The Campaign for Freedom of Information

Suite 102, 16 Baldwins Gardens, London EC1N 7RJ
Tel: 020 7831 7477
Fax: 020 7831 7461
Email: admin@cfoi.demon.co.uk
Web: www.cfoi.org.uk



Response to the Information Commissioner's consultation paper on Publication Schemes

October 2001

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

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

Campaign for Freedom of Information Ltd. Registered in England no. 1781526. Registered office as above

1. Introduction

Many freedom of information laws require public authorities to actively publish certain information. The information is usually clearly defined – typically covering matters such as a description of the authority's structure and functions, its internal guidance to staff, a guide to the classes of the records it holds and information about the arrangements it has made for implementing the Act.[1]

Uniquely, the UK legislation, adopts an entirely non-prescriptive approach. Authorities are required to produce a 'publication scheme' describing classes of information which they publish or intend to publish and any charges. The Act has nothing to say about the specific contents of these schemes, except that they must be drawn up with regard to the public interest in allowing access to information and in publishing reasons for decisions.[2]

The substance of an authority's scheme would be left to authorities' own discretion, subject to the Commissioner's guidance or requirements. Since every scheme must be approved by the Commissioner, she could require authorities to publish particular information as a condition of approval. The potential use of this power was highlighted by ministers as the Freedom of Information Bill went through Parliament.[3]

The consultation paper outlines the criteria that the Commissioner proposes to use for approval.[4] We were taken aback to find that none of these deal with the *contents* of a scheme. Approval will apparently be based on factors such as whether the scheme is easily understood, contains clear definitions, is indexed, accessible to the disabled,

---

[1] See for example Freedom of Information Act 1997 [Ireland], sections 15-16; Official Information Act 1982 [New Zealand], sections 20-22; Access to Information Act [Canada], sections 5 and 71.

[2] Section 19(3)

[3] Thus, During the House of Lords committee stage, in response to an amendment proposing that all authorities be required to publish their internal guidance, Home Office minister Lord Bassam said: "The publication schemes can be expected to *require* in their detail the inclusion of information of the kind referred to…in the noble Lord's amendment particularly where she [the Commissioner] sees that as serving a useful and purposeful end" (emphasis added) Official Report, 19/10/00, col 1238

[4] Consultation paper, pages 23-4

describes its purpose, permits feedback, will be monitored and, if internet based, loads quickly, contains a search facility and can be read on a 15" screen. None of the criteria deal with adequacy of the scheme's contents.

The questions on which consultees' views are sought reinforce this impression. None of the questions raises the issue of how the Commissioner should assess the contents of a scheme. Nor do they ask what, if any information, authorities should be *required* to publish. These are striking omissions.

It may be that these issues are being deferred until a later stage in the policy process. However, the impression from what is available at this stage is that although authorities may be encouraged to consider including a wide range of materials in their schemes they will determine the contents themselves.

Encouraging authorities to develop schemes in light of the potential benefits to themselves may result in some progress. As the consultation paper says, publishing information can save authorities the time and expense of dealing with individual requests for that information. There may be other advantages. Disclosures which reveal the complexity of decisions, the practical constraints under which authorities operate, and the efforts which they have made to overcome these, may make the public more ready to accept difficult decisions, counter any tendency to ascribe bias or bad faith to authorities and promote greater confidence in the authority's work.

But if publication schemes are to be effective, the Commissioner will also have to give clear directions about their contents. Otherwise authorities will simply concentrate on the information which they find easy to manage or helpful to publish, at the expense of more difficult but perhaps more important material.

Indeed, they may positively avoid such material. Once a class of information is listed, an authority will be obliged to publish all future documents in that class, losing any discretion over publication. The possibility that a future document may contain a fragment of information which the authority prefers not to publish, may lead it to exclude the entire class of records. They may adopt the most limited schemes, dealing only with

classes of information that they feel safest publishing.

In the absence of explicit requirements to go further, we fear that schemes will focus largely on information which is *already* publicly available, probably on authorities web sites. A publication scheme could be little more than a new 'front end' to such a site, coupled with a formal commitment to publish information which in practice is already published. This prospect is given weight by the fact that most of the classes of information specified on the Commissioner's own draft publication scheme, can already be found on Commissioner's web site.

In central government, at least, authorities' web sites have developed into sophisticated tools for disseminating published information, driven by their practical benefits, new technical developments, the commitment of those who run them and continuing government initiatives to promote the electronic dissemination of information. This process has acquired substantial momentum, without the Freedom of Information Act, and continues to develop. Unless publication schemes are consciously directed towards the release of *new* types of information, we wonder whether they will be worth having.

2. Possible functions

One approach to publication schemes is to consider their various functions. A scheme may serve as:

(a) a **publications guide,** explaining the types of records which an authority already makes publicly available;

(b) a **way of reducing workload** by recognising that classes of records which do not contain exempt information can be most efficiently dealt with by publishing them in advance of requests, thus also providing **speedier access** by users to that information.

(d) a means of allowing authorities to **sell publications or information** at higher prices than the FOI charging regime otherwise permits;

(d) a source of **guidance on the FOI Act**

(e) the focus of a **declassification process** which moves previously undisclosed information into the public domain

(f) a source of **access tools** that will help users overcome some of the hurdles they will otherwise face.

Some of these functions will be more attractive to, or easily accommodated by, authorities than others. For example authorities will have a strong interest in describing the classes of publication which they sell – otherwise they will be limited to relatively modest charges permitted under the Act's fees regime. Authorities will be under a statutory duty to provide advice and assistance to applicants, so any written guidance which they produce clearly belongs in the scheme. Classes of currently published information, whose future publication is likely to be uncontentious, will also be obvious candidates.

But other information – whose disclosure would require a more significant challenge to existing norms - may be overlooked altogether. We hope the Commissioner will direct publication schemes towards some of these and in particular to the disclosure of (a) previously unpublished information and (b) materials which will help users make effective use of the Act.

3. Declassification

Publication schemes should be used, where possible, to 'declassify' information - bring about the release of information which has previously been unpublished and perhaps undisclosed.

The Constitution Unit paper's proposed 'approval checklist' suggests that an authority should identify any unpublished classes of information which it scheme proposes to include.[5] This is a helpful first step, but we think the Commissioner should go considerably further. **Schemes should not be approved unless they reveal *substantial***

[5] Consultation paper page 10, para 8.2.3

***progress* towards the release of previously unpublished information.**

Something of this kind must be what the minister, Lord Falconer, had in mind when he described publication schemes as *"probably the most powerful push for openness in the Bill"*.[6]

In seeking approval, an authority should specify not only the classes of information which it proposes to include in its scheme but also the classes of information which it has considered, *but decided against*, including and its reasons. That analysis should itself appear on the scheme, a prospect which may stimulate more thorough consideration.

In considering what information to make available under this heading, authorities might consider:

- Whether there is evidence of public demand for that class of information;
- Whether publication would allay significant public concerns relating to the authority's responsibilities;
- Whether information would be of practical use to the public in their dealings with the authority or other bodies (such as those regulated by the authority)
- Whether publication will improve the public's opportunity to influence the authority's decisions;
- Whether publication will promote greater accountability by the authority, for example, by exposing the basis of decisions to scrutiny or reducing the scope for arbitrariness in decisions;
- Whether publication would be of symbolic importance, signalling to staff the importance attached to greater openness within the authority and encouraging a positive approach to disclosure under the Act.

The open government code of practice set significant precedents for proactive disclosure,

[6] Quoted on page 1 of the consultation paper.

requiring authorities to (a) publish the facts and analysis behind proposals and decisions; (b) give reasons to people affected by decisions (c) make public their own internal guidance, and (d) publish details of compliance with service standards.

These could be regarded as 'culture changing' requirements. With the exception of the final category,[7] they involved information that at the time was not only unpublished, but frequently *confidential*. Publication schemes should be no less radical. They should seek to bring about similar innovations, perhaps in relation to information about contracts or the publication of minutes of meetings.

Publication schemes should also retain existing code requirements for those bodies currently subject to them (it would hardly be in the public interest to withdraw existing disclosure requirements) and extend them to other authorities:

- The publication of internal guidance, in particular, is a requirement of many FOI laws, including those of the USA,[8] Australia,[9] Canada,[10] New Zealand,[11] Ireland[12] and Thailand.[13]
- The FOI Act itself contains a strong steer towards the publication of reasons for decisions.[14]
- The Freedom of Information (Scotland) Bill requires Scottish authorities to have regard to the public interest in allowing access to the facts and analysis underlying

[7] Whose disclosure was already required under the 'Citizens Charter'
[8] Freedom of Information Act [USA], 5.U.S.C. Section 552(a)(1)
[9] Freedom of Information Act 1982 [Australia], section 9(1)
[10] Access to Information Act 1982 [Canada], sections 5(1)(c) and 71(1)
[11] Official Information Act 1982 [New Zealand], sections 20(1)(c) and 22(1)
[12] Freedom of Information Act 1997 [Ireland], section 16(1)
[13] Official Information Act 1997 [Thailand], section 9.
[14] The Act's emphasis is slightly different from the code's. A publication scheme must be drawn up with regard to the public interest in the 'publication' of reasons for decisions - implying the publication of reasons to the world at large. The code requires authorities to "give reasons for administrative decisions to those affected" which includes the provision of reasons to individuals who are personally affected, even where those reasons cannot be 'published' without breaching privacy. The Commissioner could presumably combine both requirements by drawing on s 19(3)(b) to require the publication of reasons for decisions of general applicability and on s 19(3)(a) to require authorities to give (without publishing) reasons to those whose personal affairs are involved.

important decisions.[15] Importing this requirement[16] would make a small but helpful contribution to the Act's opaque provisions on access to the factual background to policy-making.[17]

4. Access tools

The public's unfamiliarity with official records is likely to be a major obstacle to the effective use of the new access rights. Most people have little idea of the records that public authorities generate for their own use. They do not know what files exist, what information they contain, who contributes to them and in what circumstances. An insider may appreciate the types of assessments, projections, workplans, costings, legal opinions, monitoring data, research findings, internal consultation and other documents likely to feature in official files. Ordinary users will be completely in the dark. It may not occur to them to even ask for material to which they could be entitled. Or they may accept a refusal at face value without appreciating how implausible it is given the nature of the record in question. A key objective of publication schemes should be to provide users with the 'access tools' that address this problem. The three types of tools that could be provided include indexes, disclosure logs and sample files.

(a) Indexes to records

Many FOI laws require authorities to publish information about the kinds of records they hold. The most far reaching approach is found in FOI laws in Sweden, Finland and Norway, which require authorities to maintain public registers of all documents completed or received by them. A similar but more focussed approach is found in Trinidad and Tobago's FOI Act which requires authorities to publish an annual index of all documents which contain (a) policy advice received from internal, external or interdepartmental bodies and paid consultants (b) scientific and technical expert studies and advice (c) reports on the authority's performance, efficiency or proposed

[15] Freedom of Information (Scotland) Bill, section 23(3)(a)(ii)
[16] Eg reference to the public interest test in section 19(3)(a) or the Commissioner's duty to promote good practice under section 47.
[17] Freedom of Information Act 2000, sections 35(1) and (2)

restructuring, (d) and legislative drafting instructions.[18]

In the UK context such a comprehensive approach might be most feasible if built into the records management system from an early stage. We hope the opportunity for such an approach provided by current plans for electronic records management will be examined. A less comprehensive and more targeted index, such as that in the Trinidad Act, may however, be practical.

Several FOI laws (including those of Canada, New Zealand, Ireland, Hungary, South Africa and Bosnia and Herzegovina) require authorities to publish a *general description* of the *classes* of records they hold. These are of variable quality, sometimes providing descriptions so broad as to be of little value.[19] The Canadian *InfoSource* publication, may be a more helpful model, with its emphasis on descriptions of databases and series of records. *InfoSource* distinguishes between their holdings of *official* records and *personal* records – a useful distinction given the high proportion of requests for personal files found under most FOI laws.

However, a more useful step would be to build on the UK's Information Asset Register, an initiative which the government itself has described as fulfilling the same aims as Canada's InfoSource.[20] It provides details of unpublished information holdings of central government through a searchable Internet database. At present, the scope of the Register, which is still in its early days, is extremely limited. However, some of its entries provide genuine insight into unpublished records, and if publication schemes were used to develop this into a comprehensive source would be an invaluable tool.

---

[18] Freedom of Information Act 1999 [Trinidad & Tobago], section 9. Documents do not have to be included in the index where to do so would itself reveal exempt information.

[19] For example, the New Zealand Directory of Official Information lists the file categories used by the New Zealand Ministry for the Environment under these broad headings "energy: production and use; climate change; ozone depletion; noise pollution; air pollution; water pollution; nuclear issues; waste management; hazardous substances; natural hazards; Resource Management Act; products and processes; effects of electromagnetic radiation and sustainable management fund". www.justice.govt.nz/pubs/reports/1999/dir_of_info/list_e/environment_min.html

[20] The Future Management of Crown Copyright, Stationery Office, March 1999, Cm 4300, para 8.5

In the meantime, authorities could wherever possible give the public direct access to their existing indexes. They might be required to:

- describe their existing indexes and catalogues, identifying those to which the public already has access (whether online by visiting the department in person),
- describe the obstacles which prevent direct public access to the remaining indexes and the feasibility of overcoming these (eg by restructuring the indexes or barring access to database fields which may contain exempt information), and
- produce a periodic report on progress towards this goal.

(b) Disclosure logs

A log of records disclosed as a result of FOI requests, coupled with easy access to the records themselves, would probably be the single most useful access tool that could be provided. A disclosure log would:

- **illustrate the information that is in practice disclosable under the Act.** Over time, as more records are disclosed under the Act, the log will become a unique guide to what can be *obtained* – as opposed to records which could be requested only to be refused. The fact that a particular record has been disclosed will often indicate that similar records will also be available. Instead of trying to work out for themselves how the Act might help them, users will thus be able to learn from the experience of others.
- **facilitate access to the same documents by others.** Once a record has been released to one user, perhaps with exempt information deleted, it could immediately be disclosed, in that form, to anyone else interested in it. Where there is clear interest from others, authorities may want to publish the document on their web sites directly. (The US Freedom of Information Act *requires* the Internet publication of such documents.[21])
- **help to publicise precedents.** If one requester succeeds in eliciting previously confidential document, the log will help to publicise this – reducing the chances that someone else will have to argue the same case from first principles over a similar

[21] Freedom of Information Act [USA], 5.U.S.C. section 552(a)(2)

document or with another authority.

- **help to educate users in the operation of exemptions.** Many documents will be released with particular types of exempt information (eg personal data about third parties, or the volume of a factory's production) deleted. Examining these records will help users understand that this information is also likely to be withheld from them. They may be less suspicious when this later happens and less likely to mount unnecessary appeals, or be better placed to recognise and question inconsistent decisions.

- **ensure that the public generally benefits from previously released information.** Some requesters may not be able to use the information disclosed to them. It may arrive too late for their purpose or be too complex for them to handle, they may not recognise its significance, choose to ignore it or lack the ability to publicise it. Yet its release may have involved substantial work on the part of the authority. For the information to disappear without trace may not only be wasteful but demoralising to officials who have worked hard to process the material or overcome obstacles to its disclosure. A disclosure log will make this information available to the public generally, increasing the chances that a public benefit will result.

- **help authorities to identify 'disclosable' information.** A log of disclosed information will be useful to officials handling requests, making it easier for them to determine whether similar information has been released in the past, and helping them avoid follow-on requests for previously disclosed information being treated as new requests.[22]

What disclosures should be listed? Since all written requests for information will be FOI requests, some criteria for deciding what to log may be needed. These could include information (a) released in response to an request which mentions the FOI Act (b) from which exempt information has been withheld (c) for which a fee has been charged under the Act (d) after consulting the authority's FOI specialists (e) of a kind which would not

[22] A decentralised organisation, which does not handle FOI requests centrally, may not realise that requested information has already been released by another division Alternatively, an authority may receive a request for a document which is held by several authorities and which has already been released by one of them.

have been disclosed before the Act (f) as a result of an appeal under the Act.[23]

(c) Sample files

A further access tool would be guides to the kinds of information found in specific kinds of files. These might describe the contents of typical files, explaining what types of documents they contain, who creates or contributes to them, for what purpose, at what stage, what information they provide, what if any third party information would be involved and to whom they would normally be circulated.

Guides might be prepared for files created during certain typical operations, such as policy making, the passage of legislation, implementation of new requirements, administration of particular schemes, investigation of complaints, enforcement of statutory requirements, etc.

The object would be to give the diligent requester some of the insight that an 'insider' might have. This might also be achieved by making some *actual* files available online, for example, records which have been or could be released early (ie before 30 years) in the Public Record Office. These should be selected not for their historical or political significance but because of their value in illustrating the types of information found in current files.

5. Monitoring data

Publication schemes could also provide monitoring data, indicating what proportion of requests had been fulfilled or refused, how often the Act's time limits had been complied with and which exemptions were most often relied on.

Requiring such information under the publication scheme may be the only way of ensuring that the statistics are collected. The Act itself does not require monitoring, and the draft of the Secretary of State's code of practice encourages authorities to monitor

[23] ie under the authority's complaints process, following informal mediation by the Commissioner, or as a result of a formal notice from the Commissioner or Tribunal.

complaints only, not *requests.*

Without this information it will be difficult for anyone, including the Commissioner, to know how the Act is being implemented. Complaints data alone will give an inadequate picture. Under the open government code, only a small percentage of refused requests lead to internal review (the equivalent of a complaint). Monitoring these will provide no information about the number of requests which are abandoned after an initial refusal, perhaps because requesters have been treated unhelpfully or have no confidence in an internal complaints process and are not prepared to exhaust this before applying to the Commissioner. Serious and systematic failures to comply with the Act requirements may go undetected.

Central government bodies are currently required to monitor code requests[24] and we hope that such existing requirements will not be relaxed by the Act. The need for improved monitoring has recently been highlighted by the Information Commissioners of both Canada[25] and Ireland.[26]

---

[24] Since the code, like the FOI Act, applies to all written requests, monitoring is based on a working definition of a 'code request', that is, one which specifically mentions the code, or for which a charge is made or where information is withheld under a code exemption.

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

For his part, the Information Commissioner can only monitor and report his own statistics on the number of complaints of delay. Departments chastised by him, on the basis of high numbers of complaints, have defended themselves by comparing the number of complaints with the total number of requests they had received. Using this comparison, the magnitude of the delay problem always looked manageable, if not insignificant. After all, only about 10 per cent of requests become complaints. Perhaps Canadians are really not complainers.

Last year the Information Commissioner decided to get to the heart of the matter: to find out exactly how often departments met deadlines, complaint or no complaint. The results of a study of six departments established that the extent of non-compliance with the law was alarming. The departments studied last year were Privy Council Office, National Defence, Revenue Canada, Citizenship and Immigration, Foreign Affairs and International Trade and Canadian Heritage. From 44 per cent to 74 per cent of requests received by those departments were not answered within statutory deadlines." *Information Commissioner of Canada, Annual Report 1997-98, pages 12-13*

[26] "I point to the apparently high rate of refusal of requests and I recommend that public bodies gather further statistics to enable the most common reasons for refusals to be identified and, if possible, further action taken to increase the release of information." *Information Commissioner of Ireland, 'The Freedom of Information Act - Compliance by Public Bodies' July 2001, page 5*

Monitoring of requests as well as complaints would be in line with the recommendations of the Home Secretary's Advisory Group on Openness in the Public Sector, which stated:

> "the essence of monitoring on Freedom of Information is to identify cases in which information is not provided in response to an application, and establish whether the reasons for not doing so are sound and the number of decisions overturned.
>
> Monitoring should be undertaken…within an authority so that senior managers can determine whether requests for information are being dealt with satisfactorily. This can be done by requiring staff who refuse a request for information to forward details to a central point in the organisation and also monitoring the complaints received about applications for information that have been refused…
>
> It would be useful to have a regional or national picture of requests for information that are refused by authorities and allowed after consideration by an authority's own complaints system. This would enable targets to be set for improving performance."[27]

6. Consultation questions

These points relate mainly the questions in Part II of the consultation paper.

'Classes' of information (Q1)

The consultation paper asks how a 'class' of information should be defined. We are not sure that a definition is necessary. What is important is that a class should be described in terms which unequivocally describe the series of documents in question. There should be as little scope as possible for subsequent disputes about what is covered.

[27] Advisory Group on Openness in the Public Sector, Report to the Home Secretary, December 1999, Paragraphs 2.45 to 2.47

Published information and exemptions (Q3 & Q4)

The consultation paper asks whether a published class of information should allow the occasional withholding of parts of documents which contain exempt information, or whether all documents must be published in full.

The difficulty of an 'all-or-none' approach is that it may lead authorities to adopt narrow schemes, excluding those classes of records which they anticipate may occasionally include any fragment of exempt information. On the other hand, expressly allowing exempt information to be withheld may reduce pressure to reconsider existing norms.

If allowing exempt information to be withheld would lead to the inclusion of classes of records that would not otherwise be published, we think that on balance this would be worthwhile. FOI laws which require the publication of internal manuals, usually allow exempt information within them to be withheld[28] as does the open government code,[29] which may have been important in overcoming fears about the feasibility of that exercise.

However, decisions about what to withhold must be made as the document is *prepared*, so that the document is published, either in full or in edited version, *before* any request for it is received.

Methods of publishing a publication scheme (Q6)

Although web publication will often be the most convenient form of publication for those with Internet access, both the publication scheme itself, and the records referred to in them, should also be made available in paper form. We are not clear whether the Commissioner can insist on this, in light of section 19(4),[30] but it would be undesirable for schemes to be available solely in one form (except in the case of small authorities which do not have web sites).

[28] Eg Freedom of Information Act 1982 [Australia], section 9(4)
[29] Code of Practice on Access to Government Information, Part I, paragraph 3(ii)
[30] This states that "A public authority shall publish its publication scheme in such manner as it thinks fit"

Duration of approval (Q8)

The consultation paper asks how long an approval should remain in force and for views on the Constitution Unit's suggestion that this could be for up to five years.[31] We think this is much too long and would lead to stagnation. Authorities would be likely to forget about their schemes for the next four and a half years, returning to them only when the renewal date approached. Far shorter periods are found under overseas proactive requirements. The publication required under New Zealand's FOI law must be updated every two years,[32] proactive publications under the South African and Canadian laws must be updated annually,[33] and every six months,[34] respectively.

Phasing in of classes (Q9)

The consultation paper asks whether phasing-in of classes should be permitted "given that the Act makes no provision for phasing-in classes".[35] We question whether this statement is correct. A publication scheme must specify classes of information which the authority publishes "or intends to publish"[36] – and this must refer to classes of information to be published in future. The suggestion that "approval will be given for a scheme that defines classes of information which will be published from the date of approval"[37] also seems likely to unnecessarily restrict the scope of a scheme.

We think the phasing-in of classes is not only envisaged in the Act but desirable. It may encourage authorities to actively develop their schemes in light of actual experience with the Act. Authorities may not be able to predict which classes of information will be regularly requested until the right of access is in force, and should be encouraged to add to their schemes in light of such experience.

---

[31] Consultation paper, page 9
[32] Official Information Act 1982 [New Zealand], section 20(2)
[33] Promotion of Access to Information Act 1999 [South Africa], section 14(2)
[34] Access to Information Act 1982 [Canada], section 5(2)
[35] Consultation paper, page 10
[36] Section 19(2)(a)
[37] Paragraph 7, page 9

Approval process (Q11)

The Constitution Unit paper suggests that approvals could be given largely on the basis of self-certification by authorities, guided by a checklist. Our concern is whether this, or any alternative, system of approval can be effective without more explicit indications of what the Commissioner expects of authorities. For example, it would leave the crucial issue of the adequacy of the scheme's contents to the following undifferentiated question:

> "Has the authority presented reasonable evidence that it has considered carefully the requirements of Section 19(3)? Has it had regard to the public interest in allowing (i) public access to information; and (ii) in publication of reasons for decisions?"[38]

In the absence of explicit guidance against which to measure their progress, it is hard to see how such a question can be meaningfully put. The statutory threshold in section 19(3)(a) is so low as to be almost undetectable. For example, almost all public authority web sites could reasonably be said to have been drawn up with regard to the public interest in allowing access to information. Only the dimmest authority (ie one whose scheme was directed at serving the needs of suppliers, contractors and job applicants, but not the public) could fail this test.

The more explicit statutory reference, to the public interest in giving of reasons for decisions, could be elaborated more easily. Questions which might be asked include: which of an authority's decisions are to subject to this obligation? Or, are any types of decisions excluded from it, and if so on what basis? Does the duty extend to the giving of reasons in cases involving personal data which where the decisions themselves are not 'published'? Does it fully cover the circumstances in which a common law duty to give reasons exists? Do the 'reasons' include findings of fact? Is the basis for the exercise of any discretion made clear (which may in itself presuppose the disclosure of relevant internal guidance)? And how does a duty to give reasons for decisions compare to the code's duty to publish the facts and analysis of facts on which proposals and decisions are based?

[38] Consultation paper, page 10, para 8.2.1.b

7. Other issues

Publication dates

On occasions the publication of an apparently completed document has been significantly delayed on the grounds that it is still being edited or awaiting 'approval'. The publication of material covered by a publication scheme should not be subject to elastic delays, and wherever possible, the expected length of time between completion of a document and its publication should be specified.

Charges for information

Authorities will be able to charge more for information than the Act itself allows provided that the information and the fact is sold are described in the publication scheme. The Commissioner will presumably not approve a scheme which appears to involve unreasonable charges. However, it may not always be possible to predict how charging criteria will be applied and an apparently reasonable charging regime may lead to excessive charges in particular circumstances. The Commissioner should make clear that any approval for a scheme that includes charging provisions is conditional on charges being reasonable in the circumstances – and that where they are not she retains the right to require them to be amended, or to revoke approval.

8. The Commissioner's Draft Scheme

The Commissioner's own draft scheme gives the impression of having been prepared by considering how the information already on the Commissioner's web site could best be presented in the context of a publication scheme. This may help to make that information accessible to people who do not have Internet access. However, it is not clear whether or how questions about content, of the kind we think most important, have been addressed (such as what presently *unpublished* information should be included in the scheme, or which types of decisions should be the subject of a duty to publish reasons).

One important area not covered by the scheme relates to enforcement action by the Commissioner. Overseas Information Commissioners generally publish their decisions. It

is essential that the UK Commissioner should do so too, and the scheme should reflect this. We hope details of cases resolved by mediation, without a formal enforcement or decision notice, will also be published. These may be numerically more significant than formal decisions, and their publication should be of practical value to users and authorities, and contribute to the accountability of the Commissioner's office.

Published details might be made available without the names of complainants. If so, this would illustrate the value of allowing exempt information (ie the identifying personal details) to be withheld in order to permit disclosure of a class of which might otherwise not be published.
