

# The Campaign for Freedom of Information

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Mr Michael Wright  
Local Government Sponsorship Division  
Department of Transport, Local Government and the Regions  
Zone 5/B2 Eland House  
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July 26, 2001

Dear Mr Wright,

## **Access to information in local government: consultation paper**

I am writing to set out the Campaign's views on the above consultation paper. We have no objection to our views being made public.

We welcome the Government's review of the exemptions to the local government access to information regime and the commitment to publish indicative thresholds for key decisions. We are also pleased at the Government's proposal to increase, from 3 to 5 days, the length of time that council papers must be publicly available before meetings.

In addition to our comments on these issues, we also refer to a number of important matters not raised in the consultation paper. These include the need for an appeal process to review an authority's claim that information is exempt; and the need to extend the openness provisions to bodies providing services on behalf of local authorities and to parish councils. Some of these matters may fall outside the scope of the present consultation, but are likely to be within the review of the access arrangements which the Government has promised to carry out in June 2002.<sup>1</sup> The Government may wish to start considering these problems now and begin to gather evidence itself, rather than rely on self-reporting at the time of the review.

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<sup>1</sup> Lord Whitty, House of Lords debate on the access to information regulations, 8 February 2001, *Hansard* cols 1338-9

**Hon. President:** Godfrey Bradman  
**Co-Chairs:** James Cornford, Neil McIntosh  
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**Parliamentary Co-Chairs:** Helen Jackson MP  
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## I. EXEMPT INFORMATION

The Campaign welcomed the Government's acknowledgement during the Committee Stage of last year's Local Government Bill that "There are sometimes abuses of the definition of exempt information to keep information away from the public".<sup>2</sup> The present Parliamentary Under-Secretary of State for local government, Dr Alan Whitehead MP, also commented on this during the Bill's Report Stage:

"In the past, local government has, in some circumstances, operated in admirable conditions of openness. However, there have also been instances in which local authorities have operated in shocking conditions of secrecy. There have also been occasions, even after the Local Government (Access to Information) Act 1985 was passed, on which local authorities subverted the requirements of such legislation by various means, including caucuses, pre-meetings, half-group meetings and half-group and officer meetings and so on."<sup>3</sup>

We therefore welcome the Government's statement in the consultation paper that decisions about exempt information should be made "in accordance with the fundamental principle that there is a presumption in favour of openness".

### **Disclosures required under other legislation**

The Campaign welcomes the proposal that the schedule of exemptions (ie Schedule 12A of the Local Government Act 1972) will be amended to provide that information required to be made available to the public by virtue of any other law is not exempt information.<sup>4</sup> This should ensure that information which would have to be disclosed under the Freedom of Information Act could not be exempt under the local government legislation, and that an executive or committee would not be justified in closing a meeting to the public on the basis of such information.

However, many other statutes also require the disclosure of information to the public. Some of these are already referred to in paragraph 2 of Part II of the schedule.<sup>5</sup> The "Good Practice Note on Access to Information" produced by the local authority associations in June 1995 contained a longer list of disclosure requirements.<sup>6</sup> It said this list was based upon the Local Government (Inspection of Documents) (Summary of Rights) Order 1986. The 1972 Act envisaged that this list would be updated periodically<sup>7</sup>, however, we have been unable to trace an updated version of this Order.

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<sup>2</sup> Beverley Hughes MP, then Parliamentary Under-Secretary of State DETR, Standing Committee A, 20 June 2000

<sup>3</sup> Official Report, House of Commons, 4 July 2000, column 258

<sup>4</sup> Consultation paper paragraph 2.13

<sup>5</sup> This limits the scope of the exemption for "Information relating to the financial or business affairs of any particular person (other than the authority)"

<sup>6</sup> A good practice note on access to information, Association of County Councils, Association of District Councils, Association of Metropolitan Authorities, June 1995, Appendix 1

<sup>7</sup> Section 100G(3)

We would however like to see the reference to this new provision placed at the start of Part I of the schedule rather than buried at the bottom of Part II. This should operate by reference to a specified list of disclosure statutes which should be set out in the schedule itself, and be updated periodically as originally envisaged.

### **The public interest in disclosure**

We believe that the exemptions should also be subject to a public interest test. The Freedom of Information Act already qualifies most exemptions by such a test<sup>8</sup> and forthcoming regulations on access to environmental information will also do so.<sup>9</sup> If the Government amends the schedule to provide that information cannot be exempt if it must be disclosed under any other legislation, it will indirectly be incorporating this public interest test into the present legislation. It would be preferable, and clearer, to make direct reference to the public interest in each of the exemptions to which that test would apply. **Councils would thus be required when assessing whether or not to claim an exemption to do so only where the public interest in claiming the exemption outweighs the public interest in disclosure.**

### **Restructuring exemptions**

The consultation paper seeks views on how the schedule might be restructured to ensure the exemptions are read and interpreted in conjunction with the qualifications and interpretations. **In our view the Government should revise Part I of the schedule so that the specific qualification to each exemption is contained within the paragraph setting out the exemption.**

### **Separating out exempt material**

The consultation paper recommends that authorities should separate out the exempt parts of a report to enable the public to read the remainder and allow its contents to be debated in public. We welcome this proposal. This is in effect what local authorities will have to do in responding to FOI Act requests.<sup>10</sup> **The schedule should contain a similar provision, to require separation of exempt and non-exempt material, so that the latter can be**

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<sup>8</sup> This provides that most types of exempt information must nevertheless be disclosed unless “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.” Freedom of Information Act 2000, section 2(2).

<sup>9</sup> These will require exemptions to be interpreted “in a restrictive way, taking into account the public interest served by disclosure”. Section 74 of the Freedom of Information Act 2000 makes provision for the Secretary of State to introduce regulations implementing the Aarhus Convention on access to environmental information. The duty to balance claims for exemption against the public interest can be found in Article 4(4).

<sup>10</sup> The right of access under the Freedom of Information Act 2000 is to information; therefore if one part of a document contains exempt information but other parts do not, the public authority must release those parts of the document that are not exempt. Freedom of Information Act 2000, section 1.

**disclosed. Where it is feasible to have a meaningful discussion of the non-exempt part of the report in public, without disclosing the exempt information, this should be done.**

### **Time limited exemptions**

A flaw of the existing regime is that information is not exempt merely for the period during which disclosure might cause harm. Some exemptions are expressed to apply only “if and so long as” the specified harm could occur<sup>11</sup> but the decision on whether information is exempt is made shortly before the meeting which considers it, and becomes a permanent decision. There is no procedure for ‘reclassifying’ exempt documents once they lose their sensitivity. Information which is exempt because it could prejudice forthcoming negotiations remains exempt after the negotiation, even if its disclosure is then not capable of causing harm.

The justification for this inflexible approach is all the more difficult to understand in light of the almost unqualified right to see financial information at the time of the council’s audit.<sup>12</sup> There are no exemptions to protect information about negotiations or commercial interests under these provisions. So contracts or records of payments which may be exempt under Schedule 12A would have to be disclosed on request at the time of the audit to anyone dedicated enough to make use of these difficult to exercise rights.<sup>13</sup> However, while the financial records – containing the once sensitive information - would have to be disclosed, the officers’ reports which referred to them do not become accessible. **The schedule should be revised to provide for access to formerly exempt information if its disclosure at the time of the request would not be harmful.**

### **Privacy exemptions**

The exemptions in paragraphs 1-6 of Part I all protect personal privacy. However, unlike privacy exemptions elsewhere,<sup>14</sup> they cannot be waived where the individual concerned *consents* to the disclosure. Where people for whom the authority is responsible have been injured (eg following an accident on its premises, a fire on a council estate or abuse of someone in care) the matter could be dealt with in private, on privacy grounds, even though the individual concerned wants it to be discussed in public. These exemptions should allow publicity where the individual concerned consents.<sup>15</sup>

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<sup>11</sup> Schedule 12A Part II, paragraphs 3-6.

<sup>12</sup> The only exemption to this right applies to personal information about employees. Audit Commission Act 1998, section 15(3).

<sup>13</sup> They are difficult to exercise partly because they allow access only for a limited number of days at the time of the audit, and because the inspection period may not occur until 18 months after the event.

<sup>14</sup> See, for example, section 7(4)(a) of the Data Protection Act 1998 and section 4(3)(b) of the Environmental Information Regulations 1992.

<sup>15</sup> Where the individual is a child, the approach could follow that recommended by the Department of Health in relation to access to social work records. That is, the child should be able to give consent if he or she has the capacity to understand the significance of doing so. Otherwise the consent of a parent should be valid, provided that openness is in the child’s best interests. See: <http://www.doh.gov.uk/scg/datap.htm>

The exemption relating to children in paragraph 6 of Part 1 is to be slightly extended. However, while the current exemption applies only to information about a “particular” child the proposed new passage is not qualified in this way.<sup>16</sup> We think the term “particular” (which appears throughout paragraphs 1-6) should be added to the new passage, to emphasize that the exemption does not apply to information about the services provided to children *in general*.

In relation to the proposed change to paragraph 2 of Part 1, we note that the text of the exemption itself appears to be different from that cited in the consultation paper (though this may be an amendment that has not yet taken effect).<sup>17</sup>

### **Financial or business affairs**

The changes in the delivery of council services introduced since the passing of the 1985 Act have not been reflected in changes to the exemptions. There is now a much greater degree of private sector delivery of services which were previously provided directly by councils.

The broad exemptions in paragraphs 7 and 9 may now prevent proper public scrutiny of the delivery of these services. This is partly because of previously identified problems. A small element of a report may be capable of affecting negotiations, or may relate to the business affairs of a contractor. As a result, the *whole* report is likely to be withheld, the whole discussion takes place in private, and the report remains permanently exempt even when the negotiations are over.

Exemption 7 presents a particular problem. It exempts any information relating to a third party’s financial or business affairs, *even if disclosure could not harm those affairs*. In this it differs from exemptions 9 and 11, both of which contain ‘prejudice’ tests, and exemption 8 which applies only if disclosure would give an ‘advantage’ to a potential contractor. This is a major shortcoming.

**When an amendment seeking to add the prejudice test to exemption 7 was debated last summer the minister said she had “some sympathy” with it.<sup>18</sup> We were pleased to hear that and believe that a harm test in this exemption is essential.**

The amendment in question would have limited exemption 7 to information whose disclosure would “prejudice to an unreasonable degree the commercial interests of the person to whom the information relates”. This is the harm test found in section 22(11) of the Environmental

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<sup>16</sup> The current exemption applies to “Information relating to the adoption, care, fostering or education of any particular child”. The proposed additional passage refers to “Information relating to any child receiving services from a local authority under the Children Act 1989”

<sup>17</sup> See *Halsbury’s Statutes*, Fourth Edition, Volume 25, April 2001 edition, page 452.

<sup>18</sup> Beverley Hughes MP, then Parliamentary under-secretary of state DETR, Standing Committee A, 20 June 2000

Protection Act 1990 (which local authorities apply) and which defines the circumstances in which information may be withheld from public registers of pollution information.<sup>19</sup> It involves a two-stage test. First, the disclosure must prejudice commercial interests. Second, that prejudice must be to an unreasonable degree.

The corresponding exemption in the Freedom of Information Act also applies where disclosure would “prejudice the commercial interests” of any person.<sup>20</sup> Even in such cases, information may still have to be disclosed under the Act’s public interest balancing test.

## Negotiations

Exemption 9 protects the terms proposed by an authority in negotiations over contracts, for property, goods or services, where disclosure could prejudice the authority’s position in those contracts. If the ‘prejudice’ test is not properly applied, this exemption may remove important information from the public domain. Indeed, the exemption may protect information which, in our view, should *have* to be disclosed before the conclusion of negotiations, to allow for public input into them.

For example:

- Council services are now frequently provided for or managed by private contractors. There needs to be public debate about the appropriate performance standards, levels of management information supplied to the authority and penalty clauses, at an early enough time to influence these matters. As the exemption stands, the prospect of a minor degree of prejudice to the authority’s negotiations would permit such information to be kept secret until the negotiations are over – and thereafter - regardless of what may be an overriding public interest in disclosure.
- Authorities may be negotiating with property developers over ‘planning gain’ agreements.<sup>21</sup> The local community may have a particular interest in knowing about these negotiations before they are complete as they may ameliorate the development’s impact on the surrounding area. There may be three competing interests in the negotiations - the developer’s, the council’s and the public’s. The local community needs to be sure that the

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<sup>19</sup> “22.–(1) No information relating to the affairs of any individual or business shall be included in a register maintained under section 20 above, carrying on that business, if and so long as the information–

(a) is, in relation to him, commercially confidential; and

(b) is not required to be included in the register in pursuance of directions under subsection (7) below;

but information is not commercially confidential for the purposes of this section unless it is determined under this section to be so by the enforcing authority or, on appeal, by the Secretary of State.

...

(11) Information is, for the purposes of any determination under this section, commercially confidential, in relation to any individual or person, if its being contained in the register would prejudice to an unreasonable degree the commercial interests of that individual or person.” Environmental Protection Act 1990, section 22

<sup>20</sup> Freedom of Information Act, section 43

<sup>21</sup> Under section 106 of the Town and Country Planning Act 1990

public interest will not come second to the institutional interest of the council or the commercial interests of the developer. This may require access to information about the specific issues being discussed, *while those discussions are still taking place*.

- Some of the negotiations protected by exemption 9 may be taking place between the authority and arms length companies created and part controlled by it, or with a housing association created by it. In such circumstances the council is in effect negotiating with a semi-detached part of itself over services of fundamental importance to the community. In other cases the authority may be negotiating with another local authority for joint provision of a service. There should be a strong presumption that such information cannot be withheld under exemption 9.

These negotiations can be distinguished from more conventional negotiations over sale or disposal of property or land in which the overriding concern may simply be to secure the best price. When the exemptions were drawn up, in 1984, it was probably with such negotiations in mind. They may not be appropriate for negotiations involving service standards, where it may be essential that the public has detailed information about what is contemplated *before* binding contracts are settled. A public interest test, as proposed earlier, although helpful, may not be sufficient. A better solution would be a provision which explicitly removed specified types of information from the scope of these exemptions altogether, or which actively required their publication prior to the finalisation of contracts.

One of the results of CCT, and other measures introducing more commercial elements into local service delivery has been to make councils wary of disclosing information about their own in-house providers because private sectors competitors do not have to follow suit. This is damaging to public confidence in authorities' work as people find they are less able to obtain information from councils about *how* services are supposed to be delivered to them. In seeking a 'level playing field' authorities should require greater openness from private sector tenderers rather than 'levelling-down' their own levels of disclosure.

### **Legal advice**

Exemption 12 permits authorities to withhold not just legal advice but a wider range of other information. It goes well beyond the scope of what is normally protected by legal professional privilege. For example, it protects the advice received from *non-lawyers*, in relation to both legal proceedings and "any matter affecting the authority". The wide scope of this provision is a matter of concern, particularly as the schedule makes no qualification to it of any kind.

The powers to promote the "well-being of their area" granted to local authorities under section 2 of the Local Government Act 2000, and the limitations on those powers set out in

section 3, may lead to claims that a council's proposed course of action is *ultra vires* and a growing interest in the advice on the issue received by the authority. **We believe a test of harm is needed so that the authority may only withhold this advice when disclosing it could *prejudice* its legal position in any existing or likely legal proceedings. In addition, the phrase “the determination of any matter affecting the authority” is unclear and potentially excessive. We note that the Freedom of Information Act's exemption for legal professional privilege is subject to the section 2 public interest test, and believe that exemption 12 should also be subject to such a test.**

### **Political advice**

The regulations on access to information about executives<sup>22</sup> created a new exemption, not found in Schedule 12A, for the advice of party political advisers<sup>23</sup> or an assistant to the Mayor.<sup>24</sup> There is nothing to stop executives taking decisions solely on the basis of a report from these advisers. Even scrutiny committees are not allowed access to documents containing their advice. The Freedom of Information Act does not provide such absolute protection in this area, and any equivalent advice might have to be disclosed under the FOI Act's public interest test. A similar test should apply under the local government regime.

### **Interpretation**

The definition of 'the authority' given in paragraph 2 of Part III of the schedule is probably in need of updating to take account of the new executive arrangements. At present the regulations on access to executive decision information expressly rely on the exemptions in Schedule 12A. However, most of these exemptions make direct reference to 'the authority' and rely on the associated definition of "authority" in paragraph 2 of Part III. This would appear to exclude the new executive structures.

### **Appeals relating to exempt information**

The new access to information framework lacks an adequate appeal mechanism. The proposed five day notice period for access to papers would provide greater opportunity for people to study papers before meetings or decisions, making it more likely that any apparently unjustified use of an exemption will be challenged. The consultation paper notes some authorities have introduced their own arrangements for checking that exemptions have been properly used, and we welcome these.<sup>25</sup> Such a mechanism should be required of all authorities.

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<sup>22</sup> The Local Authorities (Executive Arrangements)(Access to Information) (England) Regulations 2000.

<sup>23</sup> Appointed under the Local Government and Housing Act 1989

<sup>24</sup> Appointed under the Local Government Act 2000

<sup>25</sup> Consultation paper, paragraph 2.2

The previous appeal mechanism reflects a structure in which councillors of both the ruling group and opposition are able to see reports before the meeting and can challenge any motion to exclude the public and thereby deny them access to the papers. Officers know that their recommendations as to exemption are liable to be questioned and that they must be willing to justify them in public. This will remain the situation for full Council meetings of principal councils, planning and licensing committees, scrutiny committees and authorities within the scope of Part VA of the 1972 Act whose decision-making arrangements were not altered by the Local Government Act 2000.

However, under the executive arrangements, it is likely that most decisions will be taken in a single-party cabinet, or by an individual councillor or officer.<sup>26</sup> Opposition members will not be involved. The existing formal opportunities to challenge exemptions will also be significantly reduced.

One option would be to make this an explicit responsibility of the relevant overview and scrutiny committee. At present, the scrutiny committee's chair must be sent a copy of a report relating to a decision to be taken by an individual executive member or officer. However, the chair is not explicitly required to circulate reports to every member of the committee. Reports only need to be circulated if there is *no* committee chairman.<sup>27</sup> It may not be practical to routinely circulate all such reports, but it needs to be clear that each individual scrutiny member is entitled to see them if he or she wishes. There should be explicit guidance to this effect.

We are not persuaded that executive members will adequately scrutinise the justification for taking any particular decision in private. If anything, an executive made up of a Mayor or councillors of a single party should be subject to greater scrutiny for its claims for secrecy rather than less. The fact that pre-decisional scrutiny is weaker in the case of collective decisions may even influence the level at which decisions of particular sensitivity are taken.

**As scrutiny committees are not empowered to check claims for exemption when a decision is to be taken collectively, an alternative is for the authority's monitoring officer to be given this function. Whichever route is adopted should be explicitly recognised in guidance and, preferably, in regulations.**

Reports which are withheld prior to an executive decision may nevertheless have to be disclosed under the Freedom of Information Act (eg on public interest grounds). However, the Act's 20 day response time, and complicated appeals procedure,<sup>28</sup> will normally be too slow to ensure that information is available *before* decision-taking meetings.

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<sup>26</sup> Access to papers and attendance of meetings taking these decisions is governed by the The Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000, S.I. 2000 No. 3272

<sup>27</sup> Regulation 9(3)

<sup>28</sup> Applicants must ask the authority itself to reconsider any decision under an internal complaints procedure before they are free to approach the Information Commissioner.

## **Appeals relating to ‘relevant information’**

The Regulations give additional rights of access to information to members of overview and scrutiny committees.<sup>29</sup> However these extra rights are also circumscribed by exemptions.<sup>30</sup> Members of the scrutiny committee are only allowed access to documents containing exempt or confidential information if that information is “relevant” to any action or decision they are reviewing or scrutinising, or which is “relevant” to any review contained in the programme of work of the scrutiny committee. Unfortunately, just as there is no framework for arbitrating claims for exemption, so there is also no mechanism in the Regulations for querying an officer’s decision on the ‘relevancy’ of the exempt material. If scrutiny committees are to be empowered to hold the executive and administration of the authority to account, it seems a little strange to leave officers deciding whether they can examine a document.

We also question the blanket nature of the same regulation’s prohibition on scrutiny committees’ access to the advice of a political adviser or assistant.<sup>31</sup> Since there is nothing stopping a member of the executive taking a decision solely on the basis of such political advice, we believe there is a case for access to this material in certain circumstances. If the record of an executive decision produced under Regulations 3 and 4 reveals that the decision was taken solely on the basis of political advice (rather than that of a professional officer of the authority), we believe scrutiny committees should be able to see such material which is relevant to an action or decision they are examining.

## **II. THREE CLEAR DAYS**

During the passage of the Local Government Act 2000 the Government accepted the Campaign’s suggestion that it should take powers to increase the period of advance public access to papers for forthcoming meetings. We welcome the proposal to now increase this period from 3 clear days to 5 clear days. We agree with the consultation paper’s view that this will help to improve the transparency and accountability of local government. We would go further and argue that doing so will benefit the administration of the council as a whole because:

- **Extended access to papers leads to a more informed public:** Although large numbers of the public may not take advantage of their rights on any given decision, different groups of people will be particularly interested in those decisions which directly affect them. With greater access, a more informed public will be better able to provide their knowledge and expertise to councillors, which will lead to better decisions.

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<sup>29</sup> Regulation 18

<sup>30</sup> Regulation 18(2) which needs re-typesetting to make sense.

<sup>31</sup> Regulation 18(2)(a)(ii) as presently printed. However this is an error in the typesetting, and it should actually be Regulation 18(2)(b)

- **Scrutiny committee members and backbench councillors** will be better able to give adequate consideration to the papers prior to decisions, to examine what impact the decision may have on their ward and therefore be better able to carry out their representative functions. Scrutiny committee members will be better able to check claims for exemption, and examine whether the proposed course of action is within the framework given by the full council to the executive.
- **Media coverage** - and hence public awareness of the authority's activities - is likely to be better if journalists have more time to read and report on what is proposed by a council. In many areas the local newspapers are published weekly and a 5 day period will increase the chance of these publications dealing with forthcoming matters.
- **Internal communication is improved:** Greater advance access to papers will require greater efficiency of information management within councils - a desirable goal in itself. Under the executive arrangements more decisions will be taken by individuals, creating new demands on information management. If the papers for their decisions are available for longer the likelihood of 'joined-up decision making' is increased, with officers and politicians in other departments better able to ensure the decision taker is aware of other relevant facts. This will be especially important for those 'key decisions' which arise between the monthly updating of a council's forward plan and which cannot be put off.<sup>32</sup>

It may be suggested that the introduction of 'forward plans' makes it unnecessary to increase advance access to officer reports. Although forward plans are an important advance, there are limits to what they involve. They apply only to key decisions, they require only limited information to be listed on the plan, and the advance publicity requirements apply only to matters within an executive's remit and to authorities operating executive arrangements. Reports to be considered by the whole authority, or by planning, licensing and scrutiny committees and by those authorities operating the 'traditional' Part VA arrangements still only need to be available three clear days in advance. Forward plans let people know what an executive is intending to do in the future but are no substitute for greater advance access to the actual report upon which the decision will be made.

As the consultation paper points out, there is also "a risk that some councils attempt to define more and more decisions as urgent in order to side step the new requirements". This is a real risk, although it may be more likely to come about through inefficient information management than an intention to frustrate the openness requirements. It is also a risk which will be balanced in the case of executives by the duty to submit a quarterly report to the authority on the decisions taken with less than three clear days notice under the urgency

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<sup>32</sup> The Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000, S.I. 2000 No. 3272, Regulation 15

provisions.<sup>33</sup> **These reports are a welcome advance and we recommend that a similar duty be placed on all authorities in relation to decisions taken by conventional committees or by the full council.**

The consultation paper also seeks views on when the change should be introduced. It seems to us that a sensible time would be at the time of the council elections in May 2002. This is likely to be when most executive arrangements will come into force, so changes in access to information will be occurring then in any case.

### **III. THRESHOLDS FOR KEY DECISIONS**

The public's rights to information were significantly improved when they were extended beyond matters dealt with at meetings to important decisions taken by individuals. However, the new regime also created problems over the definition of those 'key decisions'.

It is crucial to stress the implications of treating a matter as *not* being a key decision. In such cases:

- Where the decision is taken by officers, *there is no right of access to the papers and records* relating to the decision;<sup>34</sup>
- Where the decision is taken at an executive meeting, *the meeting can take place in secret* – even if no exempt information is involved;
- *The public will be unaware that a decision is to be taken* and will only learn of it after the event.

**We remain concerned at the freedom given to executives to meet in secret merely because they claim that the decision itself is not especially significant. Executives who act in secret where the information is not itself exempt may quickly bring themselves into disrepute. The public will inevitably suspect that important matters are being misclassified as 'non-key' to avoid publicity.**

We are also concerned at the absence of any advance notice or publication of papers for decisions which are not key decisions. No-one will be able to challenge an executive which proposes to treat a particular decision as a non-key decision – since no-one will know of the proposed decision until after it has been taken.

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<sup>33</sup> The Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000, S.I. 2000 No. 3272, Regulation 20

<sup>34</sup> The Freedom of Information Act will provide a retrospective right of access to this information, but will introduce new and different exemptions from disclosure and require the public to wait for significant periods while their request is determined.

In the unlikely event that the public do find out about it, two routes are available. The first, judicial review, is beyond most people's financial reach. The other is political pressure. However, an executive with a politically contentious matter to resolve will resist political pressure.

After the event it may face a scrutiny committee investigation into why the decision was not viewed as having 'significant' effects. But persuading a scrutiny committee to review the decision will take time, effort and resources. The lack of scrutiny over these decisions is likely to produce greater public disenchantment with the council's decision making process. It would be better all round to require executives to be more open in the first place.

**The Welsh Assembly recognised this danger in its draft regulations on openness and did away with the concept of 'key decisions'. We think the Government should follow suit in relation to meetings. If a decision is important enough to be discussed by the executive collectively it is axiomatically important enough for the public to be informed about it.**

### **The definition of a 'key decision'**

There are two tests for whether a decision is key. First, whether the decision will result in significant expenditure or savings being made. Second, whether the decision will have significant effects on the local community.

The consultation paper seeks views on how to define the financial thresholds for the first of these tests. The Government proposes to revise its statutory guidance to set out "indicative financial thresholds which match existing good practice".<sup>35</sup> It also believes that "rather than a single universal threshold, good practice examples included in the guidance will need to show a wide range of indicative thresholds to take account of the full scope of local authorities' services and functions".<sup>36</sup> Several examples are set out in the consultation paper in an attempt to clarify the matter. We fear they fail to do so.

### **The examples**

The first example questions whether a decision in which "the likely expenditure or savings resulting from decisions...are not clear-cut", should be defined as key.<sup>37</sup> The consultation paper cites the example of a change in the way decisions on housing benefit are processed:

"If a single financial threshold were set for the administration of housing benefit, some options are likely to incur expenditure or savings above the financial threshold set for

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<sup>35</sup> Consultation paper, paragraph 4.12

<sup>36</sup> Consultation paper, paragraph 4.15

<sup>37</sup> Consultation paper, paragraphs 4.17-4.18

the service, and others below. If there were a single simplistic threshold, the executive would need to consider whether it expects its decision to fall above the financial threshold set by the authority, and therefore to be a key decision.”<sup>38</sup>

We think this is misguided. If a decision involves, say, two options, one of which involves a substantial financial impact and the other involves no impact at all, *the decision should be treated as a key decision*. The question of which option is more likely to be selected is irrelevant. **Where an authority is considering a range of options, any one of which would be above the key decision threshold, the authority should treat the determination of that matter as a key decision.**

In the second example the Government questions why a decision to commission preliminary work on a new community centre should be a key decision if it merely implements, and necessarily follows from, a decision approved by the full council. But the question here should be, “Why *shouldn't* this decision be key?” In most cases, surprisingly little work would have to be done as a result of classifying this as a key decision:

- If the decision is taken by an officer, or individual executive member, or at a meeting of the executive taking place in private, there will be no requirement to prepare a report beforehand. The decision would merely have to be listed on the forward plan. Afterwards a statement of the reasons for the decision and alternatives considered and rejected will have to be produced. This is a minimal requirement that is in any case good administrative practice
- It is only where the decision is to be taken at a public meeting of the executive that there is a duty to produce a report. This must then be publicly available three clear days before the meeting.<sup>39</sup> We assume that any matter put before a meeting of the executive will in any case be accompanied by a report. The only difference, therefore, will be that this report will be bundled with the public reports instead of the private reports. Again any administrative burden will be negligible.

In any event, if the budget for the overall project is above the key decision threshold, then the manner of implementing the decision is an important part of project. The Government does acknowledge that the later decision to award the main contract would be a key decision, but the specifications contained in the invitation to tender will be defined by this preliminary work. The Government claims it is serious about wanting to encourage greater public participation in local government.<sup>40</sup> **It should recognise that the public must be involved from the start of a project, not just when a council feels it has defined the boundaries of**

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<sup>38</sup> Consultation paper, paragraph 4.18

<sup>39</sup> Regulation 10

<sup>40</sup> *Guidance on Enhancing Public Participation in Local Government*, Department of the Environment, Transport and the Regions, 30 October 1998

**the project to its own satisfaction.** Building a new community centre is a prime example of the need to ensure public participation from the outset. It is difficult to think of less persuasive example of a matter which should not be a key decision.

In the third example it is argued that the spending of a regeneration grant should not be a key decision because Government conditions attached to the grant may limit the authority's freedom to spend it. We disagree. Successive governments have urged greater public involvement in regeneration schemes, noting that 'top-down' regeneration rarely works and that successful projects involve the public from an early stage. Even if specific conditions are attached to the money, minor differences in the project's implementation can be extremely significant to the public. It is also not unheard of for one council department bidding to spend money to be completely unaware of an overlapping (or even contradictory) project being planned by colleagues in another department. Greater publicity for forthcoming decisions will help to ensure 'joined-up' government. We do not agree that this example makes the case for the 'moving target' financial threshold suggested in the consultation paper.

The only example we believe possibly supports a case for flexibility is the fourth. If Chief Finance Officers need to place large amounts of money on deposit overnight at short notice, this presumably cannot appear on an authority's Forward Plan. They would have to follow the procedures under Regulations 15 or 16 for key decisions taken at short notice. The chairman of the scrutiny committee would have to be notified of the intended decision, the notification made public and three days allowed before taking the decision. If that is impractical, all that is required is the agreement of the chair of the scrutiny committee that the decision is urgent and cannot reasonably be deferred.<sup>41</sup> That should not be an onerous condition, but if there are cases where it is then it should be waived for this specific and limited type of decision. Since large amounts of public money are involved, there obviously needs to be an adequate audit trail, so the post-decisional provisions of Regulation 4(4) should not be unreasonable.

Even the example of a decision to purchase a car for social services workers does not, in our view, undermine the case for a universal threshold.<sup>42</sup> As we have pointed out, there is no duty to produce a report on such decisions before hand, merely to list them on the forward plan and make an adequate record of the decision afterwards.

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<sup>41</sup> Or if they are not available, the agreement of the chairman or vice-chairman of the authority that the decision is urgent. Regulation 16.

<sup>42</sup> Consultation paper, paragraph 4.14

## **A multiplicity of thresholds**

We are not persuaded of the case for different indicative thresholds for different local authority services and functions. If they are adopted, they would have to be spelt out in the statutory guidance so the public can see if their authority is complying with them. However, if the Government also wants to permit variation between different types and size of authority, the list of thresholds will be a long one indeed. We believe it will lead to substantial and arbitrary variations between authorities. A decision to spend, say, £20,000 might be considered the threshold for a ‘key decision’ by one authority whereas it might be set at £100,000 by the adjacent authority - even in relation to provision of a similar service - simply because they sub-divide their budgets in different ways. **We believe that the requirement in the statutory guidance for authorities to “ensure that there is a consistency of openness between neighbouring local authorities at the same tier”<sup>43</sup> is meaningless and unenforceable: no mechanism is provided for ensuring compliance with this requirement.**

We find it difficult to believe such a complex morass of indicative thresholds will work, either for the local authorities themselves, or, more importantly, for the public who are supposed to be the beneficiaries of this new regime. Indeed the complexity threatens to undermine the simple principle that the citizen can obtain information because of its importance, not because of who is taking the decision.

Citizens’ rights should not vary across the country. The level of openness of local authority decision making should, as far as possible, be the subject of national standards, not local discretion. The only discretion should be to decide to adopt a more open regime than the nationally required minimum.

## **The formula approach**

We would prefer the Government to set a simple national threshold for a key decision. This could be done through a simple formula:

A decision is a key decision if it would involve incurring expenditure or making savings greater than –

(a) X % of the budget for the service to which the decision relates or;

(b) £Y,000,

whichever is the lower.

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<sup>43</sup> Local Government Act 2000: Guidance to English Local Authorities, 26/2/2001, paragraph 7.18

It may be helpful (but it is not necessary) to have different cash thresholds for different services, although this should be done under broad headings such as education, social services, leisure, and housing. Introducing different thresholds for functions below these headings would lead to unnecessary complexity and should be avoided.

We also accept that it may be helpful (although not necessary) to have different cash thresholds depending on the size of population served by the authority. Such bands of thresholds could be for authorities with populations up to, say, 85,000, between 85,000 and 170,000 and above 170,000.<sup>44</sup>

The Government should set the percentage and the absolute cash figure. The absolute cash thresholds could be periodically uprated by order, or annually in line with inflation. The percentages should apply across the board.

An alternative would be for the regulations to permit authorities to set the cash threshold within a relatively narrow band of cash sums. The Government would set a minimum percentage level across the country with local choice (and accountability) for each council when deciding for itself what cash value to choose within the relevant band.

#### **IV. SCOPE OF THE LEGISLATION**

There are now serious shortcomings in the scope of the local government access regime, with local government functions increasingly being carried out by bodies which are not subject to equivalent disclosure provisions.

##### **Partnerships, contracted out services, arms-length companies and quangos**

The consultation paper makes no reference to the proposal to give authorities the power to create new corporate structures to which they can delegate executive functions.<sup>45</sup> The Section 16 consultation paper also considers the possibility of legislating to create 'Public Partnership Boards' to which "authorities would be able to delegate functions".<sup>46</sup>

The access to information regime needs to reflect the fact that authorities themselves may no longer provide the services which they fund. In particular the scope of the openness regime must be extended to cover the boards of any new organisation created by an authority to deliver services, and to any council-service provider liaison meetings.

The consultation paper also fails to take account of the existing level of outsourcing of council services, the increasing number of quangos, and the extent to which decisions are

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<sup>44</sup> Coverage of a population of 85,000 is the threshold for requiring executive arrangements to be introduced by an authority. Local Government Act 2000, section 31

<sup>45</sup> Working with others to achieve Best Value: a consultation paper on changes to the legal framework to facilitate partnership working, DETR, March 2001, paragraph 3.4

<sup>46</sup> Working with others to achieve Best Value, paragraph 3.16

now taken by partnerships of which the Council is one of a number of public sector (and sometimes also private sector) members. We previously suggested to the Department that this issue should be explored in this consultation paper.<sup>47</sup> Management of the Education Authority, administration of Housing and Council Tax Benefit, provision of housing services and many other functions are now carried out by the private sector in some authorities under a regime which started with compulsory competitive tendering, was added to by the Deregulation and Contracting Out Act 1994, and has continued to grow with the introduction of 'Best Value' under the Local Government Act 1999. Councils are also members of Single Regeneration Budget partnerships and Health and Education Action Zones. These decide their own priorities for improving the local environment and economy, boosting employment, health and learning and then spend millions of pounds of public money in delivering these improvements, often in conjunction with the private sector. These bodies are not accountable to local electors in any meaningful way and conduct their business in private with no public access to the papers. The Government's accelerating programme of transferring ownership of housing from councils to housing associations replaces public scrutiny of housing management by tenants and councillors to private assessment by a national quango, the Housing Corporation.

It is not clear that the FOI Act will provide a remedy. There is no guarantee that contractors, future arms-length companies, partnerships and 'special purpose vehicles' will be brought within the scope of the Freedom of Information Act (although the powers to do so exist)<sup>48</sup>. It appears that bodies owned by more than one public authority, or which are partly owned by private companies, cannot be designated as a "publicly-owned company" under the Act.<sup>49</sup> Nor is the information they hold held "on behalf of" the authority and therefore covered by section 3(2)(b). Each separate partnership or company could be designated as a 'public authority' for the purposes of the FOI Act, but there is no indication that this is to be done. Moreover, the FOI Act is not likely to come into force for local authorities for almost two years (and does not have to come into force until 30 November 2005) and in any case deals only with access to documents, not with open meetings.

These gaps in the openness regime are wide and widening. Changes to legislation are necessary to close them. **The Government should urgently consider the best method to bring these bodies within the existing local authority openness requirements.**<sup>50</sup>

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<sup>47</sup> Letter to Paul Hoey, DETR, 2 October 2000

<sup>48</sup> Freedom of Information Act 2000, section 5(1)

<sup>49</sup> Freedom of Information Act 2000, section 6

<sup>50</sup> One possible route would be to designate the boards of all such organisations, and any council-service provider liaison committees, as committees of principal councils for the purposes of Part VA and Schedule 12A of the 1972 Act.

## Parish Councils

Parish, Town and Community Councils are outside the scope of 1972 Act's disclosure requirements, and continue to operate under the Public Bodies (Admission to Meetings) Act 1960, with its limited and poorly defined disclosure requirements. But the world has moved on for these bodies since then. The rural white paper<sup>51</sup> published in November 2000 proposed that some parish councils be designated as "quality" parish councils, particularly those 41 town and parish councils with a budgeted income of over £500,000 a year which are already 'best value parish councils'.<sup>52</sup> These will be able to undertake provision of a greater number of services, including some services which are presently provided by District Councils and subject to the 1972 Act.

In the white paper the Government states that, "Rural areas will benefit from more modern local government which contributes to a process of democratic renewal by ensuring that councils are accountable, *open and responsive to local needs*."<sup>53</sup> We agree. **All parish, town and community councils should be brought within the scope of 1972 Act's disclosure provisions. As a minimum, those parish, town and community councils which are designated as 'quality' councils, or whose income is sufficient to bring them within the scope of the Best Value regime, should be subject to these openness requirements.**

## Conclusion

We hope the Government will accept that in addition to the three issues subject to the present consultation further changes to the access to information regime for local authorities are needed. However, we are no longer convinced that series of individual amendments to what has become a fiendishly complex set of access rules is the best way to approach this. We believe there is a strong case for a new, free-standing piece of primary legislation providing for open meetings of a much wider range of public authorities and advance access to the papers for the decisions they propose to take. When the Government fulfils its commitment to review the access to information regime next summer it should take the opportunity to broaden and deepen the scope of the review to seek peoples views on this matter.

Yours sincerely,

Andrew Ecclestone  
Researcher

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<sup>51</sup> Our Countryside: the future. A fair deal for rural England. Cm 4909 November 2000

<sup>52</sup> Our Countryside: the future. A fair deal for rural England, paragraphs 12.2.2 and 12.4.7

<sup>53</sup> Our Countryside: the future. A fair deal for rural England, paragraph 12.4.2 (emphasis added)