry of the 30-year rule might even have prompted greater candour.[8]

In another case Lord Keith held:

> 'The notion that any competent and conscientious public servant would be inhibited at all in the candour of his writings by consideration of the off-chance that they might have to be produced in litigation is in my opinion grotesque. To represent that the possibility of it might significantly impair the public service is even more so'[9]

The 'candour and frankness' argument has been regarded with scepticism by the Administrative Appeals Tribunal (AAT), which enforces the Australian FOI legislation, unless there is explicit supporting evidence. The Tribunal has said it will if necessary require officials to testify on oath that they would not have given the advice they did had they known it would be disclosed:

> "A claim for exemption will not succeed if all that can be said on the public interest issue is that the release of the document will inhibit candour and frankness of advisors in future. The candour argument may perhaps be a make-weight with other considerations... A claim for exemption...will not succeed where it is based on an argument that the document belongs to a class the disclosure of any constituent part of which would produce undesirable results (the 'floodgates' argument)."[10]

But while the AAT is rigorous in dealing with arguments of 'candour', it is sympathetic to claims that advice should be withheld on other grounds, eg that disclosure might lead to "confusion and unnecessary debate" - a particularly unattractive ground for exemption - or give a distorted account of the true reasons for a decision, thereby damaging the public interest. However, such claims would normally have to be justified by reference to the specific contents of the documents, and may be set aside only by a strong countervailing public interest argument. Some of the Australian states are far less tolerant of these arguments, and the judgement of the Information Commissioner of Queensland in the *Eccleston* case (pages 11-12), describes a more robustly open approach.

Candour might be affected not because civil servants are afraid to expose their analysis to scrutiny, but because they fear how ministers will react if the analysis appears to contradict

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[8] re HIV Haemophiliac Litigation, Royal Courts of Justice, 20.9.90

[9] *Burmah Oil Co v Bank of England* [1980], AC 1090

[10] Summary by Attorney General's Department (Australia), Memorandum D154, Sunderland and Department of Defence, 1986.

them. Would officials be ready to draw a minister's attention to the drawbacks of his or her preferred course of action knowing that their advice might be seized on by critics of the policy and used against the minister?[11] But if the civil servant's actual *recommendation* might be used in this way, is the *analysis* of the likely impact of a particular decision equally susceptible? And even if it is, should we nevertheless insist on having it, if necessary *without* the recommendation, in the interests of properly informed debate?

Could such disclosure jeopardise the political neutrality of the civil service? The problem here is that the civil service is not 'neutral'. It serves the government of the day, transferring its allegiance when the administration changes, though the secrecy of advice ensures that the nature of this role is usually not apparent. The Treasury and Civil Service Committee reported:[12]

> 'Some [witnesses] questioned whether political impartiality in a British context amounted to much more than an avoidance of identifiable political allegiances, given that civil servants owe a loyalty to the Government of the day and have to take account of the political stance of the Government in their actions. It has been contended that "Ministers want, and have always wanted, partiality...'Impartiality'...is simply the assumption that civil servants are prepared to be partial to whichever party forms a government."[13] It has also been suggested that civil servants are required to demonstrate "a chameleon-like behaviour", comparable to "the neutrality of the barrister who serves every cause in turn regardless of the rights or wrongs of the cause"[14]. Others emphasised that there was more to impartiality than service to Governments of different political persuasions. Civil servants should strive for objectivity, an objective sense of the national interest, an avoidance of the partisan or doctrinaire.[15] The requirement to retain the confidence of possible future administrations should represent a clear constraint on the nature of the commitment which civil servants give to any one Government.'

Given that ministers move seamlessly from the development of policy to its political management it is difficult to see how their officials can avoid being drawn in after them. They are responsible for writing ministers' speeches and articles and drafting answers to parliamentary questions. They may do so in line with ministers' instructions and expectations, and it may be the minister's name that appears above their words, but it is nevertheless a politicised task, involving the protection of policies against political criticism.

Greater exposure of this role may well cause questions to be asked. If it is felt that such activities overstep the mark, perhaps some of them should be undertaken by political advisers

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[11] As Sir Robin Butler, the Cabinet Secretary, told the Scott enquiry: 'I think the Minister is entitled to not have Parliament and the opposition saying: "We think that the advice you got from the Permanent Secretary was better than the decision you took." The Minister has a right to reach that decision himself, and then defend it and not to, as I say, have what advisers put to him exploited and thrown against him by his critics.' *Transcript, 9 February 1994, page 46*

[12] Treasury & Civil Service Committee, 5th Report, Session 1993-94,The Role of the Civil Service, HC 27-I, paragraph 66.

[13] Dr Keith Dowding, HC (1993-94) 27-III, pp 23-24

[14] Prof. Fred Ridley, HC (1985-86) 92-II, QQ 525-529

[15] Sir Brian Hayes, HC (1993-94) 27-III p 6

instead of civil servants. Alternatively, it may be accepted that this what the civil service expects of officials and that giving committed support to a minister does not prevent an individual giving equally committed support to his or her opposite number, when the government changes.

One unavoidable argument for at least some confidentiality is that government, like anyone else, needs to be able to think in private at least for a time, without having its tentative views fully open to scrutiny. Lord Reid in *Conway v Rimmer* regarded this, not the need for candour, as the main justification for concealing advice:

> "To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind."

After reviewing this argument on the face of countless PII certificates, Sir Richard Scott retorted:

> "As to this, some may think, and I myself think, that an acceptance from time to time of ill-informed or captious public or political criticism is part of the price that has to be paid for a democratic and open system of Government. If Government insists on secrecy for the 'inner workings of the Government machine' is it in a position to be surprised if criticism is ill-informed? Public and political criticism is what every democratic Government must expect. Criticism is captious if one disagrees with it. Those who agree with it no doubt regard it as wise and justifiable. But as to criticism being 'ill-informed', Government should, in my opinion, make it its business to do what it can to ensure that its critics are not ill-informed."[16]

However, Sir Richard was not necessarily suggesting that advice should be made public *at the time it was offered.* None of us would find it easy to expose our half-formed thoughts to intense external scrutiny, before we have even decided for ourselves whether the proposals are feasible or desirable.

One answer might be to protect advice for a period of time, but permit its release after a decision has been taken. Deferring disclosure in this way would not assist those who sought to participate in the making of the decision, although they would have immediate access to any relevant *factual* information. But it would, after the event, reveal how the decision had been made, what factors had been taken into account and which ignored, and whether well-founded objections had been properly addressed. It would therefore serve the interests of *accountability* if not of participation. This is essentially, the approach adopted in New Zealand, where it is assumed that advice would be protected only until a decision has been taken. Sir Douglas Wass has recently proposed a similar approach for the UK (see page 35).

This raises a number of definitional problems. When exactly might advice become available?

[16] Lecture to the Public Law Project, 21.3.95

At the time of the decision, or at the end of a following period? How would this be dealt with where decision-making involves a series of associated decisions, rather than a single once and for all conclusion?

The success of the publication of the minutes of the monthly meetings between the Chancellor of the Exchequer and the Governor of the Bank of England, after a delay of only 6 weeks, suggests that such problems should not be insurmountable. Disclosures of this kind would have been unthinkable only a few years earlier (indeed when equivalent documents were sought in a 1980 case, the court held that it *was* unthinkable[17]).

When the policy was announced, in April 1994, many assumed that the disclosures would prove bland and uninformative, and that the processes of government could not withstand the airing of differences at such a high level. The event proved them wrong. The minutes were described in the *Financial Times* as "remarkable for their candour".[18] A *Times* leader noted:

> "Instead of papering over disagreements with platitudes, the minutes are impressively clear and sharp".[19]

The quality of public debate has benefited and no-one suggests that it is at the expense of the decision-making process. The robustness of the personalities involved may well be an important factor in the success of this initiative. A Freedom of Information Act may be the means of demanding a similarly robust approach from others.

[17] Lord Wilberforce said: 'I am certainly not prepared - against the view of the minister - to discount the need, in the formation of such very controversial policy as that with which we are here involved, for frank and uninhibited advice from the bank to the government, from and between civil servants and between ministers. It does not require much imagination to suppose that some of those concerned took different views as to the right policy and expressed them. The documents indeed show that they did. To remove protection from revelation in court in this case at least could well deter frank and full expression in similar cases in the future.'*Burmah Oil Co v Bank of England [1980], AC 1090*

[18] 'Minutes reveal sharp rift at the top', Graham Bowley & Philip Coggan, *Financial Times*, 14.4.94

[19] 'Minutes of Interest, *The Times*, 14.4.94

Part 2
AUSTRALIA

The Australian Commonwealth FOI Act exempts internal working documents whose disclosure:

> (a) would disclose...opinion, advice or recommendation...or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes...of an agency or Minister or of the Government of the Commonwealth; and
>
> (b) would be contrary to the public interest"[20]

These are two independent tests. The fact that a document falls within the scope of paragraph (a) carries no presumption that its disclosure would be contrary to the public interest.

The meaning of "public interest" is not defined in the Act itself and its interpretation has been uneven. In the *Howard* case of 1985 the Administrative Appeals Tribunal (AAT), the enforcement body, adopted a strikingly conservative approach - defining the public interest factors which it considered operated *against* disclosure, but failing to offer any corresponding pro-disclosure principles:

The five *Howard* factors are:

> "(a) the higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed;
>
> (b) disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest;
>
> (c) disclosure which will inhibit frankness and candour in future predecisional communications is likely to be contrary to the public interest;
>
> (d) disclosure which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest;
>
> (e) disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision-making process." [21]

Several of the *Howard* factors were later rejected by the Tribunal itself, which later

[20] Section 36(1)
[21] Re Howard and Treasurer of the Commonwealth of Australia (1985) 3 AAR 169

acknowledged that they had "not aged as gracefully as they might"[22] Indeed they were the subject of a powerful and subsequently much cited critique by the Information Commissioner of Queensland who concluded that:

> "I consider that the second and fourth of the Howard criteria are wrong in principle, and should not be applied in Queensland; and further that the first, third and fifth of the Howard criteria should not be applied without regard to the qualifications on the relevance and appropriateness ... made or endorsed in the foregoing discussion."[23]

They have nevertheless had a significant chilling factor on the disclosure of advice, to such an extent that a review of Tribunal decisions by a senior lawyer in the Commonwealth Attorney-General's Department and another colleague could find hardly any examples of policy documents whose disclosure had been ordered.[24] The effect has been magnified by the fact that ministers can issue conclusive certificates to assert that disclosure of particular internal advice would be contrary to the public interest. The Tribunal can review these only on limited judicial review grounds, which prevent it from overturning a decision which it considers to be wrong but not irrational. However, the record under some of the state legislation has been much more positive.

The first *Howard* factor was rejected by the AAT in a 1986 ruling (and subsequently), where the Deputy President of the Tribunal noted:

> "...I do not consider that because the documents are 'high-level' correspondence their disclosure is necessarily contrary to the public interest. It may be that high-level correspondence is more likely than lower-level material to have characteristics which make its disclosure contrary to the public interest. If so, it is those characteristics, and not the mere fact of its being high level, which make its disclosure contrary to the public interest."[25]

In another case the Tribunal dismissed the second *Howard* factor, (communications made in the development of policy) - which had implied that disclosures of internal working documents were inherently contrary to the public interest. The Tribunal concluded that this factor "is of no relevance to a consideration of the public interest".[26]

The third factor, "candour and frankness" has, in the absence of specific supporting evidence, since been regularly rejected by the Tribunal which, in a 1987 judgement, noted:

> "the Tribunal has repeatedly indicated its reluctance to accept the candour and frankness argument, particularly when presented, in substance, as a 'class' claim..."

[22] Re Saxon and Australian Maritime Safety Authority, 1995, summarised in Freedom of Information Review (65) October 1996.
[23] Re Eccleston and Department of Family and Aboriginal and Islander Affairs, Decision No 93002, 1993
[24] Madeline Campbell & Helen Arduca. "Public Interest, FOI and the Democratic Principle. A Litmus Test', Paper presented at the Second National Freedom of Information Conference, 7 & 8 March 1996.
[25] Re Rae and Department of Prime Minister and Cabinet (1986) 12 ALD 589
[26] Re Dillon and Department of Treasury (1986) 4 AAR 320

"...it is in my view really time that agencies stopped repeating the 'candour and frankness' claim under s.36 unless a very particular factual basis is laid for the making of the claim'[27]

The Attorney General's Department has commented:

"Arguments based on 'frankness and candour', however described, have rarely been successful in the Tribunal...Theoretically some decisions have left open the possibility, of the success of that ground in relation to 'high level policy making'...In practice it will be extremely difficult to satisfy what the Tribunal in *Fewster*...referred to as 'a very particular factual basis' for making the claim...Establishing the claim would require officers of an agency to assert on oath that they would not give full and forthright advice if they believed the advice would be disclosed under FOI." [28]

The approach to "candour" can be seen from a 1993 case in which a journalist sought access to economic forecasts prepared by the Department of Treasury's Joint Economic Forecasting Group. The Tribunal described the claims made for an effect on candour:

"Mr Fraser *[a Deputy Secretary in the Treasury*] identified particular passages in the documents which, he believes, would be omitted if it were known that the documents would ultimately be made public...Under cross-examination, however, he conceded that confidential advice would be conveyed orally to the minister, or by means of departmental minutes, and that all necessary information would still reach the minister...

Mr Potts *[another Treasury official]* said that if the documents were to be made public, there would need to be considerably more explanation provided. At present, they are prepared on the assumption that they will be read only by a very small group which is familiar with these kinds of reports..."

It concluded:

"...neither of the respondent's witnesses demonstrated that the quality of the Treasury's advice would suffer as a result of the documents being made public. Indeed in Mr Potts evidence, it was suggested that future documents would be required to contain additional contextual material, not

less material, if there was a possibility that the documents would subsequently be made public. Mr Fraser indicated that the relevant advice would still be conveyed to the minister, albeit possibly by a different means. Under these circumstances, I can see no rational basis for accepting the 'candour' argument."[29]

[27] Re Fewster and Department of Prime Minister and Cabinet No 2 (1987) 13 ALD 139
[28] Attorney General, Freedom of Information Act, Annual Report 1994-95, commenting on the case of Re John Edward Walker & others and Commissioner of Taxation. AAT. 14.12.94
[29] Re: Cleary and Department of Treasury, AAT decision of 9.8.93, Administrative Law Decisions, 31, 1993.

Despite this, the Tribunal did not order the disclosure of the requested documents - which were the subject of a ministerial certificate. It accepted that it was not unreasonable for the Treasury to claim that the data in the reports "could be misinterpreted", and that the minister had not acted unreasonably in issuing a certificate.

An even more emphatic rejection of the *Howard* approach is found in a 1993 decision of the Queensland Information Commissioner:

> "Sometimes the public interest in accountability and public participation will outweigh the public interest in the effective and efficient use of limited government resources to obtain the government's desired outcomes. A certain amount of inefficiency in getting things done should be a burden that democratic governments are prepared to accept as the price of honouring the higher values of the democratic process...
>
> s 41[the deliberative processes exemption]... is the exemption provision whose application will most frequently call for the resolution of the tension between the objects which the FOI Act seeks to attain and the tradition of secrecy which has surrounded the way in which government agencies make decisions which affect the public. Unless the exemption provisions... are applied in a manner which accords appropriate weight to the public interest objects sought to be achieved by the FOI Act, the traditions of government secrecy are likely to continue unchanged...
>
> Having regard to the terms in which s.41(1) is framed, however, if the public interest considerations favouring disclosure and non-disclosure are in effect evenly balanced or neutral, the exemption is not made out, and an applicant is entitled to have access. The FOI Act does not require an applicant to demonstrate that disclosure of a deliberative process document would be in the public interest; an applicant is entitled to access unless an agency can establish that disclosure of a deliberative process document would be contrary to the public interest...
>
> the Tribunal has drawn on some principles expressed in the leading English and Australian authorities on Crown privilege/public interest immunity and sought to apply them in a manner that is quite inappropriate, having regard to the materially different context and objects of freedom of information legislation. Take for instance the passage from the judgment of Lord Reid in *Conway v Rimmer* which was quoted in *Howard's* case shortly before the formulation of the five criteria, and seems to have influenced the formulation of at least the second and fourth of those criteria ... <u>"To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism...And that must in, my view, also apply to all documents concerned with policy making within departments, including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies. Further, it may be that deliberations about a particular case require protection as much as deliberations about policy"</u>
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> The sentences which I have underlined express principles which I consider to be particularly inappropriate for transposition into the context of freedom of information legislation. It is doubtful that Lord Reid's remarks about disclosure creating or fanning ill-informed or captious

> doubtful that Lord Reid's remarks about disclosure creating or fanning ill-informed or captious public or political criticism have ever been accepted by the High Court as reflecting an appropriate justification for Crown privilege/public interest immunity in Australian law...
>
> Freedom of information legislation, however, has turned on its head the natural order that had prevailed for centuries with respect to the disclosure of government-held information...Among its avowed objects are to facilitate informed scrutiny and indeed criticism of the performance of Government. The comments of Lord Reid...must be recognised as the product of a different legal order, and as being inimical to the attainment of the avowed objects of freedom of information legislation...
>
> I consider that the approach which should be adopted in Queensland to claims for exemption *[on candour and frankness grounds should be that]*...they should be disregarded unless a very particular factual basis is laid for the claim that disclosure will inhibit frankness and candour in future deliberative process communications of a like kind, and that tangible harm to the public interest will result from that inhibition
>
> I respectfully agree with the opinion expressed by Mason J in *Sankey v Whitlam* that the possibility of future publicity would act as a deterrent against advice which is specious or expedient or otherwise inappropriate.
>
> Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary to the public interest. If the diminution in previous candour and frankness merely means that unnecessarily brusque, colourful or even defamatory remarks are removed from the expression of deliberative process advice, the public interest will not suffer. Advice which is written in temperate and reasoned language and provides justification and substantiation for the points it seeks to make is more likely to benefit the deliberative processes of government. In the absence of clear, specific and credible evidence, I would not be prepared to accept that the substance or quality of advice prepared by professional public servants could be materially altered for the worse, by the threat of disclosure under the FOI Act..."[30]

The fourth and fifth *Howard* factors - that disclosures leading to 'confusion and unnecessary debate' or which gave a misleading account of the true reasons for decisions - were not in the public interest - have however remained, though these too have been regarded as contentious. In practice, as the Tribunal has retreated from the 'candour' argument it appears instead to have made greater use of these grounds for withholding information.

Thus in one case the Tribunal held that the release of documents about the forthcoming Australian Bicentennial Authority (again subject to a conclusive certificate) would:

> "simply reactivate issues which were now in the past [which] would be contrary to the public interest as disclosure would, without countervailing public benefit, divert the resources of the

[30] Eccleston, op cit

> ABA and of high levels of government into dealing with such issues at a time when the commencement of the Bicentennial programmes was only months away"[31]

In another case, not involving a certificate, the AAT upheld the refusal to release a military submission on the selection of a trainer aircraft for the air force noting:

> "If it were possible to put together all the written and oral submissions made to the committee, the discussions of those submissions and any other element that led to the making of the final decision, and to make all that material available to one who was qualified to understand it and debate it, perhaps confusion could be avoided. That is not however the situation with which we are confronted at the moment. We have only one ingredient in the debate the disclosure of which could possibly distort the validity of the final decision that was made."[32]

This approach was criticised by the Senate Standing Committee on Legal and Constitutional Affairs in a 1987 review of the operation of the FOI Act. It expressed:

> "some concern [at] the implication that access to material would be given to 'one who was qualified to understand it and debate it', but not to a member of the public or, as in this case, a journalist...The implication is that the Australian community lacks the sophistication to distinguish between a proposal canvassed as an option and a proposal actually adopted. Debate after the event on an option that was not adopted is presumably 'unnecessary debate'.
>
> The Committee regards the Australian community as more sophisticated and robust than the guideline assumes....*The Committee records its conclusion that possible confusion and unnecessary debate not be factors to be considered in calculating where the public interest lies."*[33] *(italics added)*

The Tribunal has sometimes been prepared to assume a higher level of sophistication on the part of requesters. Thus, where a trade union sought information about staffing "bids" by its publicly owned employer, the AAT noted that:

> "Evidence had been given of the developing atmosphere of consultation and negotiations between Telecom and the union, and of the union's understanding of the limited purpose for which the 'bids' were prepared. In such circumstances, the Tribunal said that release could not be said to be likely to cause confusion and unnecessary debate, nor be unfair to nor prejudice the integrity of the decision making process."[34]

In another case, involving documents about the transfer of a senior official to a new post following a highly publicised dispute with a Minister, the Tribunal:

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[31] Fewster and Department of the Prime Minister and Cabinet (No 2), summarised in: Freedom of Information Review, October 1987, 59-60.

[32] Re Sunderland and Department of Defence (1986) 11 ALD 258

[33] 'Report on the Operation and Administration of Freedom of Information Legislation', Australian Government Publishing Service, Canberra, December 1987

[34] McCarthy and Australian Telecommunications Commission, 1987, summarised in: Attorney General's Department, Annual Report on the Freedom of Information Act 1986-87, 218-9

> "accepted that in view of the considerable public attention given to the [issue]...and the transfer of the Commissioner, it was in the public interest to ensure that the material already released did not represent a distorted selection of the totality of material in existence".[35]

In one notable case, the *Victoria* Administrative Appeals Tribunal turned the 4th principle on its head:

> "It...expressed the view that *some* confusion and *some* unnecessary debate was to be preferred to public ignorance and no public debate...about what were considered to be the great issues of the day. Such was the stuff of which strong and vigorous democracies were made."[36]

Statutory limits on public interest

As the judgement in *Eccleston* and the Victoria case above suggest, the record under the state FOI laws has been much more positive. Indeed, so marked has the reaction against the *Howard* approach has been that some state laws have explicitly excluded particular *Howard* factors. Thus, Tasmania's Act states that disclosure of an internal working document cannot be considered to be contrary to the public interest:

> "merely because of (a) the seniority of the person who created, annotated or considered the information; or (b) the possibility that the public may not readily understand any tentative or optional quality of the information".[37]

The New South Wales Act prevents consideration of whether disclosure may:

> "(a) cause embarrassment to the Government or a loss of confidence in the Government; or (b) cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason."[38]

A more up to date account of the relevant public interest factors relied on in past decisions has been compiled by the Attorney General's Department.[39] Factors which may favour disclosure include:

> "• the information may 'complete the picture' of what is already known about a matter...
>
> • an individual should have access to information affecting him or her...

[35]Downie and Department of Territories, 1985, summarised in: Freedom of Information Review, February 1986, 11

[36]Perton and Department of Premier and Cabinet, 1992. Summarised in *Freedom of Information Review, February 1993, 10-11*

[37] Freedom of Information Act 1991, section 27(4)

[38] Section 59A

[39] Freedom of Information Introductory Seminar. Information Access Unit, Family & Administrative Law Branch, Attorney-General's Department, Canberra, 1993.

- information may disclose the reasons for decisions...
- the age and lack of continuing relevance of the documents, especially where some time has passed since the creation of the documents and consideration of the matter...
- the importance of openness of administration, and of the public's need to be better informed, and more able to participate in, public affairs;
- the need to be informed about measures relating to community health and safety, and about the relationship between the regulating agency and the regulated enterprise; and
- the general public interest in obtaining access to government-held information..."

Those factors which may operate against disclosure were identified as:

"• premature release of tentative and partially considered policy matters may mislead the public and encourage ill-informed speculation...

- on-going negotiations between the government and third parties could be prejudiced by premature release; and
- the integrity of decision-making could be prejudiced if documents released do not fairly disclose the reasons for the decision, or involve sensitive matters considered at the highest level (*Re Howard*)(one must consider the content of the documents, not merely the level at which they were created..."

Part 3
NEW ZEALAND

New Zealand's Official Information Act 1982 is unusual in that it does not attempt to define "policy advice". Instead, it permits information to be withheld where this is "necessary" to maintain certain "constitutional conventions", which "for the time being" protect:

- collective ministerial responsibility
- the political neutrality of officials, and
- the confidentiality of advice.

A related exemption permits information to be withheld where necessary for the "effective conduct of public affairs through the free and frank expression of opinions". The exemptions are subject to a public interest override[40] .

The "constitutional conventions" themselves are not defined in the Act; indeed, the use of the words "for the time being" anticipates that they will change. The Ombudsman, who enforces the legislation, has made it clear that maintaining the relevant conventions does not necessarily require the withholding of all policy advice[41] - the phrase is in effect a "harm test".

What public interest factors might justify the disclosure of policy advice? The Act's 'purposes' - unlike those of the Australian Act - make clear that the legislation is intended to promote public participation and government accountability.[42] The following questions, posed by the Ombudsman in considering the public interest, refer to these:

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[40] Section 9 of the Official Information Act 1982 reads:

"(1) Where this section applies, good reason for withholding official information exists...unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available...

(2)...this section applies if, and only if, the withholding of the information is necessary to...

(f) Maintain the constitutional conventions for the time being which protect...(ii) Collective and individual ministerial responsibility: (iii) The political neutrality of officials: (iv) The confidentiality of advice tendered by Ministers of the Crown and officials; or

(g) Maintain the effective conduct of public affairs through (i) The free and frank expression of opinions by or between or to Ministers of the Crown or officers and employees of any Department or organisation in the course of their duty;..."

[41] Tenth Compendium of Case Notes of the Ombudsmen. Office of the Ombudsman. Wellington. April 1993, (subsequently 'Tenth Compendium')

[42] Section 4(a) of the Act provides that its objectives include:

"To increase progressively the availability of official information to the people of New Zealand in order

(i) To enable their more effective participation in the making and administration of laws and policies; and

(ii) To promote the accountability of Ministers of the Crown and officials

and thereby enhance respect for the law and to promote the good government of New Zealand".

- would disclosure of the information promote the purposes of the Act?
- would it enable people to participate more effectively in 'the making and administration of laws and policies'?
- is the issue one where the need for transparency in the making of the particular law or policy is high?
- is the issue one which has a widespread impact on people and therefore one about which information ought to be made available?
- would disclosure promote the accountability of Ministers or officials?[43]

Candour

The Ombudsman has accepted that releasing advice may affect candour, but requires specific evidence based on the contents of the documents. According to one commentator:

> "There is no presumption that disclosure will inhibit candour. Inhibition must be demonstrated. The fact that a particular communication is free and frank does not prove that the freedom and frankness is due to expectations of non-disclosure. There may have been no such expectation at all. The Ombudsman has, however, accepted the obverse of this argument. If the opinion sought to be withheld is not in fact candid, it is assumed that the prospect of continued non-disclosure will not induce a candour which the opinion giver refused to display on this occasion."[44]

In a case concerning a request for diplomatic cables from officials serving on an international working group in Geneva the Ombudsman held that:

> "a number of the opinions could be withheld (subject to the public interest) in that they were especially free and frank in nature and would only, in my view, have been given under a complete assurance of confidentiality. In respect of other opinions, however, the Minister accepted my view that withholding was not necessary on an ongoing basis and he agreed to make these available."[45]

The Ombudsman has also accepted that a person whose duty requires them to comment on the conduct or motives of others may require an assurance of confidentiality if such comments are to be frank.[46]

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[43] Report of the Ombudsmen, Year Ending 30.6.94

[44] I Eagles, M Taggart, G Liddell, 'Freedom of Information in New Zealand', Oxford University Press, Auckland, 1992, p 376-7

[45] Tenth Compendium of Case Notes of the Ombudsmen. Office of the Ombudsman. Wellington. April 1993. (Case W1802)

[46] I Eagles et al, op cit

However, the Ombudsman has ordered disclosure of a paper from the publicly owned Electricity Corporation of New Zealand to the Cabinet Strategy Committee considering a select committee report on electricity pricing. The Ombudsman accepted that the paper contained "free and frank expressions of opinion" by ECNZ which *would* be inhibited in future, but concluded there was an overriding public interest given the impact of such decisions on the public, the widespread public concern at earlier proposals to increase electricity prices and the fact that there were no alternative sources of information about ECNZ's pricing structure other than the information it held and provided to government. He noted that the opinions revealed were those of the ECNZ, and not the deliberations of the Cabinet Committee[47] .

Post-decisional disclosure

The most distinctive element of the New Zealand approach is that although advice is generally protected *before* a decision, *afterwards* it is much more likely to be disclosed. According to Treasury guidance:

> "The 'constitutional convention' cited is uncertain. It is most often defined as meaning that Ministers are entitled to 'undisturbed consideration' of advice on which they have not made up their minds. Therefore, as a starting point, this subsection may require withholding advice to Ministers when Ministers have not made their decision on that advice.
>
> But the grounds for withholding under this subsection tend to become weaker the longer Ministers take to decide, and the less important or sensitive is the decision."[48]

According to the then Ombudsman, the approach is:

> "to recognise that *at certain stages of the policy making process information must be protected for the sake of the process.* These withholding provisions protect the process rather than the information...But once the process has been completed it no longer requires confidentiality; *then* the emphasis frequently changes in favour of disclosure...

Occasionally, earlier pre-decisional disclosure may be called for in order to meet the Act's objective of providing "more effective participation in the making and administration of laws and policies".[49] However, this would be exceptional:

> Participation is accommodated by giving appropriate opportunities for public input at specific, regularly spaced stages of the policy making process; the Act then recognises that at some stage the doors must close so that the fruits of consultation and participation can be assimilated,

[47] Tenth Compendium Case W3649
[48] Every Treasury Officer's Guide to the Official Information Act (8/93) (NZ)
[49] Section 4(a)(i)

> debated and fashioned into policy. If as a result of a particular request Section 9(1) *[the public interest override]*... requires the doors to be opened when they would otherwise be closed, this may well be due to lack of proper consultation or participation at earlier stages, and those concerned should therefore be looking at whether the process they have followed has been an appropriate one."[50]

The other explicit objective of the Act, to promote greater accountability,[51] "need not be required until the process is completed."

The following cases illustrates the approach. In the first the Ombudsman upheld a refusal to disclose working papers of a committee that was still deliberating:

The committee was an independent body set up to investigate the safety and environmental implications of allowing nuclear vessels to enter New Zealand ports. The Ombudsman accepted that the withholding of the papers was justified on the grounds that:

> "the issue...is particularly sensitive...they key issues...were complex and required the Committee to...[operate in] a relatively tight time frame...and disclosure could...undermine ...[its]...ability to carry out its designated task in an undisturbed and orderly fashion and thereby prejudice its ability to give the Prime Minister its best advice".

But he noted that the committee's report would be published, and that by that time the factors that justified withholding supporting data "might well have passed".

As for any countervailing public interest: "if information had been withheld which evidenced any riding instructions or administrative or other constraints inconsistent with the terms of reference or public announcements of the independence of the...review process, then clearly there would be a particularly strong public interest in disclosure of such information. However, I had not identified any such information and was satisfied that none had been withheld."[52]

In the next, the Ombudsman ultimately concluded that information should be disclosed, in advance of a final decision. The case involved a challenge by the New Zealand 'Shooters Rights Association' against a refusal to allow it to see a police report on proposals to restrict the import of military style semi-automatic rifles. The Ombudsman found that there was no grounds for withholding the factual and background material contained in the report. However, on a preliminary assessment he accepted that the *recommendations* should be protected until the decision had been taken:

> "I accepted that the question of banning firearms importation was sensitive and controversial...I was satisfied that disclosure of the recommendations before a decision was taken would

[50] Nadja Tollemache, Ombudsman. Paper at a Seminar on 16/5/89 organised by the Institute of Policy Studies on the Official Information Act 1982 (emphasis in the original)
[51] Section 4(a)(ii)
[52] Tenth Compendium, Case W3621

> undermine the constitutional convention protecting the confidentiality of advice by officials to Ministers. One of the reasons for the existence of this convention is to enable Ministers to give undisturbed consideration to the options available on a particular matter, especially when that matter is sensitive. This particular issue seemed to me to be one where undisturbed Ministerial consideration was of some importance. *Once a decision had been made and announced, however, there would not be any obstacle to full disclosure*." (my italics)

But he went on to consider whether there were any public interest grounds for *earlier* disclosure, particularly in light of the Act's "more effective participation" purpose. He noted that disclosing the recommendations:

> "would add to the requester's knowledge and would sharpen the issues which it needed to address were it to approach the Minister.
>
> On the wider level, disclosure of the recommendation and the accompanying comments would assist in public debate generally on the issue of firearms importation which is, in my view, an extremely important issue which has implications for security and public safety.
>
> ...there was no doubt that disclosure...would promote the accountability of the Police[53] in matters relating to the administration of the Arms Act.
>
> On matters of particular sensitivity, the constitutional convention protecting confidentiality of advice by officials is there to protect the Minister against premature disclosure which would interfere with his ability to make a sound decision. However...it seemed to me that account should also be taken of the passage of time. The report was nearly one year old. It had awaited consideration by three successive Ministers of Police. In my view that lessened somewhat the strength of the "necessity" to withhold the information.
>
> Balanced against that are the interests in participation and accountability which are strong in relation to a matter of this nature. The issue of firearms control is one in which the principle of public safety is paramount, and in my opinion that required the greatest possible transparency in the making of laws and policies.
>
> For these reasons I formed the opinion that the withholding of the information was outweighed by other public interest considerations, and accordingly that good reason did not exist to withhold the deleted information under s.9(2)(f)(iv) *[confidentiality of advice]*. The Police accepted my opinion that this request should not have been refused and agreed to make available the information."[54]

A similar case involved a request for an interdepartmental report on proposals to reform the country's producer boards. The Ombudsman initially upheld the refusal saying: "disclosure of

[53] The police not the Minister had the statutory responsibility for making the decision in question.
[54] Tenth Compendium of Case Notes of the Ombudsmen. Office of the Ombudsman. Wellington. April 1993. Case W2159

the information under the Act would clearly pre-empt whatever action Ministers decided to take".

Several months later the report was again requested. By that time the government had decided not to proceed with the promised consultation paper or, apparently, with the substantive reforms, although it still maintained that the issue was under consideration. The Ombudsman concluded that it should be disclosed, commenting:

> "There was also....an interest in accountability which must be satisfied sooner or later. The view taken in the inter-departmental paper had been that a public discussion document would be beneficial; this underlined the desirability that the issues be aired and debated publicly at some stage. Cabinet had later decided against this option, but that seemed to me to have been no more than a consequence of its decision not to proceed with the more fundamental reforms proposed by the paper. I saw no reason why the public could not eventually have the benefit of that information; the only question was one related to the timing of disclosure." [55]

Finally, the Ombudsman's 1988 report described a notable case involving communications between two Ministers about the terms of reference for a departmental review. It was argued that

> "release of the information, which showed a difference of opinion between Ministers at the policy formation stage, would inhibit such discussions between Ministers...in future, particularly with officials present".

The Ombudsman did not accept this, and noted that as the matter had not gone to Cabinet, collective Cabinet responsibility was not involved. He commented:

> "There is a tendency, which perhaps arises from the adversarial nature of the political system, to regard such differences of opinion in a negative light. In our view, however, expressions and differences of opinion in the presence of officials by Ministers with an obligation to their portfolio responsibilities, are a normal part of the governmental process and should not be unexpected by the public. Moreover, the public interest can be and often is promoted by Ministers being seen to debate issues. Ministers' portfolio responsibilities embrace well defined objective particular to each portfolio. To suggest that as between Ministers these objectives will always coincide is unrealistic; differences and their implications must always be talked through before final decisions are taken. That factor is very much in the public interest and it may well help arrive at a better decision if the public are aware of the issues being debated and are able to contribute to the debate before a matter is finally settled in a Cabinet Committee or Cabinet forum. Collective Cabinet responsibility is not affected in these circumstances because binding decisions have not at that stage been made."

[55] Tenth Compendium, Cases W1718, 2154 & 2284

Part 4

The UK CODE OF PRACTICE ON ACCESS TO GOVERNMENT INFORMATION

The Code of Practice's approach to policy advice is to provide:

- **an exemption for 'internal discussion and advice' based on a harm test (that disclosure would ('harm the frankness and candour of internal discussion')**
- **a public interest override**
- **a commitment to publish the facts and analysis underlying new policies and decisions, "which the Government considers relevant and important" once these policies have been announced**

Exemption 2 in the Code permits the withholding of:

> 'Information whose disclosure would harm the frankness and candour of internal discussion, including:
>
> - proceedings of Cabinet and Cabinet committees;
> - internal opinion, advice, recommendation, consultation and deliberation;
> - projections and assumptions relating to internal policy analysis; analysis of internal policy options and information relating to rejected policy options;
> - confidential communications between departments,public bodies and regulatory bodies.'

This wording originally appeared ambiguous, since it was not clear whether it implied that any disclosure from within the four classes was *by definition* regarded as harmful or whether a test of harm was to be applied to any requested information. The Cabinet Office's original guidance on the Code implied the former, stating:

> "It is not the intention to change or undermine the long-established conventions protecting the confidentiality of the internal decision-making process. It is the process by which the Government reaches a collective view, and takes account of the confidential advice of officials, which requires protection."[56]

[56] 'Guidance on Interpretation. Code of Practice on Access to Government Information', 1st edition, March 1994, para 2.3

However, the Parliamentary Ombudsman adopted the latter approach; and the Government subsequently accepted that the latter is the correct approach[57]. The guidance has now been amended by adding:

> "It will be for departments to decide on a case by case basis whether information falling within any of the categories in this exemption should be released. However, by its very nature this type of information will often be particularly sensitive. Because of this, it is important that departments consider the effect that disclosure might have on future internal discussion. It is not possible to consider a request for this type of information in isolation without considering the overall harm which might result to the decision-making process. "[58]

Public interest override

The internal discussion exemption is subject to a public interest test. The Code states:

> "In those categories [of exemption] which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available...it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available"[59] .

The Code does not attempt to define the public interest but it includes amongst its stated aims a clear public interest principle:

> "to improve policy-making and the democratic process by extending access to the facts and analyses which provide the basis for the consideration of proposed policy"[60]

Referring to these aims, the guidance adds:

> "The *public interest* in disclosure is particularly strong where the information in question would assist public understanding of an issue subject to current national debate, or improve the transparency and accountability of a particular function of Government".[61] (*my italics)*

[57] Select Committee on the Parliamentary Commissioner for Administration, 1st Special Report, 1996-97, HC 75, para 2

[58] Guidance on Interpretation. Code of Practice on Access to Government Information', 2nd edition, 1997, para 2.3

Note: unless the contrary is specified all subsequent references to the Code and guidance are to the 2nd editions, of 1997.

[59] Code, Part II, 'Reasons for confidentiality'

[60] Code, paragraph 2

[61] Guidance, paragraph 3

Elsewhere, in discussing the exemption for commercial confidentiality the guidance indicates the public interest override may apply:

> "where disclosure is necessary or conducive to the protection of public health, public safety or the environment".[62]

The test might also be expected to draw on the substantial body of case law describing the circumstances in which a breach of confidence is considered justified on public interest grounds.

Facts and analysis of facts

The guidance does envisage that factual analysis should be published, at the government's own initiative, when it announces a new policy or decision. However, the Code makes clear that what should be released are the facts and analysis:

> "which the Government considers relevant and important"[63] .

This qualification may have been inserted in order to protect such decisions from review by the Ombudsman. With a rare touch of Sir Humphryism, the guidance adds:

> "It is not necessary to swamp Parliament and the public by an indiscriminate approach to this requirement".[64]

It also suggests that any such publication "should not entail the disclosure of policy advice"[65] though later in the guidance it suggests that advice might be disclosed but only after "a number of years have elapsed".[66]

The Code nevertheless represents a significant advance in relation to policy advice. It is now open to the Ombudsman to recommend the disclosure of advice, if he concludes that this will *not* affect the frankness of future discussions or if it is in the public interest to do so.

The Ombudsman and the Code

Between the Code's introduction in April 1994 and the end of the 1996 the Parliamentary Ombudsman received less than 50 open government complaints suitable for investigation, and only a handful of these involved the policy advice exemption. However, a small number of additional cases arose under the separate but broadly similar Code of Practice on Openness in the NHS, supervised by the Health Service Commissioner. The cases that follow were all

[62] Guidance, paragraph 13.14
[63] Code, paragraph 3(i)
[64] Guidance, paragraph 21
[65] Guidance, paragraph 18
[66] Guidance, paragraph 20

decided by the former Parliamentary Ombudsman, Sir William Reid, who also served as Health Service Ombudsman, and who retired in January 1997.

Cabinet Committee papers

Although Exemption 2 implies that Cabinet and Cabinet Committee papers are subject to the Code, and to its public interest test this is so in appearance only. While the Ombudsman has good general powers to demand information from government,[67] he has no right to information relating to proceedings in Cabinet or Cabinet Committee.[68] Thus, although an applicant can ask for Cabinet Committee papers, if they are refused, the Ombudsman may be unable to help. To date the Ombudsman has twice been refused access to Cabinet Committee papers during Code investigations.

> The first case involved a request by the Campaign for Freedom of Information for the report of an interdepartmental committee considering the implications of the House of Lords decision in the case of *Pepper v Hart*. (This permitted the courts to take account of ministerial statements in Parliament when interpreting ambiguous statutory provisions.) The Ombudsman abandoned his investigation once it became clear that the document itself was a Cabinet Committee report which he himself could not see.[69]
>
> Following this case, the select committee on the Ombdusman called on the government to remove this restriction,[70] but it has refused to do so.[71]
>
> The second involved information about decisions taken in 1988 by a Cabinet Committee to extend the permitted period for reprocessing spent nuclear fuel at the Dounreay nuclear plant. The Cabinet Committee papers were withheld from the Ombudsman despite his request that they be supplied to him "on a voluntary basis". He reported: "Because of the bar on my access to Cabinet material I have not been able to establish whether all the information which DTI supplied to Mr X in answer to his requests was complete and germane".[72]

Other Exemption 2 cases

The most interesting of these involved a complaint against the Department of National Heritage's refusal to release papers relating to the review and subsequent lifting of the

[67] Parliamentary Commissioner Act 1967, section 8(1)
[68] Parliamentary Commissioner Act 1967, section 8(4)
[69] PCA, Second Report, 1994-95, HC91, p7
[70] Select Committee on the PCA, 2nd Report 1995-6, HC 84 para 113
[71] Select Committee on the PCA, 1st Special Report, 1996-7, HC 75
[72] PCA, 1st report, session 1996-97, HC 231, p11

broadcasting ban in Northern Ireland. The case is significant in indicating the Ombudsman's view that:

- the exemption was subject to a harm test - and could not be withheld on a "class" basis (from the face of the Code, this was not clear at that time)
- public interest considerations could override that harm
- any harm was likely to diminish with time
- the harm might arise from the consequences of disclosure on related continuing discussions
- factual analysis might be subject to different treatment to "advice"

The Ombudsman's judgement is worth quoting in some detail:

> "I am in no doubt that the information...falls squarely within Exemption 2...I can also say that the complainant is not correct in his surmise that those papers contain separable factual or explanatory material not covered by the Exemption. The papers concerned offer advice, recommendations and comments on the implementation and implications of the broadcasting ban rather than presenting factual analysis as such...
>
> ...the preamble to Part II of the Code makes clear that the Department need also to consider whether any harm or prejudice arising from disclosure of the information sought would be outweighed by the public interest in making that information available. For his part, the complainant has argued that since the broadcasting restrictions have been lifted, there is no longer any continuing discussion that can be harmed by the disclosure of the information sought. He discounts the DNH argument that the prospect of retrospective disclosure within a relatively short period would itself inhibit the candour of internal discussion and advice...
>
> As I see it, the issue of when the public interest in disclosure will override any harm or prejudice which might arise from disclosure is a matter of judgment in the light of the facts of each individual case...It cannot be said that no information within the category covered by Exemption 2...will ever be released before the expiry of the 30 year period referred to in the Public Records Act any more than it can be said that such information will always be released on request. Varying views may legitimately be held about the lapse of time necessary before the release of internal discussion and advice will cease to have an inhibiting effect on the provision of future internal discussion and advice. The extent of public interest in disclosure will itself vary from case to case. I do not doubt that many members of the public want to know about the matters in respect of which the complainant has sought information. The broadcasting ban has now been lifted, but it cannot unfortunately be said that related matters (on which opinions and predictions were volunteered in the context of the review of it) have yet run their course or that sensitive issues in relation to them may not arise again in the future.

> Against that background I accept that harm to the frankness and candour of future internal discussion on related matters could be expected if [the requested material]...were disclosed."[73]

Most of the other cases involving Exemption 2 deal not with questions of whether the disclosure of advice would harm frankness, but on whether the material involved was 'advice' at all:

- the Department of Transport refused to release an Inspector's report following a 1988 inquiry into the proposed Birmingham Northern Relief Road. The report was originally intended to be published with the Secretary of State's decision, but the proposals had been withdrawn, and new ones announced, before the decision was made. The Department cited Exemption 2, amongst other grounds. The Ombudsman rejected these claims, noting: "It is a report which was drafted and produced in the expectation that, in the fullness of time, it would be published in its entirety. I see no justification in a claim that the release of the information contained in it could or would harm the frankness and candour either of future Inspector's reports or of discussions on them within the Department."[74]

- a health authority resisted disclosure of reports of its statutory inspections of a private nursing home arguing, in part, that the reports formed the basis of advice to the authority. The Health Service Ombudsman (who dealt with case under the NHS Code) rejected this claim, pointing out that the reports "take the form of letters addressed to the nursing home...and contain within them advice only to the proprietors of the nursing homes".[75]

- The Employment Service refused to disclose the report of an incident of alleged violence or abuse towards job centre staff by the complainant, who said he was considering an action for defamation. The incident was recorded as part of a confidential recording system designed to assess the need for special measures to protect staff. The Ombudsman concluded that only a small part of the reports contained internal advice or recommendation, but this fell within Exemption 2, as disclosure might deter staff from recording such comments, ultimately to the detriment of their safety. He added that this potential harm was "sufficient to outweigh the public interest in disclosure"[76] .

- The Housing Corporation refused to allow the complainant to see their file of correspondence about him with a Housing Association, which included internal advice from Corporation officials. The Ombudsman held that the advice "is

[73] PCA, 9th report, Session 1994-95, HC 758, Case A12/95
[74] PCA, 1st Report, Session 1994-95, HC 14, Case A.4/94.
[75] HSC, 1st Report , Session 1996-97, HC 62, Case J.3/95-96

[76] PCA, 1st Report, Session 1996-97, HC 231, Case A.41/95

clearly covered by Exemption 2" adding that he did not consider that "the harm to the frankness and candour of internal discussion which would arise were the information...made available...would be outweighed by the public interest in that information being made available"[77] .

A positive feature of these cases, is that the Ombudsman regularly raises the question of any public interest in the disclosure of exempt information. However, his reports give little idea of how he assesses the public interest. This is most noticeable in his report on the Northern Ireland broadcasting ban, where the only reference made to the arguments for disclosure is to say:

> "I do not doubt that many members of the public want to know about the matters in respect of which the complainant has sought information."

This leaves something to be desired, since the courts have frequently held that the "public interest" is not synonymous with what the public "is interested in". Remarkably, it makes no reference to what might be thought to be an obvious issue of public interest - that the ban involved an restriction on the broadcasting of news which, at least in the broadcasters' view, was capable of affecting the public's understanding of events in Northern Ireland.

This apparent reluctance to elaborate on the public interest is still more noticeable in one other case, under the NHS Code - though this did not involve policy advice. A patient had complained about her medical treatment under the NHS complaints procedure, the final stage of which was an Independent Professional Review by independent consultants, but she had not been given access to the resulting report. The Ombudsman accepted that the report had been supplied in confidence and was properly exempt, unless the obligation of confidentiality was clearly outweighed by the public interest.

He continued:

> "Given that legitimate expectation of confidentiality I do not consider that in this case it would be right to recommend disclosure. I could only do so if there were a public interest in disclosure which outweighed the requirement for confidentiality. The guidance to the Scottish [NHS] Code (paragraph 9.42) identifies such cases as being those where:
>
> > '...there would be some serious breach of the law or other wrongdoing, or exposure of a significant risk to public health or to the environment or public safety...'
>
> Such criteria are clearly not applicable to this case. I therefore conclude that the complainant is *not* entitled to have copies of the reports of the two assessors."[78]

[77] PCA, 6th Report, Session 1995-96, HC 593, Case A.36/95

[78] Report of the Health Service Commissioner. Selected Investigations - Access to Official Information in the National Health Service. 1st Report, 1996-97, HC 62, pages 18-24

It is remarkable to find the Ombudsman deferring to a government department's definition of the public interest, when a substantial body of case law on the point exists, and would certainly go beyond that suggested above[79]. The Ombudsman had in any case previously made it clear that he did not consider the government's guidance on the Code binding on him.[80] Strangest of all, is the fact that the Scottish Office guidance does not purport to be a comprehensive description of the circumstances in which an overriding public interest might occur. It actually reads as follows:

> "9.42 It is important to stress that the public interest in disclosure must clearly override that interest in preserving the confidentiality. *For example, disclosure might be envisaged where* there would be some serious breach of the law or other wrongdoing, or exposure of a significant risk to public health or to the environment or public safety." (my italics)

The italicised words, omitted in the Health Ombudsman's quoted extract, indicate that the guidance was illustrating the grounds of public interest, not defining them.

This is not to imply that either in this case, or in the case of the broadcasting ban, the Ombudsman should have found an overriding public interest in disclosure. But it does indicate the extent to which the potential public interest in disclosure under the Code is as yet unelaborated.

[79] For example, see Lord Hailsham of Marylebone's comment that "the categories of public interest are not closed" in *D v The National Society for the Prevention of Cruelty to Children [1978] AC 171*

[80] In relation to the guidance on the central government Code, the Ombudsman has said: "I do not regard myself as bound by that guidance".Parliamentary Commissioner for Administration. 2nd Report, 1994-95, HC 91, para 18

Part 5

DRAFT POLICY ADVICE EXEMPTION

Note: *This is an amended version of the policy advice exemption that appeared in the 1993 Right to Know Bill. All proposed exemptions would incorporate a public interest test, in 3(1). In interpreting 'the public interest' account would be taken of the public interest purposes of the Act set out in in 1(1)(a), and presumably of the case law relating to the 'public interest defence' to actions for breach of confidence (ie that that disclosure may be justified where it indicates serious misconduct, danger to the public, etc.)*

Purposes

1. (1) The purposes of this Part of this Act are -

(a) to extend progressively the right of the public to have access to information held by public authorities in order to further the public interest by promoting open discussion of public affairs, public participation in decision-making and in the framing of legislation and the accountability of public authorities;

(b) to enable individuals to see information held by public authorities about their affairs and to ensure that it is accurate and is held in accordance with the Data Protection Principles;

(c) to ensure that persons are given reasons for decisions taken by public authorities which affect them;

(d) to ensure that guidelines used by public authorities in making decisions affecting persons are publicly available.

(2) This Act shall be interpreted so as -

(a) to further the purposes specified in subsection (1) above; and

(b) to facilitate and encourage the disclosure of information, promptly and at the lowest reasonable cost.

Exempt information

3. (1) Information is exempt if its disclosure would (a) be likely to have any of the effects specified to in the following provisions of this section and (b) be contrary to the public interest.

(2) The effects referred to in subsection (1) are ...

(i) would damage the candour of internal discussions within the authority by revealing the advice, opinion or recommendation tendered by any identifiable individual in the course of that individual's official duties for the purpose of the formulation of the policy of the authority, but information is not exempt under this paragraph insofar as it consists of factual information, or of the analysis, interpretation or evaluation of or any projection based on factual information or of expert advice on a scientific, technical, medical, financial, statistical, legal or other matter other than advice to which paragraph (j) below applies or of information relating to the personal affairs of an individual of guidelines used in making decisions affecting persons and the reasons for any such decisions;

Part 6
EXCLUSIONS FROM THE POLICY ADVICE EXEMPTION

The draft policy advice exemption in Part 5 excludes from its scope:

(a) factual information

(b) the analysis, interpretation or evaluation of, or any projection based on, factual information;

(c) expert advice on a scientific, technical, medical, financial, statistical, legal or other matter

(d) information relating to the personal affairs of an individual

(e) internal guidelines used in decision-making affecting the public and the reasons for any such decisions.

Many overseas FOI laws also exclude similar materials from the scope of this exemption. The following summary is based on a comparison of the Australian Freedom of Information Act of 1982; Canada's Access to Information Act 1982; some of the separate FOI laws introduced by Australian states[81] and Canadian provinces[82] ; and New Zealand's Official Information Act 1982. It includes some references to Ireland's 1996 Freedom of Information Bill, which at the time of writing was close to completing its parliamentary passage.

Exclusions from these Acts' internal advice exemptions include:

- factual and statistical material[83] - and, in the case of Ireland's FOI Bill, the *analysis* of factual or statistical material[84]

- the reasons for a decision[85] or, in one case, information publicly cited as the basis for a policy[86]

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[81] Those referred to here are: *Victoria*, Freedom of Information Act 1982; *New South Wales*, Freedom of Information Act 1989; *Tasmania*, Freedom of Information Act 1989; *Queensland*, Freedom of Information Act 1992; *Western Australia*, Freedom of Information Act 1992.

[82] Those referred to are: *Manitoba*, Freedom of Information act 1985; *Ontario*, Freedom of Information and Protection of Privacy Act; *British Columbia*, Freedom of Information and Protection of Privacy Act 1992.

[83] Australia 36(5); Ontario 13(2)(a); British Columbia 13(2)(a); Victoria 30(3); Queensland 41(2)(b).

[84] Ireland (Bill) 20(2)(b)

[85] Canada 21(2)(a); Manitoba 39(2)(e); Ontario 13(2)(l); British Columbia 13(2)(n); Australia 36(6)(c); Victoria 30(4); Tasmania 27(3)(b); Queensland 41(3)(b); Ireland (Bill) 20(2)(c).

[86] British Columbia 13(2)(m)

- internal guidelines relating to departmental functions affecting the public is a generally excluded, the exclusion sometimes extending to procedures to be followed in investigating contraventions of certain kinds of statutory provisions[87]

- scientific research[88] or field research[89] relating to policy formulation, or expert scientific or technical reports or analysis[90]; in one case a broader exclusion for 'expert opinion or analysis' in any field[91]

- advice from an external consultant or persons other than a government official[92]

- a commissioned report of a government body or interdepartmental committee, other than one reporting to the Executive Council[93]

- a feasibility or other technical study[94] or plans and budgetary estimates[95] relating to new or existing government programs, or an efficiency study[96]

- an economic forecast,[97] a public opinion poll,[98] an environmental impact statement,[99] product testing results,[100] an appraisal,[101] a valuator's report.[102]

Some of these exclusions are dovetailed with specific duties to disclose particular information (especially internal guidance) provided for elsewhere in the statutes. Others reflect particular concerns or disputes. Thus the specific reference to "opinion polls" in the British Columbia's act follows a prolonged efforts by the Information Commissioner, who supervises Canada's national legislation, to secure the release of government commissioned opinion polls on independence for Quebec in the face of claims that they constituted advice.

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[87] Australia,9(1)(d)
[88] Manitoba 39(2)(c)
[89] Ontario 13(2)(h); British Columbia 13(2)(j)
[90] Australia 36(5)(a); Ireland (Bill) 20(2)(e)
[91] Queensland 41(2)(c)
[92] Canada 21(2)(b); Manitoba 39(2)(f)
[93] Ontario 13(2)(j) and (k); British Columbia 13(2)(k)
[94] Ontario 13(2)(g); British Columbia 13(2)(i)
[95] Ontario 13(2)(i); British Columbia 13(2)(l)
[96] Ontario 13(2)(f); British Columbia 13(2)(g); Ireland (Bill) 20(2)(d)
[97] British Columbia 13(2)(e)
[98] British Columbia 13(2)(b)
[99] Manitoba 39(2)(a): Ontario 13(2)(d);
[100] Manitoba 39(2)(b); Ontario 13(2)(e); British Columbia 13(2)(h)
[101] British Columbia 13(2)(d)
[102] Ontario 13(2)(c)

Appendix A

ROBERT HAZELL

Robert Hazell visited Australian, New Zealand and Canada in 1986-87, to study the Freedom of Information laws which each of those countries had enacted in 1982. Below is an extract from his conclusions on policy advice:

"FOI has not achieved the Australian government's aim of increasing public participation, mainly because most Australians do not want to participate. But even if they did, the internal working documents exemption (for advice and deliberation) would generally prevent them. In all countries the exemptions have proved highly effective in protecting those matters which the government has needed to keep confidential. As the public interest groups complained to the Senate Committee in Australia, they have been unable to participate in the policy-making process, because policy documents are never released until after the policy has been decided. But it was unrealistic to suppose that they ever would: and the government was at fault in raising expectations which which it could not meet. In the policy area FOI is rarely going to do more than show, after the event, the reasons why government came to a decision...

Two related fears were expressed before FOI: that advice would no longer be recorded in writing, and that civil servants would shelter behind anodyne opinions if their advice might be disclosed. Although these fears continue to be expressed, it is impossible to find any evidence to substantiate them. In Australia the Treasury suggested in their annual report for 1984-5 that 'because of a reluctance to put certain advice in writing, the Treasurer was not receiving the advice he otherwise would'. But under questioning from the Senate committee they resiled from this proposition; and the new Permanent Secretary at the Treasury says that he has noticed no reduction in the frankness of official advice since FOI. Another Permanent Secretary who certainly feared this result said the same: his fears have not been borne out in practice.

Nevertheless the stories persist. There is no doubt that things are occasionally done or decided which are not recorded on the files. But it tends to be forgotten that pre-FOI things were not always placed on files. The universal yellow sticker had its predecessors - the loose note, sometimes headed 'Not for File': now this is attributed to FOI, but it has always happened in sensitive cases. What does happen is that very occasionally officials may structure their advice rather more carefully when they anticipate that it might be the subject of a FOI request: but it does not affect the *nature* of that advice, and such cases are very much the exception. In the vast majority of submissions to ministers the overriding concern is to get the advice up on time, in the form that the minister will find most useful and officials think will be most persuasive, and all else tends to be subordinate to that objective...

[FOI]...has not led to the disclosure of any state secrets; and it does not inhibit officials from continuing to give full and candid advice."

'Freedom of Information in Australia, Canada and New Zealand', Public Administration 67, Summer 1989

Appendix B

SIR DOUGLAS WASS

The following are extracts from a paper by Sir Douglas Wass entitled 'Scott and Whitehall', which appeared in Public Law in Autumn 1996 (461-471).

"Although a Freedom of Information Act would have done little itself to prevent any of the lapses Scott brings to light, the duties laid upon the executive by such a statute would fundamentally affect the attitude the government and its officers have towards Parliament and the public. Indeed one of the cornerstones of the present government's resistance to a Freedom of Information Act is that it would *undermine* the accountability of ministers to Parliament. A cynic might well interpret that phrase as an implicit acknowledgement that such an Act would constrain ministers' ability to manipulate the information made available to Parliament.

A Freedom of Information Act would...have to have exceptions. The sensitive areas of defence intelligence and foreign policy would require protection, but on more general matters of public policy Parliament and the public would have the right to see all the relevant papers which led to a particular policy decision. Access would be granted at the time a policy decision was reached, so that Parliament would be apprised of all the relevant facts which contributed to (or even militated against) the decision. Such a step would be a genuine step towards the enforcement of the accountability of minister to Parliament about which Scott expresses such concern...

The case for reform is that Parliament needs the same input of data as ministers receive if they are to make an informed judgment on what the Government proposes to do. This is a difficult case to counter if there is a genuine desire to equip Parliament to fulfil its role as the supreme authority in our system of governance.

Of course there will always be categories of information that, on scarcely any conceivable definition of the public interest, it would not be right to give unrestricted access. Material which assisted the criminal, material which related to highly sensitive defence matters, diplomatic exchanges, to mention a few, must be protected. The question of the need to protect official advice outside this restricted range is not so clear cut, and recent events have led to a questioning whether protection here is as necessary as has been argued by those who favour the status quo. Not a small reason for posing this question is that the Bank of England and the Treasury have now accepted that the bank's advice on monetary policy can be revealed...A generation ago this would have been unthinkable. It would have been taken as axiomatic that when the two participants disagreed the credibility of either, or both, would be undermined and the political position of the Chancellor destroyed. For good measure it would have been said that publication of the minutes would be destabilising to financial markets. None of these things has happened. The Chancellor seems perfectly well able to live with the disclosure of differences between himself and the Governor. And the Governor sees his right to have his advice made public as a strengthening of the position rather than the reverse.

I believe that Whitehall should now take a leaf out of Threadneedle Street's book and allow at least the non-sensitive elements of officials' advice to be disclosed to Parliament. The definitions of what is 'sensitive' would require careful attention, but I do not believe that it would be a rock upon which the whole exercise of greater openness would founder. Nor do I believe that officials would change the way they advise ministers. No official worth his salt should be fearful of sound and objective advice being exposed and being questioned by people besides his ministerial chief. Indeed it can be argued that there is something unhealthy in officials having the privilege of giving important advice on policy matters without being exposed to any external challenge on matters of fact or argument."