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Response to the Government's

FREEDOM OF INFORMATION

WHITE PAPER

Campaign for Freedom of Information

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1. INTRODUCTION & SUMMARY

This paper sets out the Campaign for Freedom of Information's response to the government's white paper on freedom of information.[1] It incorporates some of the evidence given by the Campaign to the House of Commons Public Administration Committee in January 1998.[2]

We warmly welcome the white paper. The proposals should provide a fundamental break with Britain's tradition of government secrecy and lead to a Freedom1 of Information (FOI) Act comparable to some of the better overseas FOI laws. In particular:

- we welcome the broad scope of the proposed Act, both in terms of the bodies covered and the range of information to be made accessible.

- The proposal that most exemptions will only allow information to be withheld if disclosure would cause "substantial harm", and that all decisions should be in line with the Act's objective of promoting accountability, should create a strong presumption of openness.

- The Information Commissioner's enforcement powers will give applicants the advantage of legally binding decisions without the costs of going to court.

- Although the 30-year rule is not replaced by a shorter closure period, the fact that FOI applications may be made for records awaiting their 30 year release date, is an important development.

We nevertheless have some concerns.

- A number of important bodies and functions - notably the law enforcement functions of the police and some government departments - are to be excluded from the Act altogether.

- The "substantial harm" test may be replaced by a lower test in some important areas; and a more effective public interest test is required.

- Applicants may need more help in identifying what information exists than has so far been proposed.

- Finally, we are concerned that charges may be imposed for information currently available free of charge, and could become an obstacle to openness.

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[1] *Your Right to Know*, Cm 3818, December 1997

[2] Public Administration Committee, Minutes of Evidence, 20 January 1998, Campaign for Freedom of Information, HC 398-ii

2. SCOPE

The scope of the proposed FOI Act is defined widely. It will cover virtually the whole of the public sector, including not just central, regional and local government, and the NHS but also bodies which have escaped the Open Government codes of practice[3], such as quangos, educational establishments, nationalised industries and public corporations. Even local authorities, which have long been subject to better disclosure standards than other bodies, will find that FOI legislation demands much greater openness than has been required of them in the past.[4] The near universal application of common disclosure standards in the public sector will itself be helpful particularly by providing new opportunities for the spread of good practice.

The inclusion of commercial bodies carrying out public functions - the privatised utilities, and private bodies responsible for contracted-out functions - is especially welcome. It will help to meet concerns about the loss of accountability resulting from the transfer of public sector functions, and ensure that any further contracting-out will not be at the expense of the public's right to know.

A direct right of access to information held by the utilities will also reduce the need for those seeking such information to address their requests to the regulators, which may then involve the regulators in disputes about the commercial confidentiality of the companies' information. In the case of contracted-out functions, it would be preferable if people could obtain information directly from the contracting body and not have to ask the authority to obtain it on their behalf, as is apparently envisaged.[5]

The white paper does not specify which of the privatised utilities are to be covered. In addition to the water, electricity and gas companies, the privatised rail and bus companies and their successors should also be covered, though other utilities might also be considered.[6]

Information

The FOI Act will go wider than many overseas laws, in allowing access to *information* as well as to *records.*[7] This should permit enquirers to (a) see copies of records, where they request them (b) ask for answers to questions, when answers - rather than copies of documents - are what they want (c) have electronic databases searched for selections of records meeting particular criteria, and (d) seek information which is *known* to officials but not recorded. This could help address concerns that FOI will encourage officials to avoid

[3] *Code of Practice on Access to Government Information* and *Code of Practice on Openness in the NHS*

[4] For example because the legislation which requires them to meet in public, the Local Government (Access to Information) Act 1985, provides no right of access to information which has not been, and is not about to be, discussed at a meeting held in public.

[5] Para 2.2

[6] For example the privatised utilities earmarked for the so-called 'windfall tax' announced in July 1997 were BAA, British Energy, British Gas (now BG plc and Centrica), British Telecom, National Power, Northern Ireland Electricity, PowerGen, Railtrack, Scottish Hydro, Scottish Power, regional electricity companies and privatised water and sewerage companies including recs and wascos now part of Hyder, United Utilities and Scottish Power. *HM Treasury, Budget Brief 1997*

[7] Para 2.10

recording sensitive information, in order to prevent its disclosure.

The fully retrospective nature of the proposed Act, is also welcome feature. Although we would have liked to see a reduction in the 30 year rule, the fact that the Act will apply to old records awaiting their 30-year release date in the Public Record Office probably represents a more significant contribution in this area.

3. EXCLUSIONS

We regard the proposed exclusion of various bodies and classes of records as a serious weakness. The Act will not apply to the law enforcement functions of the police, immigration service, DSS and other bodies; to information relating to civil proceedings; to legal advice; to any information about the security and intelligence services, or to the employment records of public sector employees.[8]

These exclusions:

- mean that no information about the body or function will be available under the Act under any circumstances, even if (a) disclosure would cause no harm at all or (b) there is an overriding public interest in disclosure, for example, because of serious misconduct;

- are inconsistent with the white paper's stated intention of ensuring that decisions are based on the *contents* of the individual record, and not the *class* into which it falls;[9]

- involve *removing* some existing rights introduced by the former government, for example to immigration information.

Rather than exclude such matters, appropriate exemptions should be relied on to protect information in those cases where disclosure was likely to be harmful.

(a) Police, immigration and law enforcement

The most significant exclusion applies to the law enforcement functions of the police, police authorities and bodies such as the DSS and Immigration Service.[10]

The exclusion is also likely to apply to other bodies with law enforcement functions, including the Inland Revenue, the Department of Trade and Industry, Customs and Excise, and perhaps local authority bodies such as trading standards officers, planning authorities and others (though not, apparently, environmental authorities[11]). No overseas FOI Act excludes such matters from access altogether.

The government departments concerned are all presently subject to the Open Government code of practice, which allows access to this information. In these areas the FOI Act will therefore *remove existing rights* - a remarkable and unwelcome outcome.

[8] Paras 2.3 and 2.20 to 2.22
[9] Para 3.8
[10] Para 2.21
[11] Evidence of the Rt Hon Dr David Clark MP, Chancellor of the Duchy of Lancaster, to the Public Administration Committee, 16/12/97, question 92

When the Code was issued in 1994, information relating to individual immigration cases *was* excluded. However, the revised Code issued early in 1997 brought these matters within the its scope, subject to a harm test.[12] The white paper's rejection of this approach, in favour of an exclusion, therefore represents a surprising reversal of the progress made under the former government.

The law enforcement exclusion is said to be necessary to:

> *'avoid prejudicing effective law enforcement [and] the need to protect witnesses and informers'*[13]

However, such concerns could be dealt with by appropriate exemptions, as under the Data Protection Act. The Act allows individuals to see computerised police, as well as other, records, while exempting information whose disclosure would prejudice "*the prevention or detection of crime*" or "*the apprehension or prosecution of offenders.*[14] The identity of informants is also protected.[15] If necessary, more specific exemptions could be provided, as under the US FOI Act.[16]

Although most exemptions will be based on a test of 'substantial harm', the law enforcement test will be that disclosures do not "impede" these activities.[17] This is similar to the Data Protection Act exemption (which refers to "prejudice" to law enforcement). The FOI exemption will therefore be in line with existing provisions, which appear not to have caused difficulties to the police, so the case for *excluding* these matters altogether is difficult to understand.

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[12] Permitting it to be withheld only where disclosure would cause "prejudice to the effective administration of immigration controls or other statutory provisions".

[13] Para 2.21. Section 4(2) of the Official Secrets Act 1989 applies to any disclosure which: "(i) results in the commission of an offence; or (ii) facilitates an escape from legal custody or the doing of any other act prejudicial to the safekeeping of persons in legal custody; or (iii) impedes the prevention or detection of offences or the apprehension or prosecution of suspected offenders" or is likely to have any of those effects

[14] Data Protection Act 1984, section 28(1)

[15] Data Protection Act 1984, sections 21(4)(b) and 21(5)

[16] As amended in 1996, Exemption 7 of the FOI Act permits the withholding of: "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual."

[17] This is the result of the white paper's proposal (para 3.19) that FOI disclosures should not breach the Official Secrets Act harm tests.

No-one suggests that suspected criminals should be able to discover how close the police are to catching them. But many legitimate questions about policing functions will be barred by this exclusion. For example, if people are injured outside a football ground, it will not be possible to ask about the adequacy of the policing arrangements.

Nor is it clear how the administrative and law enforcement functions of the police are to be distinguished. Would measures required to be taken to protect the confidentiality of police information, investigate complaints, ensure that officers are properly trained, prevent racism, protect public safety at large events, deal with major traffic problems, secure the safe and appropriate use of CS gas, or ensure the accuracy of forensic laboratories, be regarded as administrative? Are the adequacy of the measures taken in any *individual* case 'administrative' or related to a 'law enforcement' function, particularly where the information is sought by people who believe they have suffered as a result of failure to meet the required standard? Does any distinction depend on whether the request relates to the policy, its monitoring, or its application in particular cases? Does it matter whether the individual's dealings with the police was as a complainant, victim, informant, witness, suspect or convicted criminal?

If any of these matters are regarded as involving law enforcement functions, how does the proposed exclusion square with the individual's existing rights to see what is held about him or her on computer, where no such exclusion applies? It is not clear that this approach meets the white paper's objective of introducing "clear and consistent requirements which would apply across government".[18]

The police and other law enforcement bodies carry out essential functions, but they are also capable of arbitrariness or prejudice. In light of the Metropolitan Police Commissioner's recent acknowledgement that a minority of officers are, in his words, "*corrupt, dishonest, unethical*"[19] the case for greater scrutiny of these bodies' work should be self-evident.

(b) Legal professional privilege

The government's legal advice will also be excluded.[20] We think legal advice should be accessible so long as disclosure will not harm an authority's position in existing or likely litigation.

Legal professional privilege exists to ensure that clients can seek legal advice in confidence, without fear that communications with their lawyer may become available to an opposing party. The rationale is therefore the same as that for civil servants' policy advice: to protect the frankness of communications. However, the government no longer accepts that policy advice requires absolute protection in all circumstances.[21] A similar approach should be adopted for

[18] Para 1.6
[19] Evidence to the Home Affairs Committee, December 1997
[20] Para 2.22
[21] The Code of Practice already allows access to advice subject to a harm-tested exemption, and the same approach is to be followed in the FOI Act.

legal advice, where an authority is the client.

A harm-test exemption for legal advice would generally protect legal opinions (and other privileged exchanges between an authority and its lawyers) where they relate to current or contemplated litigation or where future litigation is a realistic prospect. But it would *permit* disclosure where litigation is no longer likely, for example where:

- the matters have been concluded and there is no possibility of further related cases
- the advice relates to proceedings under legislation which has since been repealed
- it merely summarises existing case law on an issue of public policy; or
- it explains the purpose of a provision in a government bill or sets out the consequences of a new judgement or European directive.

Such material may be helpful to the public, while holding no prospect of undermining the government's position in the courts.

Existing practice may simply protect government from justifiable scrutiny. For example, one open government requester was refused information about the number of NHS prescriptions for certain high volume drugs on the grounds that:

> *"Our legal advice is that the confidentiality of information derived from patient information, including prescription data, is not removed by aggregation and anonymisation..."*[22]

The refusal to disclose the legal advice itself helped the department resolutely to maintain this illogical stance for several months, before eventually conceding that it was wrong.

In another instance, a department refused to disclose elements of legal advice (sought by the Campaign for Freedom of Information and relating to the extent of a statutory prohibition on the disclosure of information) parts of which the Ombudsman found *"simply describe the legal position, in terms of statute or case law."*[23]

The American FOI Act exempts documents subject to attorney-client privilege[24] but in 1993 the US Attorney General urged agencies not to withhold such information unless they

[22] Department of Health to Charles Medawar, Social Audit, 4.8.95

[23] Ironically, the Ombudsman then upheld the refusal to disclose on the grounds that *"That information - though not in that form - is already in the public domain, and...departments are not required to provide information which is already published"*. Parliamentary Commissioner for Administration, Session 1996-97, HC 231, Case A.3/96

[24] Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency"

"*reasonably foresee...that disclosure would be harmful to an interest protected by that exemption"*[25]. The Department of Justice has urged that this approach be applied "*even to information that falls within the traditional attorney-client privilege"* .[26]

Canada's Information Commissioner has described the sweeping protection for legally privileged documents under his country's legislation as "unsatisfactory":

> *"Most legal opinions, however stale, general or uncontroversial, are jealously kept secret. In the spirit of openness, the government's vast storehouse of legal opinions on every conceivable subject should be made available to interested members of the public.*
>
> *Tax dollars paid for these opinions and, unless an injury to the conduct of government affairs could reasonably be said to result from disclosure, legal opinions should be disclosed."*[27]

(c) Personnel files

Public sector employees will not be able to see their personnel records under the Act. The white paper argues that such access would discriminate unjustly between public and private sector employees.[28]

The new Data Protection Bill could have provided the vehicle for an across-the-board right, covering both public and private sectors, but because its application to manual records is likely to be limited this will apparently not occur. An alternative would be to use the FOI Act to establish a new right of access to employment records spanning both public and private sectors, as proposed in the 1993 *Right to Know Bill.* Failing this, we think the FOI Act should permit public sector employees to see their personnel files, even if a similar right is not yet available in the private sector. Precedents exist in other personal files legislation. For example, public sector housing tenants have access to their housing records,[29] though private tenants do not; the records of state schools are accessible to parents and older pupils[30], but private school records are not.

Access to public sector personnel records is not just a private employer-employee matter. It would contribute to the accountability of public bodies by:

(a) supporting the political neutrality of public officials and deterring reprisals against whistleblowers, by revealing whether those who have raised such

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[25] US Department of Justice, *FOIA Update*, Summer/Fall 1993
[26] US Department of Justice, *FOIA Update*, Spring 1994
[27] Annual Report 1993-94, page 30
[28] Para 2.20
[29] Access to Personal Files Act 1987
[30] Education (School Records) Regulations 1989

concerns have been penalised by unjustified comments being entered on their records;

(b) ensuring access by those whose public duties exposed them to danger, such as the Gulf War veterans. Information about the individual circumstances of resulting injuries may not be publicly available under FOI on privacy grounds. Also denying the individuals themselves access would protect the authorities concerned from legitimate scrutiny;

(c) demonstrating to public officials - whose support for FOI may be essential - that they too enjoy direct benefits under it.

(d) Security and Intelligence Services

Security and intelligence services are covered by FOI laws in the USA, Canada and New Zealand, subject to appropriate exemptions. Certain information about their work could be published without any prospect of harm to national security. This includes information about the numbers of files held, created and destroyed - information which is routinely made available in relation to some other countries.[31] The case for including them in the UK is strengthened by:

(a) the security service's increasing involvement in non-national security work, and the fact that they have taken on functions previously carried out by parts of the ordinary civil service. The government has acknowledged that MI5 has recently been involved in *"an audit of security procedures in the DSS"*.[32] It has also taken on some responsibilities for computer security in Whitehall, functions previously exercised by the government's computer agency the CCTA. Because the CCTA is subject to the Open Government code, and MI5 is not, this has meant that information which could have been obtained in the past under the code now is inaccessible.

(b) The Data Protection Registrar has called for MI5 to register under the Data Protection Act. At present, it relies on the national security exemption contained in section 27 of that Act to avoid registering any of the data it holds, implying that all its computerised information, without exception, requires protection on national security grounds. The Registrar has objected to this, commenting: *'The extension of the role of the Security Services into areas of traditional policing should not carry with it an extension of the exemptions provided by section 27'*.[33]

(c) Past Labour Party commitments included proposals for a new Security

[31] Eg In Canada, such figures are published annually by the Security Intelligence Review Committee.
[32] Letter from Social Security minister John Denham MP, *Guardian*, 24.9.97
[33] Comments of the Data Protection Registrar on: 'Data Protection: the Government's Proposals', September 1997

Services Act providing, amongst other things for "*the right for individuals to be informed that they have been under surveillance by the security or intelligence services once disclosing that information would no longer prejudice the investigation*".[34]

[34] 'The Charter of Rights', Labour Party, 1991.

4. HARM TESTS

We hope that all exemptions will be *discretionary,* that is, that they will permit but not require authorities to withhold information. Where mandatory exemptions exist, for example, in the Environmental Information Regulations, they have created substantial new obstacles to access, preventing authorities releasing information even where they wish to.

Substantial harm

We welcome the proposal that most of the Act's exemptions should be based on a test of whether disclosure would cause "substantial harm" rather than the straightforward "harm" that now applies under the Open Government Code of Practice.

This is an important aspect of the proposals. It indicates that an authority seeking to withhold information must meet a significant burden of proof, and be able to demonstrate that material damage is likely to result from disclosure. It should avoid the tendency towards reflex refusals of requests for material not disclosed in the past, and should encourage authorities to discount inconvenience or speculative risks.

Departments' initial responses under the Code are sometimes poorly argued, and show little sign that the possibility of harm has been considered rigorously. Having refused a request, the burden of proof thereafter is on the *applicant* to disprove the department's sometimes unstated reasoning. Success in identifying and rebutting such arguments may lead the department to invoke previously unmentioned exemptions. This continues even during Ombudsman investigations, prompting the former Ombudsman, Sir William Reid, to report:

> *"there is a tendency in some departments to use every argument that can be mounted, whether legally-based, Code-based or at times simply obstructive, to help justify a past decision that a particular document or piece of information should not be released instead of reappraising the matter in the light of the Code with an open mind. I have found it time-consuming to have to consider a whole series of different defences, even when many of them prove to have no real foundation."*[35]

The present Ombudsman, Mr Michael Buckley, has indicated that such obstructiveness continues, with departments sometimes engaging in a

> *"process of haggling...about the interpretation, whether or not the Code applies"*[36]

[35] Parliamentary Commissioner for Administration, Annual Report for 1995, page 51

[36] Michael Buckley, Parliamentary Ombudsman. Oral evidence to the Public Administration Committee, 2/12/97

> *"[they] dispute my interpretation of the Code and the exemptions under it; or dispute my judgment regarding the "harm" test."*[37]

The stronger presumption of openness implied by the "substantial harm" test, coupled with the fact that the FOI Act will be legally binding, should help to deal with this problem.

To demonstrate substantial harm authorities should be required to inform the applicant of:

(a) which parts of the requested information would cause harm

(b) the nature of harm which they believe would result

(c) the mechanism by which they believe this harm would be caused[38]

(d) why they believe it would be "substantial" and

(e) the measures they have considered (eg aggregating, anonymising, or excluding part of the data, or seeking the consent of a third party) to make the information disclosable.

Such details should accompany any initial refusal, and not be the end product of a prolonged correspondence during internal review.

Specific factors, indicating when substantial harm is likely to arise are to be set out.[39] These should not all point to the withholding of information. Ideally, they should also indicate the circumstances in which the appropriate harm test has *not* been met. A useful example (albeit more detailed than the white paper envisages) may be the privacy exemption in British Columbia's FOI & Privacy Act,[40] which sets out the factors which tend to favour both the disclosure and the withholding of personal information.

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[37] Michael Buckley, Parliamentary Ombudsman. Written evidence to the Public Administration Committee, January 1998

[38] For example, in claiming disclosure of a report would damage commercial confidentiality, departments sometimes fail even to indicate whether the damage would be caused by revealing manufacturing process secrets, pricing information or the identities of customers.

[39] Para 3.9

[40] Section 22(2) states: "In determining...whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny, (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment, (c) the personal information is relevant to a fair determination of the applicant's rights, (d) the the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people, (e) the third party will be exposed unfairly to financial or other harm, (f) the personal information has been supplied in confidence, (g) the personal information is likely to be inaccurate or unreliable, and (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant."
A variety of additional factors are also separately listed. These indicate that the disclosure of certain types of personal information (such as medical information and information relating to social security applications) are "presumed" to involve an unreasonable invasion of privacy, whereas other specified disclosures (eg concerning an individuals's functions as a public employee) are deemed not to be.

The Official Secrets Act

The white paper proposes that all exemptions other than that for policy advice will be subject to a "substantial harm" test. However, in some other areas substantial harm may be replaced by a lower test, as a result of the white paper's statement that:

> "*there may in some cases be a need to ensure that a decision taken under the FOI Act would not force a disclosure resulting in a breach of the harm tests that prohibit disclosure under the Official Secrets Act".*[41]

Some of the Official Secrets Act (OSA) tests are equivalent to "substantial harm" but others - particularly on international relations - are lower.

This cross referencing to the OSA is therefore likely to complicate and weaken the FOI Act in certain areas. The case for linking the two Acts is not clear: there is no suggestion that "substantial harm" will require disclosures likely to threaten essential national interests. Its purpose, according to the white paper, is to define the burden of proof "*in specific and demanding terms*".[42] There is no reason to believe that vital defence or similar interests would be undermined by introducing a strict burden of proof.

We question the assumption that consistency between the FOI Act and OSA is needed at all. Their purposes are different. The OSA is not designed to prevent the *disclosure* of information, its purpose is to deter *leaking*. Ministers frequently provide information to Parliament whose unauthorised release by an official would be an offence. Almost every official announcement about the work of the security and intelligence services, including the naming of the head of MI5, would be offences were the same information leaked. The same is true of much published information about international relations. If consistency between the two statutes is thought essential, it should be achieved by amending the OSA to bring it into line with the "substantial harm" test. This would be consistent with the Franks committee's 1972 report, which proposed that only disclosures causing "serious injury" should be OSA offences[43] and with Labour policy[44] during and after the passage of the 1989 Official Secrets Act.

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[41] Para 3.19

[42] Para 3.7

[43] *"...strong measures are clearly justified in preventing serious injury to the nation. It is less clear that the criminal law must be brought in to reinforce other means of protection where the possible injury is of a less serious nature. The most obvious example is defence. Some defence information is highly secret: its unauthorised disclosure would cause serious injury to the nation, and it requires full protection. Some defence information is public knowledge. In between these two extremes, there is a continuous gradation. There is some defence information which could be published without harm, or with little harm, to the nation. And there is a considerable range of information the unauthorised disclosure of which would be prejudicial to the interests of the nation, but would not cause serious injury...In our view, the appropriate test on this basis, in relation to national security, is that unauthorised disclosure would cause serious injury to the nation. This means that the criminal law would not apply to information the unauthorised disclosure of which would cause some injury to the interests of the nation, but short of serious injury.*" Departmental Committee on Section 2 of the Official Secrets Act 1911, Chairman Lord Franks, Vol 1, paras 117-118, Cmnd 5104, 1972

[44] As reflected in Labour's 1991 *Charter of Rights* and in the *Right to Information Bill* introduced by the Labour front bench in February 1992.

5. EXEMPTIONS

The white paper proposes that there should be seven protected interests (exemptions). Although broadly stated, we welcome the fact that they appear to remove some of the grounds for withholding information found in the Code of Practice.

(1) National security, defence and international relations

Information relating to the work of the security and intelligence services will be excluded from the Act. But where other information whose disclosure raises issues of *national security* is sought, the relevant exemption will require that "substantial harm" be shown.

Disclosures relating to *defence* will need to be consistent with the OSA harm tests. These apply to disclosures likely to "*damage*" the capability of any part of the armed forces, or cause "*serious damage*" to military equipment, or likely to "*lead to loss of life or injury*" to members of those forces.[45] These are probably all equivalent to "substantial harm".

However, a disclosure about *defence* or *international relations* which "*endangers*" the interests of the United Kingdom abroad is also an OSA offence - and this may involve a lower test than "substantial harm".[46] The same is true of disclosures of information obtained in confidence from other governments or intergovernmental bodies where, regardless of the nature or substance of the information involved, the *breach of confidence* is itself likely to be deemed to "*endanger*" the UK's interests abroad.[47]

One implication might be that it could be an offence to leak EU documents containing nothing more inherently sensitive than proposals for a directive which the UK might soon be required to implement. Such material would also be exempt under FOI. Given that European institutions are in effect part of our legislature, it is difficult to see why information about such matters should be exempt merely because it emanates from that source.

(2) Law enforcement

The *law enforcement* functions of the police and other law enforcement bodies will be excluded from the Act. Disclosures about other matters must be consistent with the OSA harm tests which apply where disclosures "*result in the commission of an offence*" or "*impede*" the prevention or detection of offences.[48]

These OSA provisions are not limited to serious offences (as might have been done by

[45] OSA section 2(2)(a)
[46] OSA section 2(2)(b) and 3(2)(a)
[47] OSA section 3(1)(b) and 3(3)(b)
[48] OSA section 4(2)(a)(i) and (iii)

applying the provision to indictable offences only).[49] Arguably a disclosure about the sparcity of traffic wardens in a particular area would therefore be exempt under FOI if it was felt this might facilitate a parking offence. This also raises the question of whether traffic wardens may be amongst those bodies whose law enforcement functions are to be excluded from the scope of the Act altogether.

The law enforcement exemptions of both the Australian[50] and Irish[51] Freedom of Information Acts only protect information relating to *lawful* methods of law enforcement. If the police break the law themselves, they cannot rely on these exemptions.

If the proposed exclusion of law enforcement functions from the UK Act is retained:

- the exclusion should relate only to *lawful* actions undertaken for law enforcement purposes; and

- any residual law enforcement exemption should (unless the exclusion renders it redundant) also apply only to *lawful* law enforcement activities.

A more satisfactory solution would be to bring law enforcement matters within the Act's scope, and protect any such lawful activities by exemption, as is done in other countries.

(3) Personal privacy

We assume that information in personal files held by public authorities on identifiable individuals who have done nothing to merit special public attention, will not normally be available to third parties under the FOI Act. Such disclosures should generally be regarded as involving "substantial harm".

However, we agree with the white paper's statement that the right to privacy cannot be absolute.[52] The right may need to be balanced against the public interest in disclosure, or the rights of another individual. This may be especially appropriate where:

(a) the individual is a public official and the information relates to his or her functions as such;

(b) the information indicates misconduct, particularly in public office;

(c) access is necessary to hold the government properly accountable (eg where a substantial issue of government policy is raised by the treatment of an individual);

[49] The *Right to Information Bill* introduced by the Labour front bench team in 1992 would have replaced the law enforcement offence of the 1989 OSA by one which applied only to disclosures likely to result in *indictable* offences.

[50] Freedom of Information Act 1982 (Australia) section 37(2)(b) and (c)

[51] Freedom of Information Act 1997 (Ireland) section 23(1)(a)(i) and (iii) and section 23(3)(a)(i)

[52] Para 3.11§3

(d) access is necessary to improve the protection of public safety; or

(e) a person against whom some adverse action may be taken needs to defend him or herself (for example against allegations made by an individual whose identity would otherwise be protected on privacy grounds).

(4) Commercial confidentiality

Commercial confidentiality should also not be given absolute protection. This is already recognised in a variety of ways. For example:

- labelling provisions which require disclosure of the ingredients of foods, pharmaceuticals or toxic products, in the interests of consumers, though this may involve information of assistance to competitors;

- companies are required to publish an annual financial report (in the interests of shareholders and suppliers) though may well provide valuable information to rivals or potential predators;

- although commercially confidential information can be withheld from public registers of pollution data under the Environmental Protection Act 1990 the definition of "commercially confidential" refers to information whose disclosure *"would prejudice to an unreasonable degree the commercial interests"* of the person from whom it was obtained.[53] This is a *double* harm test, requiring that disclosure be prejudicial and that the prejudice be more than is reasonable.

The white paper's substantial harm test precisely mirrors the exemption in the American FOI Act for confidential commercial or financial information. "Confidential" is judicially defined as incorporating two tests: one relating to the government's future ability to obtain similar information; the other that disclosure "*would cause substantial harm to the competitive position of the person from whom the information was obtained*".[54]

However, such rigour is often conspicuously absent in government's use of the term commercial confidentiality, which at times it regards as synonymous with "information about a commercial entity".[55]

[53] Environmental Protection Act 1990, section 22(11)

[54] *National Parks and Conservation Association v Morton (I)* 498 F 2d at 770 (D.C. Cir 1974)

[55] For example, in response to a series of identical parliamentary questions in 1994-95 seeking information about the value of individual consultancy contracts, or the names of consultancies paid more than £1,000 a day, some departments refused answers on grounds of commercial confidentiality, while others readily disclosed the requested information in full. (*Government departments "misguided" on commercial confidentiality'*, Campaign for Freedom of Information, press release, 27.10.97)

The following criteria might be applied under this exemption:

(a) it should apply only to information which the organisation concerned has supplied to government in confidence - not to information generated by government itself, for example through its own product testing;

(b) the business should have consistently treated the information as confidential - companies which have shared information at technical conferences or with selected journalists should not be able to claim exemption when it is sought by potential critics;

(c) the information should not be available from published sources or obtainable at modest cost in other ways (eg from market research firms, or by analysing a product);

(d) the information should be likely to cause substantial competitive harm to the business, by allowing a rival to unfairly exploit the information in order to manufacture or sell more effectively;

(e) for such competitive harm to occur there must be competition, a test which will not be met in a monopoly situation;

(f) even where competitors exist, they must be capable of making substantial use of the information. Where other barriers to market entry (eg product development costs, or the reluctance of government to license particular types of facility, such as nuclear reprocessing plants) prevent potential rivals from engaging in actual competition, or where competitors are already irrevocably committed to alternative manufacturing processes and cannot benefit from details of the originating company's process, substantial harm will not occur;

(g) a disclosure which harms the originator by promoting consumer choice - for example by revealing that its products are inferior to a rival's - should not be exempt;

(h) a disclosure which harms share prices in a similar way - eg because investors anticipate that customers will stop buying a substandard product, or that government may impose new restrictions on a dangerous product - should also not be exempt. (However where government has been given confidential information about a business's future plans, the share price implications of disclosure would become a legitimate consideration.)

None of the above consideration should prevent public authorities releasing details of their specifications for a contract, its terms, value, performance bonuses, penalty clauses or similar

information. Apart from considerations of accountability for public funds, such information is the authority's, and not obtained by it in confidence from the contractor. Moreover, any disadvantage to the contractor is likely to arise by more effective competition from others for future contracts - which serves the public interest by promoting more effective use of public funds.

We agree that third parties should normally be consulted before disclosure of information obtained from them, *provided* there are reasonable grounds to believe that the information may be exempt on grounds of privacy or commercial confidentiality. As consultation may lead to unnecessary delay to the applicant it should not be required without such reasonable grounds, for example, where the information clearly falls into a class of material previously found to be disclosable by the Commissioner.

(5) Information supplied in confidence

The object of any such exemption should be:

- to protect the interests of the *authority*, in continuing to receive information essential to its work, and which it will only receive if confidentiality is guaranteed. The exemption should not seek to protect the *submitter's* interests, which should be addressed under the commercial confidentiality and privacy exemptions.

- to prevent an authority and a third party withholding information merely by agreeing between themselves that it is supplied in confidence. There must be an objective demonstration of substantial harm.

The exemption should be available only where:

(a) disclosure would substantially harm an authority's ability to obtain information in future from a third party;

(b) without the information the authority's ability to carry out its functions would be substantially harmed;

(c) the authority has no statutory or contractual power to compel the supply of the information;

(d) the third party has no strong self interest in continuing to supply the information regardless of disclosure, for example in order to influence policy or obtain some benefit for itself;

(e) the information cannot be obtained from other sources.

There should be a strong presumption that this provision will not protect behind the scenes lobbying, where an outside body is seeking some change in the law or other advantage beneficial to itself. Such self-interested communications will always continue, regardless of disclosure requirements. The provision should also lead to a change in the normal practice of government consultation, where those responding to proposals are able to ask for their submissions to be kept confidential, even where no issue of personal privacy or commercial confidentiality is involved.

(6) Individual safety, public safety and the environment

It will presumably be relatively rare for information to need to be withheld on these grounds. Information which might expose someone to risk of attack may already qualify for protection under exemptions on law enforcement or (where the information identifies a confidential informant) information supplied in confidence.

The exemption provision corresponds to an existing provision in the Environmental Information Regulations intended to protect the location of endangered plants or animals from threats from collectors. A safeguard against its potential abuse would be provided by the proposed 'perverseness test'[56] (see below) which may prevent it being used to suppress information which would reveal complacency by regulatory bodies.

(7) Decision-making and policy advice

The Campaign's proposals on access to policy advice were set out in detail shortly before the white paper's publication.[57] This acknowledged that some internal discussions require confidentiality, particularly where they involve (a) the discussion of untested ideas, before those involved have had the chance to consider whether they are feasible or desirable, or (b) frank assessments of how key players are likely to react to proposals, and the tactics for handling them.

However, there is a much stronger case for the disclosure of internal discussion and advice *after* a decision has been taken. Access to material involving considered assessment or exchanges about the merits of particular options should also be possible, so the public and Parliament can see the real implications of a new policy or decision, and judge whether potential obstacles have been properly considered and addressed. Knowledge that such materials may become public is likely to improve their quality, encouraging a more rigorous and balanced approach to policy analysis.

Post decisional access to advice is common in New Zealand. The New Zealand Law Commission, in a report published in October 1997, concluded:

[56] Para 3.19

[57] Campaign for Freedom of Information, *Freedom of Information: Key Issues*, December 1997

> *"Since 1982 there has been a fundamental change in attitudes to the availability of official information. Ministers and officials have learned to live with much greater openness. The assumption that policy advice will eventually be released under the Act has in our view improved the quality and transparency of that advice."*[58]

The former premier of Victoria in Australia has stated:

> *"FOI is a bit like a compulsory random breath test on our roads. Motorists are aware of its presence and the ever-present likelihood of a check. Governments, likewise, are aware of the prospect of examination of a comprehensive list of documents on which a decision is based. Because of that the Act has had a significant impact on the quality of decision making. It has improved the public sector's professionalism and the capacity of its officers to develop, analyse, and articulate policy that stands up to scrutiny."*[59]

We proposed that an FOI exemption for such material should provide that:

- policy advice and internal discussion should generally be withheld until a decision is taken but released afterwards;

- even after a decision is taken, advice and discussion could be withheld if disclosure *at the time in question* would inhibit the frankness of future discussions to such a degree that the quality of resulting decisions would be damaged. The weight of this consideration may vary depending on how soon after the decision the request for access is made;

- in both of the above cases, the public interest in openness should be taken into account, and material released where the benefits of openness outweigh the possible harm. A similar test applies to internal advice under the Australian and New Zealand FOI laws and the UK's open government Code of Practice;

- factual analysis and expert advice on a technical issue should not fall within the scope of this exemption at all, and normally should be available.

The white paper proposes that policy advice and material relating to decision-making should be available in some circumstances, but subject to a lower damage test - that disclosure would cause "harm" rather than the Act's normal "substantial harm" test.[60]

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[58] Law Commission. Review of the Official Information Act 1982, October 1997, Wellington, New Zealand, page 5

[59] John Cain, *Freedom of Information Review*, No 58, August 1995

[60] Para 3.12, point 7

The difference between "substantial harm" and plain "harm" is not yet clear. However, in an area such as this, where the traditional view - that all disclosure of advice is likely to be harmful - is still deeply held, substituting the lower test may reduce the pressure to be rigorous in considering whether disclosure would be harmful. A stricter test would not imply that cabinet minutes would no longer be protected or that 'thinking the unthinkable' would cease for fear of premature disclosure.

A test of plain "harm" should nevertheless still lead to greater openness. A key question will be how the proposed public interest test - with its obligation to ensure that decisions are in line with the objective of promoting accountability - operates in this area.

The Act will set out the factors indicating when disclosure of policy advice would be harmful. We hope these will also indicate the circumstances favouring its disclosure. The factors should acknowledge that the conventions relating to policy advice are not rigid principles but concepts which have evolved and relaxed over time, and that the advent of FOI will itself contribute to this development in the future.

For example, the need to uphold the political impartiality of public officials until relatively recently was taken to require the anonymity of civil servants. The regularity with which officials now appear before select committees, the high profile role of executive agency heads, the Citizen's Charter requirement that officials who deal with the public wear name badges, and even the recent decision of the prime minister's press secretary to be identified as the source of his statements to the press, illustrate the changes in this practice over a short period of time.

These changes have also affected the presumption that the policy analysis should not be disclosed. Important factors here include:

- the recent changes in the rules on public interest immunity, which is now claimed only where disclosure of advice would cause "serious harm";[61]

- the former government's acknowledgement that advice would become available in some circumstances under the Open Government Code of Practice;[62] and

- the decision to publish the minutes of the monthly meeting between the Chancellor of the Exchequer and the Governor of the Bank of England.

The white paper's announcement that the minutes of meetings between the government's

[61] This change was introduced by the former government in December 1996, in response to the Scott report's recommendations. Previously, PII was claimed for all policy advice, regardless of its contents or the likely result of its disclosure.

[62] The Code acknowledges that advice may be disclosed either where this would not harm the frankness of future discussions or where the public interest in openness outweighs any such harm.

Freedom of Information Unit and the Information Commissioner will be published[63] represents a further innovation.

An account of the public interest factors relating to the disclosure of internal advice has been given by the the Premier's Department of New South Wales:

> *"The...issue is whether the release of the document would on balance be contrary to the public interest. There should be no assumption that a document is automatically exempt because it fits the class [of internal discussion] and therefore release would on balance be contrary to the public interest. Such documents are available for access unless the public interest would on balance be negatively affected by this disclosure at this time...*
>
> *Factors favouring release will always include the general public interest in disclosure which promotes accountability. Thus an applicant has a right to know what government has done (and perhaps what it intends to do) unless disclosure in this particular instance would result in greater damage to the public interest. The public interest usually will be advanced by discussion debate and criticism of government action...*
>
> *The general public interest in the openness of administration may also be stronger in particular cases where the integrity of actions of the administration is called into question."*[64]

In a key judgement on policy advice, the Queensland Information Commissioner held:

> *"I consider that the approach which should be adopted in Queensland to claims for exemption [on candour and frankness grounds should be]...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...*

[63] Para 7.8
[64] New South Wales Premier's Department. FOI Procedure Manual. 3rd editions 1994.

> *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."*[65]

Factual and background material

We welcome the white paper's proposal that factual and background material should be available, and in particular the suggestion[66] that the government has in mind a provision comparable to that in the 1993 *Right to Know Bill*. This proposed that the Bill's policy advice exemption would not apply to:

(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 other than advice which is exempt on grounds of legal professional privilege

(d) information relating to decisions taken or proposed to be taken in relation to the personal affairs of an individual.

This approach is in line with that of a number of overseas FOI laws. Australia's FOI Act excludes reports of scientific or technical experts from the scope of the policy advice exemption[67]. Technical reports and the analysis of factual or statistical material are excluded from the corresponding exemption in Ireland's Act[68], while Queensland's FOI law provides that "expert opinion or analysis" is disclosable.[69]

[65] *Eccleston and Department of Family Services and Aboriginal and Islander Affairs (*1993) 1 QAR 60
[66] Para 3.13
[67] Freedom of Information Act 1982, Australia, section 36(6)(a)
[68] Freedom of Information Act 1997, Ireland, section 20(2)
[69] Freedom of Information Act 1992 (Queensland) section 41(2)(c)

We welcome the publication of the Background Material to the white paper, which provides valuable insight into the development of some key proposals, and are pleased to see that that the government intends that this should “exemplify” the approach to be followed under the Act.[70]

[70] Para 3.13

6. THE PUBLIC INTEREST TEST

The proposed "public interest" test, against which all decisions are to be judged is, potentially, one of the Act's most crucial provisions. However, the white paper's three-part public interest test differs from the kind of public interest test found in most overseas FOI laws, partly because it may be made up of a series of separate tests, none of which will itself necessarily refer to the "public interest". Although the proposed tests are helpful, an explicit reference to the "public interest" is in our view necessary.

The three part test

The proposed public interest test is made up of three elements:

(1) Perverseness

This requires that decisions to disclose or withhold information should not be 'perverse', so that withholding information under an exemption should not damage the interest which the exemption is designed to protect.

It appears that this test can only operate *in favour* of disclosure (ie by reversing an initial decision to withhold information). An opposite test would be superfluous, since a disclosure which would harm a protected interest would be exempt in its own right.

We hope that what the proposed test will mean in practice is the potential *benefits* of disclosure in terms of a protected interest should be balanced against the *harm.* For example, disclosing what biological warfare vaccinations are being given to troops:

- might be *harmful* to defence, by revealing to an enemy the agents against which troops were *not* protected, but also

- could also be *beneficial* to defence interests, if it revealed that the vaccinations themselves were potentially debilitating to troops.

A test which depended on whether the benefits of openness outweighed the harm to the specific interest would be valuable - though it would be improved if the benefits to *any* of the protected interests could be taken into account.[71] However, even taken together, the protected interests do not equate to the public interest: for example, none of them are capable of providing grounds for disclosures revealing gross maladministration or dishonesty in public office.

This test should permit internal discussion to be disclosed where any harm to the frankness of communications is outweighed by the benefits to the quality of advice resulting from

[71] Thus if it was proposed to withhold information on grounds of harm to *defence* but releasing the information might prevent some greater damage being done to *privacy,* the disclosure might be permitted.

openness. For example, where internal discussion operated on the basis of out of date information or false premises (eg in relation to the cause of BSE) which would not survive external scrutiny, disclosure ought to be permitted.

(2) Consistency with other legislation

The proposal that decisions on disclosure should be consistent with other relevant legislation will operate *against* disclosure - for example, by preventing disclosures which breach the Official Secrets Act harm tests. As explained above, we regard this as an unnecessary restriction.

Where European Community law restricts access to information, we hope the 'consistency' principle will be interpreted in the most liberal manner possible:

- If any other EU member - including Sweden whose FOI tradition long predates its accession to the EU - operates a more relaxed interpretation of the same European requirement, Britain should follow suit.

- Secrecy provisions resulting from EU law should be be included in the forthcoming review of statutory bars to disclosure, and amended where they lead to greater restriction on disclosure than the parent directive strictly requires.

(3) Consistency with the purpose of promoting accountability

The third element requires that decisions "*be in line with the overall purpose of the Act, to encourage government to be more open and accountable*". This is a potentially far reaching provision, which should permit any initial decision to withhold information to be reassessed, even where the relevant harm test has been met.

An explicit public interest override

The *accountability* test may require a 'purposes' clause, along the lines of those in many overseas FOI laws. However, these laws usually combine both an '*accountability*' purposes provision and an explicit '*public interest'* test. The former on its own, may not be sufficient.

Incorporating a reference to the public interest would allow the Commissioner to draw on the extensive relevant case law. The advantages may seen from the hypothetical case of an individual known to the authorities to be an infectious carrier of smallpox but who refuses to be treated.

Revealing his identity could alert his contacts to the danger, yet it would certainly cause 'substantial harm' to his privacy. It is not clear that an 'accountability' test would allow disclosure. Unless otherwise defined, this may be taken to mean disclosure after the event of

the basis for a decision. However, the case for disclosure on classic "public interest" grounds would immediately be recognised, both by the courts and the medical profession.

A public interest test should be capable of applying to any protected information, including that covered by the Official Secrets Act. We were concerned to see that the Background Material proposed that the public interest test then being discussed (which differs from that in the final white paper) should be *disallowed* where the OSA was involved.[72] This would imply that information about arms sales could not be disclosed even where it revealed the existence of corruption or fraud - an untenable position.

Where an exemption protected highly sensitive information, the public interest case would have to be considerable. By definition, the public interest required to override "substantial harm" will be greater than that required for plain "harm". But even where sensitive state interests are involved, the courts have accepted that the public interest may justify disclosure.[73]

Public interest criteria

A public interest test should permit factors such as the following to be taken into account. These include the need to ensure that:

- public authorities are held *accountable* through proper *scrutiny* of their decisions;
- matters of importance are subject to informed *public debate* before decisions are taken
- the public can *participate* in decisions affecting them
- *misconduct* is exposed or unjustified suspicion of it is dispelled
- the public is warned of *dangers* to their safety or the environment

This inevitably cannot be an exhaustive list.[74]

[72] Background Material, para 142

[73] Thus, when the *Spycatcher* case reached the House of Lords, Lord Griffiths said: "...theoretically, if a member of the [security] service discovered that some iniquitous course of action was being pursued that was clearly detrimental to our national interest, and he was unable to persuade any senior members of his service or any member of the establishment, or the police, to do anything about it, then he should be relieved of his duty of confidence so that he could alert his fellow citizens to the impending danger." A*ttorney General v Guardian Newspapers (No 2)* [1988] 3 All ER, 638 at 650

[74] *"the categories of public interest are not closed, and must alter from time to time...as social conditions and social legislation develop".* Lord Hailsham in*: D v NSPCC* [1978] AC 171, 230.

UK PRECEDENTS

The above elements can be found in numerous UK provisions.

(1) The law of confidence

The courts have stressed that the case for a disclosure "in the public interest" is not based on "what the public is interested in".[75] Disclosures are likely to be in the public interest if they reveal:

- "*crime or fraud*"[76]
- a matter which "*threatens...individual safety*"[77] or
- "*any misconduct of such a nature that it ought in the public interest to be disclosed to others*"[78]

The public interest principle under the law of confidence goes beyond the exposure of wrong-doing. According to the former Master of the Rolls, Lord Denning:

> *"I do not look on the word 'iniquity' as expressing a principle. It is merely an instance of just cause or excuse for breaking confidence".*[79]

The judges have sometimes accepted a public interest in *accountability*. For example, it has been held that disclosure may be justified if it provides electors with important information about a council's performance *before* rather than after a local election.[80]

The Lord Chancellor, Lord Irvine, was recently asked whether the proposed FOI Act would permit disclosure of exempt information if it revealed serious misconduct or danger. He replied:

> *"You are referring of course to the iniquity rule of common law and the rule that you cannot withhold disclosure of information which it would be in the public interest to disclose because it would demonstrate misconduct or malpractice, particularly in Government. I have no reason to believe that any different conclusion would be arrived at under the Freedom of Information Bill. It is quite obvious that*

[75] "There is a wide difference between what is interesting to the public and what it is in the public interest to make known". Lord Wilberforce in *British Steel Corporation v Granada Television* [1981] 1 All ER 417 at 455

[76] *Gartside v Outram* [1856] 26 LJ Ch. 113 at 114

[77] *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 WLR 848 at 869

[78] *Initial Services Ltd v Putterill* [1968] 1 QB 396, at 405

[79] *Fraser v Evans* [1969] 1 QB 349

[80] *KPMG Peat Marwick v Liverpool Daily Post & Echo Ltd,* Queen's Bench Division, 29.3.94

personal privacy yields to the public interest in exposing wrong-doing."[81]

(2) The Open Government code of practice

The Open Government code of practice provides a public interest test, as follows:

> *"In those categories [of exempt information] 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".*

The code does not define 'public interest', but the government's guidance on this code and the separate code on access to NHS information, between them identify all the elements - accountability, wrongdoing and danger to the public - mentioned above:

> *"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"*[82]

> *"...disclosure might be envisaged where there would be some breach of the law or other wrongdoing, or exposure of a significant risk to public health or to the environment or public safety."*[83]

> *"Where disclosure is necessary or conducive to the protection of public health, public safety or the environment, such considerations may clearly outweigh financial loss or prejudice to the competitive position of a third party"*[84]

Reports of the former Parliamentary Ombudsman into complaints during nearly the first two and a half years of the Code's existence, suggest that little was done to apply the public interest test. Usually his reports merely stated that no overriding public interest for disclosure had been found. They gave no indication of what if any grounds had been considered or what weight had been attached to them. In some cases clear public interest grounds appear to have

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[81] Evidence of Lord Irvine to the Public Administration Committee, in response to a question by Richard Shepherd MP, 3 March 1998. HC 398-v Question 337.

[82] Cabinet Office. 'Code of Practice on Access to Government Information. Guidance on Interpretation', 2nd edition (1997) para 3.

[83] NHS Executive. Guidance on Implementation of the Code of Practice on Openness in the NHS, May 1995, para 9.43

[84] Cabinet Office. 'Code of Practice on Access to Government Information. Guidance on Interpretation', 2nd edition (1977) para 3.Guidance, para 13.14

been overlooked entirely.[85] More recently the present Ombudsman has indicated a greater willingness to apply this test.[86]

(3) The Public Interest Disclosure Bill

This private member's bill introduced by Richard Shepherd MP is currently going through Parliament with government support. It would protect employees from victimisation for disclosing information, in accordance with certain requirements, if they believe on reasonable grounds that it tends to show the existence of specified kinds of malpractice. These elaborate on some of the previously identified elements of public interest:

> *"(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *(e) that the environment has been, is being or is likely to be damaged, or*
>
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."*

From an FOI perspective, paragraph (f) is significant in confirming that suppressing evidence of malpractice is itself malpractice.

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[85] For example, in relation to a request about the lifting of the Northern Ireland broadcasting ban the Ombudsman addressed the public interest issue merely by stating: *"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"*. (9th report, Session 1994-95, HC 758, Case A12/95). He made no reference to the central public interest issue, which was that the ban involved an restriction on the broadcasting of news which broadcasters themselves believed could affect the public's understanding of events in Northern Ireland, and which raised obvious issues of freedom of expression. It is unlikely that a court would have failed to recognise this as an issue of public interest.

[86] For example he has noted that if commercially confidential information about the decision to approve the British Nuclear Fuels THORP plant was not "consistent" with the account published by the company and the government: *"I should have concluded that the public interest in disclosing at least some, and possibly all, of the information was greater than any harm that might result."* Case A.29/95, 11/12/97

The reference in (b) to failure to comply with any legal obligation is particularly broad, and would cover obligations under statute, civil law, common law or administrative law and permit protected disclosures to be made about:

- unreasonable or procedural improper decisions of an authority which would be overturned at judicial review (these would be breaches of administrative law), and

- improper behaviour by civil servants - these would breach their contractual obligations to comply with the Civil Service Code.

(4) Other provisions

Other public interest overrides, justifying the publication of normally confidential material, appears in a variety of other provisions.

Data Protection Bill

The public interest in *"freedom of expression"* is explicitly cited in the current Data Protection Bill. The bill permits some safeguards over the use of personal data to be set aside where a publisher reasonably believes that compliance is "*incompatible*" with a journalistic, literary or artistic purpose and that *"having regard in particular to the special importance of freedom of expression, publication would be in the public interest"*[87]

Existing statutes

A public interest override appears in the *Environmental Protection Act 1990* which allows commercially confidential information to be withheld from public pollution registers but permits the Secretary of State to direct pollution authorities *"as to specified information...which the public interest requires to be included in registers...notwithstanding that the information may be commercially confidential"*[88]

Local Ombudsmen (Commissioners) are prohibited from identifying individuals by name in their reports *"unless, after taking into account the public interest as well as the interests of the complainant and of persons other than the complainant, the Local Commissioner considers it necessary to mention the name of that person"* [89]

[87] Data Protection Bill, clause 31(1)
[88] Environmental Protection Act 1990, section 22(7). Emphasis added
[89] Local Government Act 1974, section 30(3)

Broadcasting Standards Commission

An infringement of privacy must be justified by *"an overriding public interest"* according to the code which the Broadcasting Standards Commission is required by law to produce. The code states that public interest grounds would include: *"revealing or detecting crime or disreputable behaviour, protecting public health or safety, exposing misleading claims made by individuals or organisations, or disclosing significant incompetence in public office."*[90]

Press Complaints Commission

The Press Complaints Commission code also requires a public interest justification for a breach of privacy, adding: "*The public interest includes (i) Detecting or exposing crime or a serious misdemeanour (ii) Protecting public health and safety (iii) Preventing the public from being misled by some statement or action of an individual or organisation."*[91]

General Medical Council

GMC guidance on medical confidentiality acknowledges that the disclosure of patient information "*may be necessary in the public interest"* in order to avoid "*death or serious harm"* occurring. The guidance adds that such circumstances may arise where, for example, *"A patient continues to drive, against medical advice, when unfit to do so...A colleague, who is also a patient, is placing patients at risk as a result of illness or another medical condition...Disclosure is necessary for the prevention or detection of a serious crime"*[92]

Parliament

Ministers have sometimes disclosed information in the public interest which Parliamentary convention would permit them to withhold. Thus in 1994 the then trade and industry minister stated: *"It has been the practice of successive Administrations not to disclose information supplied in confidence by or about applicants for export licences. However my right hon. Friend the President of the Board of Trade is prepared to disclose information in circumstances where he considers that the public interest overrides considerations of confidentiality."*[93]

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[90] Broadcasting Standards Commission, Code on Fairness and Privacy, January 1998, para 14
[91] Press Complaints Commission, Code of Practice, November 1997
[92] 'Confidentiality: Guidance from the General Medical Council', October 1995
[93] Mr Richard Needham, Hansard (Commons), Written Answers 24.1.94, col 5.

In his evidence to the Scott Inquiry, the then Cabinet Secretary, Sir Robin Butler, accepted that even where Intelligence reports were involved: *"If things go wrong and the circumstances are such that Parliament and the public feel that such is the pressure that, exceptionally, you need to look into what went wrong in that case, then the veil may have to be lifted. The public interest in lifting the veil is greater than the public interest in maintaining the secrecy."*[94]

OVERSEAS PUBLIC INTEREST CASES

The following are examples from overseas FOI laws indicating where the enforcing body has held that public interest factors justify the disclosure of otherwise exempt information:

- Internal discussion of the consequences for Ontario if Quebec became independent was disclosed after the Ontario Information and Privacy Commissioner held that *"the need for informed public discussion"* constituted a *"compelling public interest"*. The possibility of independence was, he observed, *"a political issue of virtually unprecedented importance in the history of the Canadian nation, and has a significant potential impact on the people of Ontario"*. He added: "*While I recognize that the formulation of government policy in a confidential environment is also an important public policy concern, I have decided that this case represents an instance where this objective must yield to the public interest in disclosure. Moreover, it is clear that the formulation of government policy on this subject will proceed, as necessary, even if the records at issue are disclosed."* However, he did not order the disclosure of documents which set out the government's economic negotiating strategy in the event of independence, concluding that the balance of public interest favoured *"minimization of any potential negative effects on Ontario's economy"*.[95]

- Minutes of a government committee which prepared the Queensland Forest Service to be reconstituted on commercial lines were ordered to be disclosed partly because of the changed status had *"potentially very serious environmental implications"* in relation to wood production from native forests. The committee had dealt with substantive issues about the service's future functions and the Commissioner held *"disclosure would further the public interest in promoting informed community debate relating to the*

[94] Transcript of Evidence to the Scott Report (Smith Bernal Reporting Ltd). Day 62, Evidence of Sir Robin Butler, 9 February 1994, page 60

[95] Information and Privacy Commissioner of Ontario, Order P-1398, May 1997

government's forest policy in the future."[96]

- Safety studies on silicone gel breast implants which indicated a possible carcinogenic effect in animals were disclosed after a US court held that the commercial value to a rival manufacturer would be limited, because the data were 20 years old. It added: "*disclosure of the positive tests, which demonstrate that a product poses a danger when used in a certain manner, is unquestionably in the public interest. To argue that this type of information is confidential suggests that, in order to protect whatever marginal commercial benefits Dow Corning [the manufacturer] may get from having independently discovered certain risks, other manufacturers be permitted to blindly put out potentially damaging products....The benefit of releasing this type of information far outstrips the negligible competitive harm that defendants allege."*[97]

- A government audit report showing irregularities in the way a Queensland football league handled a large grant from public funds was disclosed, despite potentially adverse commercial consequences for the league, because of the "*strong public interest in ensuring that taxpayers' funds which are expended by way of....subsidies...are properly accounted for"*.[98]

- The report of an investigation into a fatal boating accident was released despite objections from the victims widows' after the New Zealand Ombudsman concluded that the public interest in releasing information which "*would play a part in the prevention of boating accidents in the future...was stronger than the privacy interest in withholding*".[99]

- Exempt confidential information about the award of a consultancy contract was disclosed because the contract had been let "*without any process of tendering or seeking of expressions of interest and therefore in a manner inconsistent with the Government's contracting out guidelines"*. The Victorian tribunal accepted that, given the urgency of the contract, the departure from the guidelines "*is thoroughly understandable... nevertheless it increases the public interest in disclosure of the commercial terms of the consultancy*".[100]

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[96] Information Commissioner of Queensland, *Australian Rainforest Conservation Society v Queensland Treasury*, Decision No 96005

[97] *Teich v Food & Drug Administration*, 751 F. Supp. 243 (D.D.C. 1990) 243-255129

[98] Information Commissioner of Queensland, Decision No 94027.

[99] Ombudsman (NZ) Quarterly review, Volume 1, Issue 2. June 1995 ISSN 1173-4736

[100] Administrative Appeals Tribunal, Victoria, *Thwaites v Department of Health & Community Services*, case 1995/25696

- Exempt documents about a privatisation were disclosed after the body was sold to a management buy-out by senior employees responsible for handling the privatisation. The Victoria tribunal made no finding of impropriety but held that the circumstances raised issues about the *"purity of public administration"* which were *"of the strongest public interest."*[101]

- A physiotherapy report on the treatment given to a hospital patient was disclosed although, because it had been prepared for possible litigation, it was exempt on grounds of legal professional privilege. However, allegations about the patient's care had been widely aired in the media and the patient's mother had written a book about the case. Disclosure to the mother was ordered partly because of her legitimate concern with the welfare of her son and partly because of the public interest in resolving the controversy and allowing more informed public debate.[102]

- A report which cleared a government scientist of allegations of scientific fraud, but nevertheless contained some unfavourable findings, was disclosed, against the scientist's wishes. The Commissioner concluded that the balance of public interest favoured *"public scrutiny of, and accountability with respect to, the process and outcome of an investigation into alleged breaches of acceptable standards of research in publicly funded institutions."* [103]

[101] Administrative Appeals Tribunal, Victoria, *Mildenhall v Vicroads*, case no 1995/04596
[102] Administrative Appeals Tribunal, Victoria, case No 850817. Reported in *Freedom of Information Review*, October 1986, 5, 65-66
[103] Information Commissioner of Queensland, *Pope v Queensland Health*, Decision 94016

7. CHARGES

The white paper proposes that authorities should be able to charge (a) an access fee of £10 per application for all requests,[104] and (b) a further charge if the request involves "*significant additional work*".[105] Additional charges for photocopying do not appear to have been ruled out, except for personal files.[106] Fees can be waived on public interest grounds.[107]

(a) Application fees

We are concerned at the proposed application fee, since this can be imposed for information which is currently available free of charge. They may also deter many users.

Most departments do not require application fees under the Code of Practice, and charge only for requests taking more than a set number of hours. Application fees are not normally made under the Environmental Information Regulations 1992 or the Local Government (Access to Information) Act 1985. Much of the free access presently available under these provisions could therefore be removed.

Under the Code in 1996:

- thirteen departments and agencies dealt with *all* the requests they received free of charge, without requiring a fee in any case;[108]
- three other departments[109] charged only for 3% of requests they received;
- even the most regular chargers still dealt with nearly 40% of requests free of charge;[110]
- overall, charges were made in only 9% of requests.

At first sight, a £10 application fee may appear reasonable. However, it is likely to deter many enquirers. The white paper states that it is modelled on the existing £10 Data Protection Act fee for computerised personal records.[111] The Data Protection Registrar has expressed "*serious*

[104] Para 2.31
[105] Para 2.32
[106] Para 2.31
[107] Para 5.12
[108] Departments which did not charge in even a single case (with the number of requests dealt with in brackets) in 1996 were: Department for Education and Employment (15); Employment Service (124); Department of the Environment (25); Office of Fair Trading (2); Foreign & Commonwealth Office (52); Lord Chancellors Department (18); Department of Natural Heritage (26); Office of Public Service (4); Scottish Office (57); Benefits Agency (73); Department of Trade & Industry (50); Treasury (26); and Welsh Office (22). *Source: Cabinet Office, Code of Practice on Access to Government Information, 1996 Report.*
[109] Department of Health, Ministry of Defence, Department of Social Security.
[110] The most regular chargers in 1996 were the Inland Revenue, which required a fee in 62% of cases(70/113), the Overseas Development Agency, 61% (11/18) and the Department of Transport, 53% (8/15).
[111] Para 2.31

doubts" about whether that fee should be retained given that *"on occasions it may be a deterrent to those seeking to exercise their rights"*.[112] The Inland Revenue, one of the few departments to charge an application fee under the Code, reported at the end of 1994 that 10 per cent of requesters had abandoned their requests after being notified of the charges.[113]

Applicants may need to make not just a single request but a series of related requests, whose cumulative effect may be substantial. For example a query about the proposed closure of an NHS facility, and the transfer of its functions to a social services department, may involve requests to several NHS trusts, the health authority, the NHS Executive, the Department of Health and the local authority. A request for information about an environmental problem may involve the council's environmental health and planning departments, the Health & Safety Executive, the Environment Agency, the Department of the Environment, MAFF and a polluting privatised utility. Each request in itself may be easily handled, but nevertheless require a separate £10 application fee. The overall effect - particularly as additional fees may be charged on top of the application fee - may be to prevent many people from using the Act.

The application fee is intended partly to prevent authorities from facing "frivolous" requests.[114] We think this concern is overstated, particularly in light of the so-called "Gateway" safeguards, which permit authorities to refuse requests on a formidable variety of grounds[115] and appear more than adequate to protect authorities from unreasonable requests.

In these circumstances, we think it would be unduly harsh to permit application fees to be charged for all requests. Access should be free for information which:

- has been freely provided in the past; or
- authorities should be expected to release as part of their normal dealings with the public; or
- can be disclosed without substantial additional work by authorities.

(b) Additional fees

In addition to an application fee, authorities will be able to make further charges for more complex requests.

We are (at least at this stage, given that the actual level of the fees is not yet known) less concerned about these given that they may be waived on public interest grounds. These waivers are an important safeguard, but we assume they are are more likely to apply to the additional fees than to application fees.

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[112] 'Data Protection and the EU Directive, the View of the Data Protection Registrar, July 1996, p 57
[113] Cabinet Office, 1994 Report, Code of Practice on Access to Government Information
[114] Para 2.30
[115] Para 2.26

It appears that authorities will be able to determine their own charges, within certain statutory parameters.[116] We are not clear why this approach, rather than a uniform charging regime, is proposed.

Authorities have been free to set their own charges under the Code of Practice and the Environmental Information Regulations, and in both cases there have been considerable inconsistencies. For example, under the Code:

- Charges for time spent on requests vary from £15 or £20 an hour (in the case of most departments) to to £35[117] or £45 per hour.[118]

- The amount of free time allowed before charges are imposed ranges from 10 minutes[119] to 5 hours[120]

- Some departments charge only the marginal extra costs, for requests which exceed the free time period, while others charge for the total time taken including the free period.[121]

Charges under other provisions are equally variable:

- Hourly charges by local authorities under the Environmental Information Regulations have reached as much as £62 per hour.[122]

- A 1994 survey[123] of local authority charges for photocopying planning documents found they ranged from nothing to £13 for a single sheet.[124]

It is possible that by allowing authorities discretion to set their own fees, some may adopt a more liberal charging regime than the norm. Equally, others may adopt a more restrictive approach. We think any charging regime should be set at the most liberal end of the spectrum; alternatively minimum standards should be guaranteed. For example, if charges are to be based on hourly fees, all authorities should be required to allow *at least* a specified period of free time. Many authorities have found 5 hours of free time to be feasible, suggesting that this could become the uniform minimum. There should be a maximum hourly search fee.

[116]Para 2.32
[117]Ordnance Survey
[118]Health and Safety Executive nuclear inspectors
[119]Central Office of Information
[120]Departments which allow either 5 hours free time, or waive the first £100 of any charges, include the Lord Chancellor's Department, Department of National Heritage, Scottish Office, Welsh Office, the Northern Ireland Office, Department of Trade & Industry, Office of Public Service and Office of Electricity Regulation.
[121]Thus both the Welsh Office and Scottish Office make no charge for a request taking up to 5 hours. But if the request takes 6 hours, the Scottish Office charges only for the sixth hour, but the Welsh Office charges for all 6 hours.
[122]London Borough of Redbridge, cited in the Friends of the Earth 1996 report: "Insisting on Our Right to Know"
[123]Council for the Protection of Rural England, *Public Access to Planning Documents, January 1994.*
[124]Essex County Council

Photocopying fees should be fixed, say at 10p a page, and not provide the opportunity for concealing an additional administrative charge.

(c) Multiple fees

At present people may be charged two separate £10 application fees when they apply for a personal file which is partly held on *computer* (for which a £10 fee under the Data Protection Act can be charged) and partly in *manual form* (for which a second £10 fee, under various access to personal files laws can be required). The FOI Act could provide grounds for a *third* fee to be charged where it opens up additional personal information. The Act should make clear that a request for a particular type of personal file to a single authority should attract only a *single* application fee.

(d) Public interest fee waivers

We welcome the proposal that the Commissioner should be able to review the reasonableness of an authority's charging scheme, and waive individual charges where disclosure is in the public interest.[125] These important safeguards could be strengthened by:

- making clear that it was the *authority's* duty, not just the Commissioner's, to waive fees in the public interest. Waivers should not merely be an individual remedy available on complaint;

- specifying the circumstances in which a fee waiver should be given.

Useful guidance has been suggested by the Information and Privacy Commissioner of British Columbia. He has proposed that the following factors are relevant:

> "* *has the information been the subject of recent public debate?*
>
> * *does the subject matter of the record relate directly to the environment, public health, or safety?*
>
> * *would dissemination of the information yield a public benefit by*
>
> * *disclosing an environmental, public health, or safety concern*
>
> * *contributing meaningfully to the development or understanding of an important environmental, health, or safety issue, or*
>
> * *assisting public understanding of an important policy, law, program, or service?*

[125] Para 5.12.

* *do the records show how the public body is allocating financial or other resources?"*

If the head [of the public body] decides that the records do relate to a matter of public interest, then he or she must then determine whether the applicant should be excused from paying all or part of the estimated fees. The focus here should be on the applicant and the purpose for making his or her request. Factors that should be considered would include:

* *is the applicant's primary purpose to disseminate information in a way that could reasonably be expected to benefit the public, or to serve a private interest?*

* *is the applicant able to disseminate the information to the public?*

If the applicant's primary purpose is to serve a private interest, then the head may be justified in refusing to waive fees, even where he or she is of the opinion that the records do relate to a matter of public interest.

The factors described above are not intended to be exhaustive."[126]

(e) Differential charging

The white paper asks whether higher fees for corporate bodies should be introduced. If such charges would permit charges for individuals and non-profit groups to be kept lower than otherwise would be the case we would support them. However, even under a two tier scheme, charges to commercial requesters should be limited to the direct costs of processing the request, and not used to generate a profit.

It is possible that commercial users could evade the higher charges by asking staff to apply for the information in their personal capacity, from their private addresses. However, this would inhibit the companies from making public use of the information, or referring to it in subsequent discussions with government. That may be too great a disadvantage for a relatively modest saving on fees.

[126] Office of the Information and Privacy Commissioner, British Columbia, Order No. 90-1996, March 8, 1996

This is the approach under the US FOI Act where:

- c*ommercial users* pay reasonable standard charges to cover document search, copying and the time spent considering whether exemptions apply ('review time')[127]

- *non-commercial users* pay the same standard charges but these may cover only search time and copying - not review time. Requesters are entitled to the first two hours of search time and the first 100 pages of copying free of charge. No requester, including a commercial requester, may be charged if the cost of collecting the fee exceeds the fee itself.

- *news media or non-commercial educational or scientific institutions* can be charged copying fees only

In addition, any requester - including a commercial organisation - can qualify for a public interest fee waiver under the US Act:

> *"if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."*

(f) Tradeable information

Public interest fee waivers should also be available for "tradeable information". Without such a provision, information which is of interest to business as well as individuals will be *sold*, priced beyond the pocket of ordinary people.

Thus:

- Ordnance Survey sought a fee of £350,000 from Friends of the Earth for providing digital mapping information which FOE wanted to use to produce a map showing pollution hot spots in Britain. The map was to be published on the Internet and made publicly available without charge.[128]

- the Department of Health resisted disclosing information about the number of NHS prescriptions for particular drugs for many months, on the grounds that it involved confidential patient information. During an Ombudsman

[127] The term "commercial use" is defined as "a use or purpose that furthers the commercial, trade or profit interests of the requester or the person on whose behalf the request is being made," which can include furthering those interests through litigation. Designation of a requester as a "commercial-use requester," therefore, will turn on the use to which the requested information would be put, rather than on the identity of the requester.' *Justice Department Guide to the Freedom of Information Act*, page 415

[128] Friends of the Earth, 'Insisting on Our Right to Know', 1996

investigation it accepted that the information could not be withheld but proposed that in future they should "*make a charge for the information to reflect both its market value and the cost of producing it*"[129]. It subsequently decided to make only a nominal charge.

The proposal that tradeable information should be excluded from the FOI Act's charging provisions will exacerbate such problems.[130] The public will be denied information where it can be sold to businesses, an outcome incompatible with the purposes of FOI.

It may be possible to prevent certain classes of information being traded in this way, but this can never be more than a limited solution. Many classes of information will be of interest *both* to business and to individuals:

- a database of all government contracts could be of commercial value to those interested in bidding for contracts. But it would also be essential resource for anyone wishing to investigate whether authorities were dealing with companies with a history of malpractice, or whether companies had developed unhealthy market dominance;

- a database of health and safety inspection reports could be of commercial interest to those selling safety equipment or consultancy services, but to treat it as such would deny it to worker safety representatives who could use it to improve standards in their own workplace.

The answer to such problems is not to exclude "tradeable" information from the FOI Act, but waive charges for non-commercial users on public interest grounds. Access could be given subject to conditions which prevent the requester making commercial use of, or re-selling, the information. A precedent for access on these terms can be found in regulations on access to pesticide safety data.[131]

[129]Parliamentary Ombudsman, Case A4/96, First Report Session 1997-98, Selected cases 1997, volume 3, HC 132, July 1997.137
[130]Para 2.38
[131]The Control of Pesticides (Amendment) Regulations 1997, Regulation 8.

8. GATEWAY PROVISIONS

The 'gateway' restrictions on requests are, according to the Background Papers, intended to *"deter the frivolous, the obsessive and the deliberately vexatious enquirer"*.[132] However, their breadth suggests they would permit reasonable requests from reasonable applicants to be refused. Although authorities would be expected to help applicants reformulate more manageable requests, some may find it easier to block requests than to provide real assistance.

Some of the 'gateway' provisions seem designed to encourage narrow, targeted requests - which authorities will presumably prefer. However, other provisions could have the opposite effect:

- If applicants are charged a £10 application fee for each request it will not be in their interests to focus their requests narrowly. They will ask for as much as they can, so as to reduce the chance of later having to make, and pay for, related requests.

- The provision aimed at preventing *"multiple applications from the same source for related material"* is clearly intended to prevent people breaking down a large request, for which a higher charge may be made, into a series of smaller requests. But it also encourages broad requests and could be used to obstruct those needing to make a series of related requests.

We suggest that:

(a) Authorities should be required to notify the Commissioner each time they invoke any of the 'gateway' restrictions. This would provide a more reliable safeguard than leaving it to applicants to complain; some are likely to abandon their requests without complaint even where an authority has clearly abused its powers.

(b) It would be fairer (see above) to modify the charging regime, so that modestly framed requests attract no charge - as is the case at present under the Code of Practice.

(c) Restrictions intended to deal with abuse should reflect this purpose in their drafting, so that they cannot be used against the ordinary enquirer. Authorities could be permitted to refuse "vexatious" requests, providing a safeguard against deliberately obstructive or obsessive individuals or campaigns intended to disrupt the work of an authority. Such a provision exists in New Zealand[133] and would be in line with the courts' existing powers to bar actions by vexatious litigants. This type of provision should be introduced only if it replaces some of the broader 'gateway' restrictions.

[132] 'Your Right to Know - Background Material', Cabinet Office, February 1998, para 81
[133] Official Information Act 1982, section 18(h)

It would be essential that the Commissioner be notified - and perhaps be required to consent - before this power is used.

(c) There should be no attempt to bar "fishing expeditions". The term is used in relation to discovery during legal proceedings and refers to an application for documents of no demonstrable relevance to the proceedings. A provision intended to have this effect would be out of place in an FOI Act, as authorities should not be entitled to enquire into a requester's purpose or to argue that requested documents are not relevant to that purpose. (See also the New Zealand Ombudsman's comments on this point.[134])

(d) We have reservations about the suggestion that authorities will be able refuse applications which involve '*disproportionate cost*', as this term - as used in relation to Parliamentary Questions - implies a relatively low cost threshold, currently £450. Instead, authorities should be able to refuse requests which (i) do not reasonably describe the information required or (ii) would involve '*substantial and unreasonable'* interference to the authority's work, a test adopted in some overseas laws.[135] The word 'unreasonable' indicates that authorities should make extra efforts where requests raise issues of particular public importance; it should explicitly be linked to the Act's objective of securing greater accountability.

(e) The provision permitting information to be refused if it is intended to be published in the future should not be open-ended. One option would be to allow some specified extra time, perhaps an extra 30 or 45 days, with the proviso that if, at the end of the period the information had not been published, it should automatically be released to the requester.

[134] "*It is one of the fundamental principles of any freedom of information system that a requester does not need to specify a reason for seeking information. Broad requests for information cannot therefore be excluded under the act, and references to the term 'fishing expedition', as it is understood in its judicial sense, are inappropriate in the official information context."*Report of the Ombudsman, 1989, Wellington, page 32

[135] For example in the Queensland Freedom of Information Act 1992, section 28(2)(b).

9. ASSISTING THE PUBLIC

People will be unable to make effective use of a right of access if they do not know what information public authorities hold. Authorities should be under a statutory duty to provide assistance to applicants.

It will be in the interests of authorities themselves, as well as applicants, to provide effective guidance to the information they hold. This will help applicants address their requests to the appropriate body, reducing the number of misdirected applications received by authorities with no relevant responsibility. It may also reduce the tendency for applicants to make untargeted sweeping requests. Only a relatively well informed enquirer is likely to be able to limit requests to specific documents which actually exist.

To help requesters discover what information exists:

(a) *Authorities should be required to publish a guide to the classes of records they keep and the purposes for which these are held.* Where possible, it would be helpful for these to indicate whether or not they are likely to contain exempt information. Any files likely to contain personal information about individuals should also be indicated. One model might be the Canadian government's *InfoSource,* a guide to the kinds of records held by each department.

(b) *Authorities should give the public access to the internal indexes they use for identifying their own records, where this can be done without revealing exempt information.* In most cases, the *titles* of records or files held will not in themselves contain exempt information, even where their *contents* may be exempt. (An exception are files which relate to individuals, such as social security claimants, if the index refers to individual names.)

(c) *Authorities should make available an index to the records they have released in response to FOI requests, and copies of those records.* Many US government agencies do this, and their collections of previously disclosed records are highly effective in demonstrating to the new user what information is likely to be held *and* releasable. Equally, they demonstrate what information is likely to be exempt, since a pattern of blanking out particular classes of information (such as the names of private individuals or references to trade secret formulations) is often discernible. Prospective applicants who have understood how exemptions are applied may be less likely to mount fruitless challenges when similar information is withheld in response to their own requests.

Making disclosed records available to public at large and not just to the individual applicant, has a wider purpose. Applicants will sometimes fail to make good use of information they receive, perhaps because they receive it too late to be of use or because it is too complex for them to handle or because they lack the means to publish or disseminate their findings. If authorities themselves 'publish' disclosed records the effort that may have gone into processing the particular request may be more likely to benefit the public.

(d) *Authorities should, where practical, be required to provide public reading rooms where such information as well as the guides and manuals whose disclosure is proposed in the white paper*[136] *could be inspected.*

(e) *Wherever practical, all the above materials should also be made available electronically, on the Internet.* A similar provision has recently been introduced in amendments to the US FOIA. This not only reduces the cost to the authority of handling repeated requests for the same information; it allows those who are unable to visit a reading room to enjoy the identical facilities via the Internet.

Paragraphs (c) to (e) correspond to requirements under the American FOI Act.[137]

[136] Para 7.4

[137] Following 1996 amendments to the FOI Act, sections (a)(2)(D) and (E) state: *"Each agency, in accordance with published rules, shall make available for public inspection and copying...(D) copies of all records, regardless of form or format, which have been released to any person...and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and (E) a general index of the records referred to under subparagraph (D); unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means."*

10. ENFORCEMENT

Some countries' FOI laws allow ministers to overrule the appeals body in certain areas. We are pleased that no such ministerial veto has been proposed here, and welcome the proposed enforcement mechanism based on an Information Commissioner with the powers to order disclosure.

Internal review

The white paper proposes that complainants must normally have asked the authority itself to review any adverse decision before a complaint to the Commissioner may be made.[138] The pros and cons of internal review are well summed up in the Background Material[139], which recognises that while it helps some applicants and reduces the burden on the Commissioner it also encourage authorities to refuse requests at the initial stage, and adds to unnecessary delays.

Our experience with internal review under the Code reveals ample evidence of these disadvantages. Internal review, coupled with a firm reluctance to contemplate disclosure, has sometimes led to frustrating and pointless delays, in which - after a wait of several months - the department merely confirmed its initial refusal. The system was tolerated only because the alternative, of complaining to the Ombudsman, was so much slower (one of the Campaign's complaints was with the Ombudsman for nearly two and a half years) that it was not always worth proceeding beyond internal review at all. We were however, more impressed with the reviews carried out by the Ministry of Defence, in which the more senior official who handled these matters notified us at a relatively early stage in the review that he had accepted the case for disclosure of the bulk of the requested material, but required more time for consideration of certain particularly complex issues.

Internal review may be useful *only* if it strictly time-limited. We suggest:

- authorities should be given a fixed period, perhaps two or three weeks, to complete internal review;

- if at the end of that time, a review has not been completed, a complainant should be free to approach the Commissioner. Where an authority had indicated that it was likely to disclose the information but required more time, complainants may consider that it would be in their own interests to allow more time - knowing that if the delay became unreasonable they would be free to turn to the Commissioner.

This partly reflects the Australian approach. If an internal review is not complete within 30 days, a complaint to the Administrative Appeals Tribunal may be made.[140] The Australian Law

[138] Para 5.8
[139] "Your Right to Know. Background Material", Cabinet Office, paras 117-8
[140] Freedom of Information Act 1982 (Australia), section 55(3)

Reform Commission has recently recommended that internal review should be an *option*, but not a requirement.[141]

Appointment of Commissioner

The method of appointing the Commissioner will be important. Any suspicion that the individual concerned had been chosen on the basis of a perceived readiness to defer to the government when potentially sensitive information is involved would undermine public confidence in the office. We suggest the appointment should be based on joint agreement between the prime minister, the leaders of the main opposition parties and the chair of an appropriate select committee.[142]

Commissioner's powers

The Commissioner's proposed powers appear appropriate. However, we note that he or she will only be entitled to inspect records that are relevant to an investigation and *"within the scope of the Act"*.[143] It will also be necessary for the Commissioner to be able to see records that are *outside* the scope of the Act:

- It may not be possible to investigate complaints about the police's administrative functions if the Commissioner is denied records relating to the their law enforcement functions. Problems will also arise if the Commissioner could not see material held by an authority relating to civil proceedings.

- The Commissioner may also need to see an authority's legal advice. The Parliamentary Ombudsman is entitled to see such material which has often proved to have contributed to unjustified secrecy or maladministration.

- Although the security and intelligence services are to fall outside the Act, the Commissioner will deal with complaints about the failure to release historical material relating to them under the Public Records Acts[144]. He or she must therefore be able to see such records, even if they are not available under FOI.

The problems that may occur if the Commissioner's powers to see documents are limited are illustrated by the problems caused to the Ombudsman by the restriction on his right to see Cabinet committee papers. This has caused him to abort one enquiry and seriously hampered another.[145]

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[141] Australian Law Reform Commission Report No 77/Administrative Review Council Report No 40. 'Open Government, a review of the federal Freedom of Information Act 1982', 1995, recommendation 83.

[142] This partly reflects the procedure for appointing the Comptroller & Auditor General which requires the agreement of the Prime Minister and the Chairman of the Public Accounts Committee. See section 1(1) of the National Audit Act 1983.

[143] Para 5.12

[144] Para 5.10

[145] Session 1994-95, HC91, para 23 and Session 1996-97, HC 231, case A.25/95

We welcome the proposal that the Commissioner be able to resolve disputes by mediation.[146]

The detailed case notes published by the Parliamentary Ombudsman under the Code have been extremely valuable; and we are pleased that the Commissioner will be expected to continue this practice.[147] We hope it will extend to describing the outcome of complaints resolved through mediation, as this route is likely to be particularly important under FOI.

Penalties for obstruction

The white paper proposes that anyone obstructing the Commissioner could be punished for contempt of court, and that the deliberate destruction of records required by the Commissioner is to be made an offence.[148]

The penalties for obstruction should be wider than this. In particular,

- it should be an offence to destroy a record after it has been requested by an *applicant;*

- it should be an offence to wilfully obstruct an applicant in the exercise of any right under the Act. A precedent can be found in the Local Government (Access to Information) Act 1985[149]

- the Commissioner should also be able to impose administrative sanctions on obstructive authorities, for example, by denying such authorities the right to make charges for certain periods or certain classes of document.

Evidence of the need for sanctions beyond those currently proposed have been cited by Canada's Information Commissioner. Having initially declared his confidence that administrators would never deliberately attempt to undermine the legislation, he subsequently confessed to having been "naive", noting that:

- A senior manager in Canada's Transport department ordered officials to destroy an audit report critical of senior managers *"in circumstances indicating that the senior manager knew an access to information request had been made or was imminent."*[150]

[146] Para 5.12

[147] Para 5.11

[148] Para 5.14

[149] This inserted the following, section 100H(4), into the Local Government Act 1972: *"If, without reasonable excuse, a person have the custody of a document which is required by section 100B(1) or 100C(1) to be open to inspection by the public - (a) intentionally obstructs any person exercising a right conferred by this Part to inspect, or to make a copy of or extracts from the document, or (b) refuses to furnish copies to any person entitled to obtain them under any provision of this Part, he shall be liable on summary conviction to a fine not exceeding level 1 on the standard scale."*

[150] Information Commissioner of Canada, Annual Report 1995-96, page 9

- The National Defence (ND) department altered documents before disclosing them to a journalist and *"orders were subsequently given to destroy the originals."*[151]

- The Canadian Blood Committee, a government body, ordered the destruction of tapes and transcripts of its proceedings *"so that the records could not become subject to the right of access"*. The decision *"was motivated by concern about potential litigation and liability issues associated with tainted blood products"* .[152]

Following an investigation into the National Defence's handling of requests the Commissioner has cited other instances *"of what public officials are capable of doing to undermine the public's right to know"*. These, he said, included:

- *"grossly inflating the number of hours spent on searching for and reviewing records requested under the access law...*

- *dispersing records ordinarily held in one location to many locations throughout the department, thus making it more expensive for access requesters...*

- *conducting inadequate searches for records requested under the access law;*

- *senior level involvement in monitoring the access requests made by selected requesters...*

- *publicly attacking the motives of an access requester who used the access law to find skeletons in the ND closet;*

- *taking legal action (unsuccessful) to muzzle the Information Commissioner's criticisms of the department; and*

- *delaying responses to requests for so long that some requesters lost their right to complain to the Information Commissioner, a right which must be exercised within one year of the date the request was made."*[153]

The Commissioner has described the Canadian legislation "toothless" in relation to obstruction and called for penalties to be provided for those who deliberately shred records in order to

[151] Information Commissioner of Canada, Annual Report 1995-96, page 9
[152] Information Commissioner of Canada, Annual Report 1996-97, page 12
[153] Information Commissioner of Canada, Annual Report 1996-97, page 15

frustrate applications. Given the references to departmental obstructiveness made by two successive Parliamentary Ombudsmen in the UK (see above), similar provisions are clearly called for here.

Delays

We welcome the suggestion that the Commissioner will resolve complaints "*in weeks not months*"[154]. However, we note that the Parliamentary Ombudsman originally intended to complete open government investigations within 13 weeks on average, but within two years of the Code's introduction was taking an average of nearly a year, despite having a relatively small number of cases (140 in total since the Code's introduction). Some complaints have taken two years or more. Substantial delays in the appeals process may undermine public confidence in the legislation, particularly if delays by authorities themselves are also occurring.

UK experience may be contrasted with that of Canada's Information Commissioner who in 1995-96 dealt with over 1,500 cases in an average turn around time of less than four months[155]. It may be helpful to seek to understand (a) precisely why such delays under the Code occurred, and consider what can be done to prevent similar problems under the Act (b) what can be learnt from the Canadian Commissioner's experience in achieving much more rapid resolution of complaints. The proposal that the Commissioner be able to mediate may permit speedier resolution of many complaints, but we would not assume that this would automatically deal with all problems.

[154] Para 5.3

[155] Information Commissioner of Canada, Annual Report 1995-96, page 77

11. STATUTORY RESTRICTIONS

Some 250 statutory restrictions prevent the disclosure of particular types of information, and are capable of substantially undermining the Act. We therefore welcome the white paper's recognition of the need to address this problem.

However, we question how effective the proposed approach - to repeal or amend each restriction *individually*[156] - will be. This exercise has been attempted once before, following a commitment in the Conservative Party's 1992 election manifesto to:

> *"review the 80 [sic] or so statutory restrictions which exist on the disclosure of information - retaining only those needed to protect privacy and essential confidentiality".*

The government's review led to virtually no specific action, presumably because the scale of the exercise (which revealed that there were 250 and not 80 restrictions) proved overwhelming.[157]

The burden of such an exercise has also defeated a parliamentary committee in Canada and the Australian Government, both of which attempted but failed to complete the exercise despite a three year timetable in each case.[158,159] There must be doubts about the feasibility of the present UK commitment, particularly as the time allowed for review is relatively short. In both Canada and Australia, excessive secrecy provisions have remained in force, and were subsequently added to, as a result of the difficulties of this approach.

The case for an override

Instead of attempting to address each restriction individually, the FOI Act should *override* them all, relying on the Act's exemptions to protect genuinely sensitive information. This was also what the Canadian parliamentary committee proposed:

> *"in every instance, the type of information safeguarded...would be adequately protected by one or more of the exemptions already contained in the Access Act. Most of the enumerated provisions...protect either confidential business information or personal information. The exemptions...provide ample protection for these interests. Less frequently, information pertaining to national security, law enforcement, federal-provincial relations or governmental economic*

[156] Para 3.20

[157] These were listed in the *Open Government* white paper of July 1993 (Cm 2290) which concluded that "it would be a major exercise to write a harm test into all existing statutes" (para 8.39)

[158] "Open and Shut", Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act, House of Commons, Canada, 1987, page 117

[159] Australian Law Reform Commission/Administrative Review Council, Discussion paper 59, May 1995, para 6.15

> *interests is protected by certain Schedule II provisions. Once again, however, there are ample exemptions in the Access Act to address these important state interests.*[160]*"*

The Australian Law Reform Commission has reached a similar conclusion:

> *"the exemption provisions in the FOI Act represent the full extent of information that should not be disclosed to members of the public. Secrecy provisions that prohibit the disclosure of information that would not fall with the exemption provisions are too broad. The Review considers that repealing s 38 [which exempts such information] will promote a more pro-disclosure culture in agencies."*[161]

One approach could be that of the Environmental Information Regulations (EIR) 1992, whose right of access to environmental information overrides all restrictions - *unless* the restriction coincides with one of the exemptions in the regulations. In this case disclosure continues to be prohibited.[162] The government may be required to introduced some such override, if it proposes to repeal the Regulations and provide access to environmental information under the FOI Act. The EU directive which underlies the EIR permits the right to see environmental data to be limited only in accordance with the directive's exemptions.[163] Withholding information because of statutory restrictions which go beyond these exemptions would be unlawful.

The drawback of the EIR's override is that where an exemption and a restriction coincide, the exemption becomes *mandatory*. Authorities lose any discretion to release information in these cases. This approach could undermine the Act's proposed public interest test.

The Queensland FOI Act improves on the EIR's approach by exempting information subject to a prohibition, but allowing disclosure on public interest grounds.[164]

An absolute override

However, a better approach would be an *absolute* override. Precedents for this can be found under the Data Protection Act 1984 and the Access to Personal Files Act 1987. The individual's right to see a computerised personal file:

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[160] "Open and Shut" page 116

[161] Australian Law Reform Commission Report No 77/Administrative Review Council Report No 40. 'Open Government, a review of the federal Freedom of Information Act 1982', 1995, para 11.3

[162] Regulations 3(7) and 4(2)

[163] Council Directive 90/313/EEC on the freedom of access to information on the environment

[164] Section 48 of the Queensland Freedom of Information Act 1992 states:

"(1) Matter is exempt matter if - (a) there is in force an enactment applying specifically to matter of that kind, and prohibiting persons mentioned in the enactment from disclosing matter of that kind (whether the prohibition is absolute or subject to exceptions or qualifications); and (b) its disclosure would, on balance, be contrary to the public interest.

(2) ....[relates to subject access requests]

(3) This section has effect for only 2 years from the date of assent."

> *"shall apply notwithstanding any enactment or rule of law prohibiting or restricting the disclosure, or authorising the withholding, of information"*[165]

Special provision may be needed for some statutory restrictions which prohibit the disclosure of highly sensitive personal information, especially medical information (such as the identity of patients treated for sexually transmitted diseases[166], or undergoing abortions[167]). In such cases, the override should still apply, but the Act could provide that disclosures:

- would only be permitted where exceptional public interest factors - such as those recognised by the General Medical Council as justifying breaches of medical confidentiality [see above] were involved;
- in such cases could only be made with the prior approval of the Information Commissioner.

Failure to override prohibitions will allow the FOI Act to be gradually weakened by the establishment of new statutory restrictions. The UK Law Commission has recently proposed a new criminal offence for the disclosure of confidential information of commercial value.[168] If enacted, this would do considerable damage to the FOI Act by effectively removing its "substantial harm" test for commercial confidentiality. Similar proposals in any future legislation could be equally harmful.

It is therefore important that:

(a) the FOI right of access should override all existing statutory restrictions;

(b) the FOI exemptions be relied on to protect information whose disclosure would harm the specified interests;

(b) the prior consent of the Commissioner be required for the release in the public interest of information of exceptional sensitivity currently subject to certain specified prohibitions;

This approach would also address restrictions in international agreements, such as that which prevents the disclosure of safety information by the Channel Tunnel Safety Authority.[169]

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[165] Data Protection Act 1984, s.26(4). See also s. 1(5) of the Access to Personal Files Act 1987.

[166] The National Health Service (Venereal Diseases) Regulations 1974, regulation 2

[167] The Abortion Regulations 1991, Regulation 5

[168] "Legislating the Criminal Code: Misuse of Trade Secrets", Consultation Paper 150, November 1997.

[169] The channel tunnel concession agreement between the governments of Britain and France and the developers envisages that a legal requirement to disclose information could override the confidentiality provision. It states: "Each of the parties hereto and the Intergovernmental Commission and the Safety Authority shall hold in confidence all Documents and other information whether technical or commercial supplied to them by or on behalf of any other party hereto relating to the Fixed Link and shall not save as required by law or procedural practices publish or otherwise disclose the same otherwise than for the purposes contemplated by this Agreement". The Channel Fixed Link, Concession Agreement, Cmnd 9769, HMSO, 1986, Clause 33.3.

12. DATA PROTECTION

We welcome the proposal that the FOI Act should provide a common access regime to personal information held by public bodies,[170] regardless of whether the Data Protection Act (DPA) applies:

- This should not permit any levelling down of existing rights. The DPA allows a data user 40 days to respond to access requests,[171] an excessive period which should not be reflected in any corresponding FOI provision.

- The DPA allows the record holder to conceal the identity of any other identifiable individual referred to on the file.[172] This permits a government department to conceal the identity of a civil servant, or even minister, involved in handling the applicant's case. The new Data Protection Bill relaxes this restriction, permitting such information to be disclosed where it is reasonable to do so.[173] The FOI Act should go further, and establish that identity of a public official mentioned on a personal file cannot be withheld on privacy grounds (though other exemptions, such as the need to protect the official from threats of violent attack, may be relevant).[174]

- If FOI and DPA provisions are to be harmonised, internal review of an unfavourable decision should be required in both cases or neither. It would be better that it should apply in neither, particularly as no review requirement applies under any existing personal files legislation. Internal review would create substantial delays because other identifiable individuals are almost always mentioned on an applicant's file. They would have to be consulted and given the opportunity to object to a proposed disclosure *both* at the time of the initial decision and at the time of a review, and would then still be entitled to complain to the Commissioner.

Removal of existing access rights

Clause 28(4) of the Data Protection Bill permits the Secretary of State, by order, to remove altogether subject access rights (and other safeguards), where such an exclusion is required for law enforcement or tax purposes. An existing exemption already allows access to be denied in any individual case where disclosure would prejudice those purposes. The order making power would therefore permit *existing access rights* to be removed in cases where disclosure

[170] Para 4.10

[171] Data Protection Act 1984, section 21(6)

[172] Data Protection Act 1984, sections 21(4) and (5)

[173] Clause 7(4)(c)

[174] The precedent should be the provision in access to social work and medical records laws which prevents the identity of social workers or health professionals from being withheld in such circumstances.Eg Access to Personal Files (Social Services) Regulations 1989, regulations 8(5)(b) and 9(3)(a); Access to Health Records Act 1990, section 5(2)(b)

would *not* cause such harm, and appears unnecessary and objectionable in principle.[175]

New secrecy provision

We are concerned to find that the Data Protection Registrar will be prohibited by law from disclosing information obtained in the course of her functions. Although the prohibition, in clause 54, is not absolute, the circumstances in which disclosure would be possible are limited and may be difficult to demonstrate.[176] The Registrar herself therefore risks committing a criminal offence by disclosing information about her functions. She has criticised this provision stating that it *"could require her and her staff to be unnecessarily guarded in future"*.[177]

This restriction also has damaging implications for FOI.

(a) it contradicts the policy set out in the 1993 Open Government white paper, that new restrictions on access should apply only where disclosure would cause identifiable harm.[178] The data protection restriction contains no harm test.

(b) it undermines the FOI white paper's proposal to remove unnecessary statutory restrictions on disclosure[179] - by creating precisely such a restriction.

(c) most importantly, *the restriction will bind the Information Commissioner*, insofar as he or she receives information from the Registrar. The white paper proposes that the two officers should *"co-operate closely"* and be required *"to consult each other and to exchange information on those cases where both jurisdictions come into play"*.[180] However, information obtained by the Commissioner from the Registrar will also be subject to the prohibition in clause 54. The Commissioner will risk committing an offence by disclosing such information and may be unable to justify decisions taken after consultations between the two offices. This could lead to damaging accusations that the Commissioner is acting secretively, bringing the FOI Act itself into disrepute.

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[175]Clause 28(4) was subsequently deleted from the Bill by a Lords amendment. The amendment was opposed by the Government, which stated that it may reintroduce the provision in the House of Commons. [Lords Hansard, 24.3.98, cols 1098-1109)

[176]It would have to be shown that *"having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary for reasons of substantial public interest."* Data Protection Bill, clause 54(1)(d)

[177]Data Protection Registrar. 'Data Protection Bill, Criminal Disclosures by the Commissioners Staff', 29.1.98

[178]Open Government', 1993, Cm 2290, para 8.40

[179]Para 3.20

[180]Paras 4.12 and 4.13

13. ACCESS TO PERSONAL FILES

The white paper suggests that some existing access to personal files rights may be incorporated into the FOI Act.[181] Provided that any incorporation avoids "levelling down", there would be significant advantage to this.

(1) Enforcement

Some existing provisions provide no independent appeals mechanism, and would benefit from the FOI Act's appeal mechanism.[182] In other cases, where a remedy in the courts does exist,[183] the alternative of complaint to the Information Commissioner, whose ruling will be legally binding, will provide a more accessible remedy..

(2) Public interest test

Applicants may also benefit from the proposed FOI public interest test: there is no such test in existing personal files laws. The test would provide a balancing mechanism where an individual's file contains information about a third party who cannot be contacted to ask if he or she consents to disclosure, or who refuses consent. At present, access is automatically refused in these cases, and this led to European Court of Human Right's decision against the UK in the in the *Gaskin* case.[184]

(3) Exemptions

The FOI Act will contain a greater range of exemptions than existing personal files laws. These usually permit information to be withheld only where disclosure would (a) infringe the privacy of a third party (b) reveal the identity of an informant other than a professional or (c) expose someone to risk of serious harm. These correspond to the 3rd, 5th and 6th of the proposed protected interests, but there is no equivalent to the four other proposed exemptions.

The approach under New Zealand's FOI law[185] should be followed. This permits only a subset of the full range of exemptions to apply where personal files have been sought.

In particular, existing access rights should not be subject to an exemption for 'decision making', 'advice' or 'internal discussion'. This would remove existing rights to see opinions

[181] Para 4.2

[182] For example, complaints about requests for access to housing or social work records are dealt with by appeal to councillors In the case of social work records, appeal is to an ad hoc committee of three councillors, one of whom may be a member of the social services committee. Appeals about housing records are, at the authority's discretion, either to a meeting of the full authority or to an unspecified number of councillors not involved in the original decision. Complaints about school records are to the school's governing body. Neither remedy is acceptable.

[183] Such as those under the Access to Health Records Act 1990 and the Access to Medical Reports Act 1988

[184] Gaskin v United Kingdom, Series A No. 160, (1990) 12 EHRR 36

[185] Official Information Act 1982 (New Zealand) section 27

expressly guaranteed in statute[186] and prevent individuals from participating in decisions about their own health or welfare.

(4) Fees and time limits

Incorporation of existing personal files rights should not remove:

(a) *free* access for people who merely want to inspect their records without obtaining photocopies, as provided for in provisions on access to school records[187], medical reports for employers or insurance companies[188] and information added to manual health records in the previous 40 days.[189] No free access appears to be envisaged in the white paper.

(b) *short response times* such as the 15 day period for access to school records and the requirement that medical records be disclosed within 21 days if the file has been added to in the past 40 days.

(5) Retrospection

Although FOI rights will be fully retrospective, the white paper suggests such retrospection will not apply where an existing right is not itself fully retrospective. For example, only information added to medical records after November 1991 is currently available[190] (similar restrictions apply to housing and social work records).

If access to all other public sector personal files is to be fully retrospective, there seems no case for denying it for these records, particularly as:

(a) access to pre-1991 medical records is now possible under the NHS open government code, so the proposed restriction would *remove* an existing right.

(b) even before the legislation on medical and social work files, the government encouraged (and continues to encourage) record holders to give access voluntarily, so a fully retrospective right would not overturn previous expectations[191]

[186] Access to Health Records Act 1990, section 11; Access to Personal Files Act 1987, section 2(2); Data Protection Act 1984, section 1(3); Data Protection Bill, clause 1(1)

[187] Education (School Records) Regulations 1989, regulation 6(1)(b)

[188] Access to Medical Reports Act 1988, section 4(4)

[189] Access to Health Records Act 1990, section 3(4)(a)

[190] Under the Access to Health Records Act 1990

[191] For example, current Department of Health Guidance states: "...although there is no general statutory right to see manual records made before November 1991, access should be given wherever possible, subject to the judgment of the health professionals responsible for the patient's care and safeguards for other people who may have provided information about the patient". *The Protection and Use of Patient Information. Guidance from the Department of Health, 7 March 1996*

(c) the ECHR ruling in *Gaskin* established a retrospective right to personal files in some cases under Article 8 of the European Convention. This will soon be directly enforceable under the UK Human Rights Act.

A uniform retrospective right access, to all personal files, would appear to be justifiable and consistent with existing provisions.

14. LOCAL GOVERNMENT

The 1985 Local Government (Access to Information) Act should be amended to bring its exemptions into line with those in the FOI Act.

The 1985 Act allows local authorities to close their meetings to the public where information falling into any of 15 categories of "exempt information" is likely to be disclosed. However, most of these exemptions are drafted more broadly than the proposed FOI provisions. Nor do they make any provision for a public interest test.

Authorities will thus be able to *close* their meetings to the public to protect information which they will have to *disclose* under the FOI Act. The 1985 Act will, almost by definition, allow authorities to operate in conditions of what will be seen as unjustified secrecy, and will in practice become unsustainable.