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## Freedom of Information in Scotland

### Response to the Scottish Executive's consultation document on Freedom of Information

2 May 2000

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# **CAMPAIGN FOR FREEDOM OF INFORMATION**

## **Response to the Scottish Executive's Consultation Document on Freedom of Information**

May 2 2000

### **INTRODUCTION**

The Campaign for Freedom of Information warmly welcomes the Scottish Executive's proposals for a Freedom of Information (FOI) Act.<sup>1</sup> In a number of important areas these represent a significant advance on the weak Freedom of Information Bill currently going through the Westminster Parliament. However, in other areas, the Westminster bill's unhelpful approach has been retained.

We particularly welcome:

- The robust test of harm to be adopted in many exemptions, which will only allow authorities to withhold information if they can show that disclosure would '*substantially prejudice*' particular interests. This is a significant improvement over both the '*prejudice*' test in the UK bill and the '*harm*' test of the current openness code.<sup>2</sup>
- The fact that, in *some* (though not all) areas the Scottish Information Commissioner will have the final say on whether information should be disclosed in the public interest. Under the UK bill, such decisions would always be subject to a ministerial veto.

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<sup>1</sup> 'An Open Scotland. Freedom of Information: A Consultation'. Scottish Executive, November 1999, SE/1995/51

<sup>2</sup> Code of Practice on Access to Scottish Executive Information

- The fact that the broad exemption for policy information does not protect background factual information. Such information will normally be exempt under the UK bill.

**Unfortunately, the Scottish proposals also contain some of the Westminster bill's serious flaws:**

- all information within sweeping classes can be withheld, even if the specific disclosure would not cause harm. Much information about safety problems may fall within one of these classes.
- In these areas, ministers collectively could overrule the Commissioner and veto any order to disclose information in the public interest.

**The proposals represent a hybrid between the bold and the fearful. In many areas, the 'substantial prejudice' test, combined with the Commissioner's powers to order disclosure in the public interest, promise a remarkably powerful right of access, as good as that in any FOI law.**

**But in other areas, a bias against disclosure continues, even where disclosure would cause no harm. The 'class' exemptions, reinforced by the prospect of a ministerial veto, embody a strong presumption of secrecy.**

**These conflicting approaches will make the process of culture change more difficult. Some exemptions imply a norm of considerable openness with secrecy the exception. Others imply the direct opposite. Yet a single request may involve both types of exemption. Officials may have to switch their pro-disclosure disposition on and off as they move from paragraph to paragraph.**

Sometimes the conflicting philosophies will collide head-on. The exemption for a third party's commercial confidences with its 'substantial prejudice' provision is markedly pro-disclosure. Yet most information which might be disclosed under this test could be blocked under the sweeping class exemption for information supplied in confidence.

**We recognise that the consultation document represents a serious attempt to move beyond the limitations of the Westminster bill. However, the proposals do not go far enough. The most important change needed is to remove the class exemptions and replace them with harm-tested exemptions. Failing that, their scope should be significantly cut back. Such changes involve no risks to the quality of government in Scotland.**

**The second change would be to strengthen the Commissioner's power to apply the public interest test. The ministerial veto should be removed altogether, or at least made far more difficult to use. A purpose clause, highlighting the key objectives of promoting accountability, participation and informed public debate, would ensure that decisions on the public interest reflected these vital principles.**

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## SCOPE

The authorities to be covered by the Act are described in Annex A to the consultation document. Although this list is illustrative rather than exhaustive, it could be extended in a number of ways.

- The Act should apply not only to all Scottish authorities, but to all bodies over whom ministers or authorities exercise significant control through their power to make appointments, their shareholding or contractually.
- Although information about services provided under contract will be available we think this should be done by applying the Act *directly* to contractors – rather than by obliging requesters to obtain information via the authority responsible for the contract.<sup>3</sup>
- The UK bill permits private bodies carrying out public functions to be brought within its scope.<sup>4</sup> A similar provision should appear in the Scottish legislation.
- We note that the prospect of including the Scottish Parliament within the law’s scope is being considered.<sup>5</sup> We hope it will be included, given that the Westminster bill now extends to the Houses of Parliament and to the Welsh and Northern Ireland assemblies.<sup>6</sup>

## UNRECORDED INFORMATION

The Scottish legislation should provide a right of access to all information, including *unrecorded* information known to officials. The Scottish openness code already provides this,

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<sup>3</sup> The disadvantage of the latter approach is that much information held by the authority will have been supplied to it by the contractor in confidence, and will be protected from disclosure by the ‘in confidence’ exemption.

<sup>4</sup> Clause 4(1)(a)

<sup>5</sup> An Open Scotland, paragraph 2.6

<sup>6</sup> Freedom of Information Bill, Schedule 1, Part I

as does the New Zealand FOI law.<sup>7</sup> However, unrecorded information would *not* be available under the UK bill.<sup>8</sup>

The UK bill would permit officials to refuse to provide information which was common knowledge to those involved merely because it had not been recorded. This might involve the reasons for a particular decision, or the reasons why no action on a matter had been taken.

This may encourage officials to deliberately not record sensitive information, in order to avoid disclosure. Bringing such information within the Act's scope reduces this incentive.

As long as any duty to provide unrecorded information is subject to a reasonableness test (it clearly could not apply to matters which had taken place long ago, or where the officials involved were no longer in post) it should not present difficulties. There may be concerns about whether such a duty could be enforced: but it is unlikely that officials will attempt to deceive the Commissioner by claiming not to remember recent events.

## **DUTY TO ASSIST**

The proposals do not explicitly propose creating a *statutory duty* to assist applicants. Such a duty exists in most FOI laws, including those of Australia, Ireland and New Zealand.<sup>9</sup> The Irish Act treats this duty as of such importance that it is also specified in the long title.<sup>10</sup>

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<sup>7</sup> According to one commentator: 'One of the perceived advantages of not restricting a freedom of information regime to documents or records is that there is less incentive to attempt to evade the regime by not recording information in some form. On several occasions where no formal note of decision or of the preceding discussion has been made, the [New Zealand] Ombudsman in the course of his investigation under the Act, has asked one or more of the persons involved in the decision making process to provide a written account of what was said or the reasons expressed orally for reaching the decision.' R. Snell, University of Tasmania, [www.comlaw.utas.edu.au/law/foi/nz.html](http://www.comlaw.utas.edu.au/law/foi/nz.html)

<sup>8</sup> Clause 81 of the UK bill defines the 'information' to which a right of access exists as 'information recorded in any form'.

<sup>9</sup> For example, section 13 of New Zealand's *Official Information Act* states: "It is the duty of every Department, Minister of the Crown, and organisation to give reasonable assistance to a person, who-- (a) Wishes to make a request in accordance with section 12 of this Act; or (b) In making a request under section 12 of this Act, has not made that request in accordance with that section; or (c) Has not made his request to the appropriate Department or Minister of the Crown or organisation [or local authority],--to make a request in a manner that is in accordance with that section or to direct his request to the appropriate Department or Minister of the Crown or organisation [or local authority]."

<sup>10</sup> The long title of Ireland's *Freedom of Information Act 1997* describes it as 'An act to enable members of the public to obtain access, to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of public bodies and to enable

The UK Government has resisted any such provision in the Westminster bill, preferring instead to *encourage* authorities to assist applicants in accordance with a code of practice.<sup>11</sup> Failure to comply with the code could result only in a non-enforceable ‘practice recommendation’ by the Commissioner.<sup>12</sup>

A statutory duty to assist would make it more likely that (a) authorities would recognise and act on the duty, thus also contributing towards a change in culture (b) applicants would realise that they are entitled to assistance and challenge any failure to provide it (c) any obstructive behaviour by authorities towards applicants would become a matter for formal enforcement action.

## **DUTY TO PUBLISH INFORMATION**

Scottish authorities will be under a duty to produce ‘publication schemes’<sup>13</sup>, similar to those in the UK bill,<sup>14</sup> a valuable provision. These schemes will replace the existing proactive disclosure requirements of the openness code. Under the UK bill, it appears that some of the code’s existing publication requirements could be weakened or even lost. These include the duty to give individuals reasons for decisions affecting them; the duty to publish internal guidance (a provision also found in virtually all FOI laws) and the duty to publish the facts and analysis underlying major policy decisions. The Scottish legislation should explicitly restate these requirements.

Authorities should be required to allow public access to any existing indexes to their records, where this can be done without disclosing exempt information.

Copies of records released under the Act should be indexed and made publicly available - not just supplied to the requester. This could be done by placing copies in a ‘reading room’, though it would be preferable to publish them on the Internet. This would ensure that the

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persons to have personal information relating to them in the possession of such bodies corrected and, accordingly, to provide for a right of access to records held by such bodies, for necessary exceptions to that right and *for assistance to persons to enable them to exercise it...*’

<sup>11</sup> Clause 44(2)(a)

<sup>12</sup> Clause 47

<sup>13</sup> An Open Scotland, Para 2.16

<sup>14</sup> Clause 17

public generally benefited from what was disclosed. This may be important where the requester has not been able to make public use of the information, perhaps because it arrived too late, or because it was too complex for the requester to handle or because he or she lacks the means to disseminate it publicly.

Publishing disclosed information in this way would also illustrate to potential users the kind of information that is disclosable; providing insight into the practical use of the legislation.

It will also reduce authorities' costs, as applicants will be able to download previously disclosed information from the Internet without troubling the authority.

## **EXEMPTIONS**

The right of access would be subject to a series of exemptions. These are divided between '*harm tested*' exemptions, which apply only if disclosure of the information in question would cause harm and *class exemptions* which apply to entire classes of information regardless of whether disclosure would cause harm.

The following two lists identify the two types of exemption

### **Harm test exemptions**

Information in the following areas would be exempt only if disclosure was likely to cause harm – in most cases by 'substantially prejudicing' the interest in question.<sup>15</sup>

*Security or defence*

*International relations*

*Factual background to policy formulation*

*Prevention or detection of crime*

*Apprehension of offenders*

*Administration of justice*

*Prison security*

*Regulatory functions*

*Accident investigations*

*Protecting the health & safety of workers or the public*

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<sup>15</sup>Exemptions marked (\*) are in fact harm-tested exemptions though were described in the consultation document as class exemptions.

*Protecting charities against misconduct*  
*Civil proceedings relating to regulatory functions*  
*Immigration controls\**  
*Management of the economy*  
*Tax collection*  
*Competitive position of the authority*  
*Negotiations*  
*Efficient conduct of an authority's operations*  
*Vexatious or manifestly unreasonable requests\**  
*Requests involving unreasonable diversion of resources\**  
*Information to be published*  
*Invasion of privacy\**  
*Third party's commercial confidences*  
*Prejudice to the future supply of information*

### **Class exemptions**

Information within these classes would be exempt regardless of whether disclosure would cause harm

*Information in confidence from foreign governments*  
*Information relating to policy formulation*  
*Communications between ministers or between departments or public bodies*  
*Cabinet and ministerial committee proceedings*  
*Law officers advice*  
*Information about ministers' private offices*  
*Communications with the Royal Household*  
*Investigations*  
*Informants*  
*Discussions with legal advisers*  
*Fatal accident inquiries*  
*Public appointments & honours*  
*Information about companies and products held in connection with research, statistics or safety surveillance*  
*In confidence information*  
*Information whose disclosure is prohibited by law*

## **Substantial prejudice**

We welcome the proposal that authorities seeking to withhold information would have to show that disclosure would cause ‘substantial prejudice’. This reasserts the ‘substantial harm’ test of the UK white paper of December 1997,<sup>16</sup> from which the UK Government later retreated. The Public Administration select committee in the House of Commons<sup>17</sup> and an ad hoc select committee of the House of Lords<sup>18</sup> both called for the UK bill’s ‘prejudice’ test to be replaced by a test of ‘substantial prejudice’. The UK government has refused to do so, but we are delighted that the Scottish Executive has adopted this standard.

**We agree with the consultation document’s view that it is ‘demanding’ test.<sup>19</sup> It will be a powerful indicator, both practically and symbolically, that the public is to have a vigorous right to information and that a major shift in culture to accommodate it is required.**

**The consultation document states that the substantial prejudice test will require that ‘the prejudice caused by disclosure would be real, actual and of significant substance’.<sup>20</sup> This definition must appear on the *face* of the legislation.**

UK ministers have used a similar (though far less rigorous<sup>21</sup>) formulation to indicate how they would expect the courts to interpret the UK bill’s *prejudice* test, but have refused to incorporate it into the bill.

## **Class exemptions**

**We are disappointed at the large number of class exemptions proposed. These allow information to be withheld even if the particular disclosure cannot be shown to be harmful.**

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<sup>16</sup> Your Right to Know, Cm 3818

<sup>17</sup> Public Administration select committee, session 98-99, HC 570, paragraph 71

<sup>18</sup> Report from the select committee appointed to consider the draft Freedom of Information Bill, session 1998-99, HL 97

<sup>19</sup> An Open Scotland, Para 4.11

<sup>20</sup> An Open Scotland, Para. 4.11

<sup>21</sup> The Home Secretary has said that he regards the term ‘prejudice’ as meaning that ‘the prejudice has to be real, actual or of substance’. HC *Debates*, 24/5/99, col 26

**They reflect part of the Westminster bill’s deeply unhelpful approach to freedom of information.**

**The consultation document maintains that in these areas ‘disclosure would normally result in substantial prejudice to the interest in question’.<sup>22</sup> We do not agree. These exemptions clearly include much information that could be disclosed without harm. These class exemptions should be amended to incorporate tests of harm.**

## **INTERNAL DISCUSSION**

The most significant group of class exemptions appears under the heading ‘internal discussion and advice’. These would exempt all information relating to (a) the formulation or development of policy (b) communications between ministers or between public authorities (c) proceedings of cabinet and ministerial committees (d) Law Officers’ advice (e) the operation of any Ministerial private office.

### **Factual information**

Unlike the UK bill, factual information relating to policy discussions is excluded from the class exemption and subject instead to a test of ‘substantial prejudice’ to collective responsibility or the frankness of discussion, advice or exchange of views. This is a welcome improvement on one of the UK bill’s most unacceptable features.

### **Non-factual information**

**However, we do not accept that other information relating to policy discussions needs the protection of a *class* exemption. This implies that disclosure will always be harmful. In fact it may be beneficial and lead to more informed debate or better public understanding of complex decisions, reassure the public that issues have been thoroughly examined or expose weaknesses in official thinking to informed scrutiny. The prospect of such scrutiny may itself ensure greater rigour in analysis.**

**Under the existing code, policy information is disclosable subject to a harm test; that is, whether its disclosure would ‘harm the frankness and candour of internal discussion’.<sup>23</sup>**

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<sup>22</sup> An Open Scotland, Para 4.9

<sup>23</sup> Code of Practice on Access to Scottish Executive Information, Exemption 2

**This approach should be retained. The Scottish Freedom of Information Act should not lead to a more restrictive approach than the non-statutory code it replaces.**

**The Cabinet Office’s background material to the 1997 white paper explicitly acknowledged that ‘not all advice is sensitive’.**<sup>24</sup> The white paper itself proposed that internal discussion should be available if disclosure would not cause ‘simple’ harm (ie a less demanding test than the normal ‘substantial harm’ test).<sup>25</sup>

Evidence that some advice can be disclosed without harm includes:

- The 1994 decision to publish the minutes of meetings between the Chancellor of the Exchequer and the Governor of the Bank of England after 6 weeks, an approach now continued (after an interval of only 2 weeks) in the publication of the minutes of the Monetary Policy Committee.<sup>26</sup>

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<sup>24</sup> The Cabinet Office material states: “two possible ways forward which take account of the fact that not all advice is sensitive...might be:

(A) Narrow exclusion with a purpose-built harm-test beyond that. This would involve a narrowly-based total exclusion perhaps on the lines of the “Cabinet confidences” exclusion which exists - uniquely - in the Canadian legislation...For other policy advice and consideration (more broadly drawn) there would then be a more widely-based harm test than for other specified interests, involving not only scrutiny for “contents” damage, but also requiring those determining harm to “have regard” to such considerations as the public interest in preserving privacy in matters affecting or likely to endanger the collective responsibility of Ministers, the anonymity and non-political status of officials, and the integrity of the advice processes of Government. This would allow disclosure of, for example, technical or professional advice on health, safety or environmental matters, or analytical papers not containing advocacy or advice.

(B) Specific “contents” harm-test, and purpose-built public interest override. This course would dispense with an absolute exclusion and would rely on a harm-test related to specific “contents” damage which would result (e.g. to national security) from disclosure, but with a public interest override “having regard” (as in the wider harm test described in (A) above) to collective responsibility, anonymity and non-political status of officials and the integrity of the advice process. The disclosure pattern would be broadly as for A, but with more risk of higher-level policy papers emerging into the public domain, particularly on appeal to a commissioner or the courts.” *Cabinet Office. ‘Your Right to Know – Background Material’, January 1998, paragraph 111.*

<sup>25</sup> Your Right to Know, Cm 3818, para 3.12

<sup>26</sup> The publication of these minutes involves the disclosure of advice at the highest level, on an issue of particular sensitivity. It was originally feared that the minutes would be so bland as to be meaningless, or alternatively, would damage decision-making by revealing serious differences of opinion. Neither concern has been borne out. The practice is generally accepted to have been successful in enhancing public confidence in and understanding of the basis for interest rate decisions, without discouraging frank and sometimes potentially embarrassing exchanges of views.

According to the Deputy Governor of the Bank of England: “The whole process is systematic and transparent in a way that would have been unthinkable only ten years ago....Fears that divided votes

- The decision that public interest immunity (PII) would not in future be claimed for policy advice on a class basis. Following the Scott report, the government announced that PII should only be sought where disclosure would cause ‘real damage’ or ‘serious harm’.<sup>27</sup>
- The *Food Standards Agency* has been given explicit statutory authority to publish its advice to ministers.<sup>28</sup> The *Advisory Committee on Pesticides* has decided to publish its minutes including its advice to Ministers and to release a separate detailed attributable record of its members’ contributions to the discussions.<sup>29</sup> The advice of the *Director General of Fair Trading* to the Trade & Industry Secretary on mergers is also to be made public.<sup>30</sup>
- The practice under some FOI laws of revealing advice *after* decisions have been taken. The approach is well-established in New Zealand. According to one New Zealand agency head: “*One aspect of some of the overseas debates on freedom of information appears to be that openness will somehow hinder the efficiency and effectiveness of government. This argument has not featured strongly in New Zealand: rather the question has been how openness can contribute to greater effectiveness. The effectiveness of government is a much wider issue than whether the processes run smoothly and make life easy for ministers and public servants.*”<sup>31,32</sup> A similar approach is now being adopted under

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would undermine the credibility of the Committee have proved unfounded. Differences of view there have been. Over the past two years – 24 meetings in total – there have been only 4 occasions when the Committee has been unanimous. But explaining openly to the public the nature of the uncertainties and difficulties in judging the appropriate level of interest rates has proved successful. Indeed, it has added credibility to the nature of the process.” *Mervyn King, Address to the joint luncheon of the American Economic Association & the American Finance Association, Boston Marriott Hotel, 7/1/00*

<sup>27</sup> The former Attorney General, Sir Nicholas Lyell stated: “Under the new approach, Ministers will focus directly on the damage that disclosure would cause. The former division into class and contents claims will no longer be applied. Ministers will claim public interest immunity only when it is believed that disclosure of a document would cause real damage or harm to the public interest...”

The new emphasis on the test of serious harm means that Ministers will not, for example, claim PII to protect either internal advice or national security material merely by pointing to the general nature of the documents. The only basis for claiming PII will be a belief that disclosure will cause real harm.” *Hansard 18/12/96, cols 949-950.*

<sup>28</sup> Food Standards Act 1999, section 19(1)(a)

<sup>29</sup> Pesticides Safety Directorate, ‘Open Procedures for the Advisory Committee on Pesticides’, 22/3/00

<sup>30</sup> ‘A New Era in Competition’. Speech by Stephen Byers, Social Market Foundation, 28/2/00

<sup>31</sup> *Judith Aitken, Chief Executive of New Zealand’s Education Review Office, In: A McDonald & G Terrill, eds ‘Open Government, Freedom of Information and Privacy’ Macmillan, 1998, page 136*

Ireland's 1997 Freedom of Information Act.

- Minutes of Welsh cabinet meetings are now published on the Internet after six weeks. The first set appeared at the end of April 2000,<sup>33</sup> unedited, apart from information supplied in confidence by third parties.<sup>34</sup> The Welsh First Secretary, Rhodri Morgan, has indicated that other policy information, including advice, will be published unless there 'is a strong likelihood of substantial harm' being caused.<sup>35,36</sup>

**The Welsh initiative, in particular, represents a far-reaching challenge to the traditional assertion that any disclosure of advice is bound to be damaging. By the time the Scottish legislation is introduced, there should be significant practical experience of the release of policy information in Wales. We hope the Scottish Executive will monitor this experience carefully, and be prepared to modify its own proposals in light of it.**

In our view there is already plenty of evidence to indicate that a class exemption in this area is unnecessary. Policy related information should be available subject to a harm test. If necessary, the test for such information might be reduced from 'substantial prejudice' to 'prejudice'.

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<sup>32</sup> The Ombudsman, who enforces New Zealand's FOI law, has set out some of the considerations which are taken into account in deciding whether policy information should be released. "Some factors which an Ombudsman may consider as relevant include:(i) the policy and/or decision-making process to which the information relates; (ii) Whether the process is completed and, if not, what stage it has reached; (iii) Whether the information in question is still under consideration and, if not, what decisions have been made in relation to it; (iv) Whether the concern expressed by the holder of the information relates to the content of the information or the context in which it was generated or supplied; (v) The effect which disclosure of the information would have had at the time of the decision on that or any other policy and/or decision-making process; (vi) The extent to which, if any, the topic in question is already in the public domain.' *Tenth Compendium of Case Notes of the Ombudsmen. Office of the Ombudsman. Wellington. April 1993.*(31)

<sup>33</sup> 26/4/00, [www.assembly.wales.gov.uk/cabinet/minutes/cabinetminutes\\_e.html](http://www.assembly.wales.gov.uk/cabinet/minutes/cabinetminutes_e.html)

<sup>34</sup> Press Association, 26/4/00 'Welsh Assembly becomes first to publish details of cabinet meetings', [www.pa.press.net/news/story/politics\\_welsh-assembly\\_115386.html](http://www.pa.press.net/news/story/politics_welsh-assembly_115386.html)

<sup>35</sup> National Assembly of Wales, Press release, 'Greater Openness at the Assembly – Rhodri Morgan', 13/3/00

<sup>36</sup> A Press Association report stated 'Along with the minutes of all future Assembly Cabinet meetings, background briefing documents, correspondence and official advice will all now be made publicly available, either through the press or on the internet'. *Welsh Assembly becomes first to publish details of cabinet meetings.* 26/4/00, [www.pa.press.net/news/story/politics\\_welsh-assembly\\_115386.html](http://www.pa.press.net/news/story/politics_welsh-assembly_115386.html)

## **Distinguishing between facts and advice**

The consultation document suggests that the class exemption will apply to ‘Information relating to the formulation or development of policy’.<sup>37</sup> This definition is unacceptably broad. A footnote indicates this is intended to apply only to ‘internal opinion, recommendation, consultation and deliberation’. It should be explicitly drafted in such terms (preferably with a harm test). The Australian exemption provides one model.<sup>38</sup> On the face of it, such a definition might not include purely factual information in the first place.

The information that is excluded from the scope of the class exemption should not be limited to purely factual data, but should include:

- the *analysis* of factual information. Such information is excluded from the policy exemption under Ireland’s FOI Act.<sup>39</sup>
- *expert scientific, technical and other advice* – such material is excluded from the policy exemption in the Australian,<sup>40</sup> Irish<sup>41</sup> and Queensland<sup>42</sup> FOI laws.

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<sup>37</sup> An Open Scotland, Annex C, ‘Internal discussion and advice’

<sup>38</sup> Section 36(1) of the Freedom of Information Act 1982 [Australia] states: ‘36. (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act: (a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and (b) would be contrary to the public interest.’

<sup>39</sup> Section 20(2)(b) of the Freedom of Information Act 1997 [Ireland] excludes from the corresponding exemption ‘a record in so far as it contains...factual (including statistical) information and analyses thereof’.

<sup>40</sup> Section 36(6)(a) of the Australian Freedom of Information Act 1982 excludes from its policy exemption: ‘reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters’.

<sup>41</sup> Section 20(2)(e) of the Irish Freedom of Information Act 1997 excludes from its policy exemption: ‘a report, study or analysis of a scientific or technical expert relating to the subject of his or her expertise or a report containing opinions or advice of such an expert and not being a report used or commissioned for the purposes of a decision of a public body made pursuant to any enactment or scheme’.

<sup>42</sup> Section 41(2)(c) of the Freedom of Information Act 1992 [Queensland] excludes from the policy exemption: ‘expert opinion or analysis by a person recognised as an expert in the field of knowledge to which the opinion or analysis relates.’

- *Other information* – a variety of other exclusions can also be found. The British Columbia act provides the narrowest exemption, and the most comprehensive list of exclusions.<sup>43</sup>

Note that in all these overseas cases, the material which is excluded from the policy advice exemption is not subject to any further test of harm (as would be the case under the Scottish proposals).

**If the Scottish Act is to retain a harm-tested exemption for such material, it should be accompanied by the transfer of a substantial amount of less sensitive information from the class exemption into this category. In particular, the post-decisional disclosure of options and their analysis should be permitted, subject to the substantial prejudice test.**

### **Policy information: other considerations**

In two respects, the proposed policy formulation exemption is *broader* than the equivalent UK provision:

(1) *The policy exemption would not be limited to the Scottish Executive but would apply to all Scottish authorities.* The UK bill's class exemption applies only to *government departments*. A slightly less restrictive (though nevertheless unsatisfactory) test applies to other authorities.<sup>44</sup> The

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<sup>43</sup> Section 13 of the Freedom of Information and Protection of Privacy Act 1992 [British Columbia] reads in full as follows:

13 (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

(2) The head of a public body must not refuse to disclose under subsection (1) - (a) any factual material, (b) a public opinion poll, (c) a statistical survey, (d) an appraisal, (e) an economic forecast, (f) an environmental impact statement or similar information, (g) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies, (h) a consumer test report or a report of a test carried out on a product to test equipment of the public body, (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body, (j) a report on the results of field research undertaken before a policy proposal is formulated, (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body, (l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body, (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

(3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.'

<sup>44</sup> Clause 34 of the Westminster bill. This requires that, in the 'reasonable opinion' of a 'qualified person' (a minister or senior official) disclosure would be likely to prejudice collective responsibility, the frankness of advice or exchange of views or the effective conduct of public affairs. The reference to 'reasonable opinion' means this test is largely immune from challenge by the Information

class exemption should not be extended to all public bodies.

(2) The class exemption applies not just to discussions *within* an authority but also to discussions *between different authorities*. In the UK bill, these are subject to a separate, arguably slightly less restrictive exemption, for information subject to a legal obligation of confidentiality.<sup>45</sup>

### **Communications between ministers or between public bodies**

**The class exemptions for ministerial communications and confidential communications between departments or public bodies is unnecessary and should be dropped in favour of a harm-test exemption.**

This exemption presumably refers to communications *not relating to* policy (as these are caught by the previous exemption). But communications dealing with procedural or administrative matters certainly do not require protection as a class, even if they involve ministers. **The first published Welsh cabinet minutes are full of such exchanges, and their publication contradicts any suggestion that all such disclosures are by definition harmful.** This information could be dealt with under the substantial prejudice test instead.

### **Ministerial private offices**

**A class exemption for all information about the operation of a minister's private office cannot be justified.** It would allow ministers to refuse to disclose the numbers of staff in their office, or to explain why correspondence from the public had not been answered. A minister might claim that a sudden crisis could not have been anticipated, while concealing the fact that advance warning had been received by in the private office but not acted upon. A harm-test exemption should be sufficient.

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Commissioner, unless the opinion is irrational or perverse – an option we hope will not be followed in Scotland.

<sup>45</sup> Clause 39 of the Westminster bill. Some confidential discussions between authorities (which would be caught by the Scottish exemption) will not involve information subject to a legal obligation of confidentiality and would therefore not be caught by the clause 39 exemption. The comparison is not straightforward. Information covered by the UK exemption is subject to a narrower public interest test (ie one that is less favourable to disclosure). But ministers could not veto this public interest test.

### **Duty to confirm or deny**

Almost every exemption in the UK bill is accompanied by a provision permitting authorities to refuse to confirm or deny the existence of requested information. For harm-tested exemptions, authorities do not have to confirm the existence of information if doing so would itself cause the harm in question. But for *class exemptions*, such as those for policy information and investigations, there is *never* any duty to acknowledge whether information exists – regardless of whether to do so would cause harm. We hope the Scottish legislation will avoid any such provision.

## **INVESTIGATIONS**

A class exemption for investigations is proposed, apparently on the lines of that in the UK bill. Information which is or at any time has been held by the police and Procurator Fiscal in connection with particular investigations would be exempt, regardless of whether disclosure could prejudice legal proceedings or law enforcement. Information relating to investigations or inspections by other bodies with duties to investigate potential offences, including trading standards and environmental health officers, would also be exempt.

**Information collected during routine inspections relating to consumer protection, environmental health or public safety matters would be withheld under this provision, even where there is no question of a prosecution being brought. The exemption would apply indefinitely, even after any prosecution was over.**

**The exemption will deprive the public of information about safety problems and the adequacy of authorities' response to them. This is the kind of information most people will assume an FOI Act exists to provide. Any such blanket provision is likely to undermine public confidence in the legislation.**

The proposed public interest test would provide possible grounds for disclosure in certain cases. However, it is not an adequate solution. The legislation should require the disclosure of such information unless the *authority* can show that it would be harmful. To have to rely on the public interest test is to accept that such information should normally be secret, and that exceptions should be made only if the *applicant* can demonstrate an overriding case for disclosure.

This approach will apply under the UK bill to bodies such as the Health & Safety Executive (HSE), which also operate in Scotland. However, the HSE's Director General, Jenny Bacon, has made clear that it regards the approach as excessive. She told a House of Commons select committee: *'We note that [the provision] is a class exemption. The [Health & Safety] Commission feel that in respect of health and safety matters a prejudice tested exemption would provide sufficient protection for these matters.'*<sup>46</sup>

Information held by the police, which might indicate that they had ignored evidence of serious crime, or failed to follow up important leads, would also be exempt. The evidence which revealed the inadequacy of the investigation into the murder of Stephen Lawrence would all be exempt as a result. The Macpherson report into the police inquiry explicitly rejected any class exemption for police information.<sup>47</sup>

This exemption should be amended so that it applies only where disclosure would jeopardise legal proceedings or the conduct of the investigation. An alternative would be to retain the class exemption so long as an investigation was 'live' but require disclosure subject to a harm test once a final decision not to bring charges has been taken, or any proceedings have been concluded. This appears to be the approach proposed for information relating to fatal accident inquiries, where a class exemption would apply 'until the conclusion of the proceedings'.<sup>48</sup>

### **Other law enforcement information**

Information about the police and regulatory authorities which does not relate to particular investigations would be disclosable subject to a test of 'substantial prejudice' to law enforcement or the administration of justice. We welcome the intention to apply this demanding test in these areas.

Some of the subsidiary exemptions under the 'law enforcement' heading appear redundant. We do not think it necessary to provide specific exemptions for disclosures which would substantially prejudice accident investigations, the protection of workers' health and safety or the safety of others affected by work activities. These matters are adequately protected by an

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<sup>46</sup> House of Commons Public Administration select committee. HC 570-II, Q. 826

<sup>47</sup> The Macpherson report stated: 'we consider it an important matter of principle that the Police Services should be open to the full provisions of a Freedom of Information Act. We see no logical grounds for a class exemption for the police in any area'. *The Stephen Lawrence Inquiry, CM 4262-I, February 1999, paragraph 46.32*

<sup>48</sup> An Open Scotland, Annex C, page 78

exemption for disclosures which prejudice an authority's functions for ascertaining whether any person has failed to comply with the law.

## **COMMERCIAL AND CONFIDENTIAL INFORMATION**

### **An authority's competitive position**

One of the areas where the substantial prejudice test is likely to have the greatest impact is in preventing public authorities casually claiming that disclosures about public expenditure, particularly on contracts, would undermine their own commercial interests. Here the advantage of the Scottish proposals over the UK bill are clear:

- An authority subject to the UK bill would be able to withhold information if disclosure would 'prejudice' its own commercial interests.<sup>49</sup> A Scottish authority would have to demonstrate 'substantial prejudice'.
- Both the UK and the Scottish Information Commissioners could require authorities to disclose such information in the public interest. The UK Commissioner's decision, however, could be vetoed by ministers. The Scottish Commissioner's decision could not be overruled.

### **Third parties' commercial interests**

On the face of it an equally rigorous test applies to claims for commercial confidentiality by third parties. An exemption would apply to:

'information including commercial confidences, trade secrets or intellectual property whose unwarranted disclosure would substantially prejudice the competitive position of a third party'.

This is broadly comparable to the equivalent exemption under the US Freedom of Information Act, which applies to disclosures which "*would cause substantial harm to the competitive*

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<sup>49</sup> Clause 41(2)

*position of the person from whom the information was obtained”*.<sup>50</sup>

**However, the value of this exemption will be undermined by the class exemption for information ‘in confidence’.**

### **Information in confidence**

The consultation document proposes to retain the code’s class exemption for information in confidence. There are effectively *three* separate exemptions, for:

- information given in confidence under a statutory guarantee of confidentiality. (This exemption is in fact redundant, as a separate exemption protects all information whose disclosure is prohibited by statute.)
- information supplied in confidence voluntarily by a person who has not consented to its disclosure.
- information whose disclosure would substantially prejudice the future supply of information. This is the only of the three exemptions with a harm test.

Between them, these exemptions provide a virtually impregnable barrier to access. They are if anything slightly broader than the corresponding UK bill’s exemption<sup>51</sup> (although we do not advocate the UK exemption as a solution).<sup>52</sup> The second exemption in particular would permit a third party to ensure that any information it supplied was exempt merely by indicating that it was being supplied in confidence

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<sup>50</sup> National Parks and Conservation Association v Morton (I) 498 F 2d at 770 (D.C. Cir 1974)

<sup>51</sup> The UK exemption only applies to information which is subject to a legally binding obligation of confidentiality. This would exclude trivial information and information which was already in the public domain – both of which could be caught by the proposed Scottish test. This is nevertheless far from being a demanding test since all that is needed for an obligation of confidentiality to arise is an implicit agreement between the supplier and the recipient of the information that it is given in confidence. Not all information apparently supplied ‘in confidence’ will be subject to a legal obligation of confidentiality. However, the drawback of the UK exemption is that it carries with it the relatively narrow common law ‘public interest’ defence to an action for breach of confidence. This is likely to be more restrictive than the test available under the proposals.

<sup>52</sup> Partly because the UK exemption would be subject to the common law public interest defence to an action for breach of confidence. This tends to focus on misconduct or danger to the public rather than the wider interest in more accountable government. The Scottish exemption would be subject to the Scottish Act’s public interest test which should give greater priority to the public interest in accountability.

**Virtually all third party information which could *not* be withheld under the ‘commercial confidentiality’ exemption *could* be withheld under this exemption. The fact that disclosure would not harm a company’s competitive position will be irrelevant.**

**Where disclosure was mutually inconvenient, to an authority and an outside body, they could circumvent the Act by agreeing that information supplied was ‘in confidence’. This could conceal lobbying or special pleading by commercial interests, over policy decisions., license or other applications or enforcement of regulatory requirements.**

This exemption should be subject to a harm test. The test should be whether disclosure would *substantially prejudice the authority’s work by depriving the authority of similar information in future*. This would in effect merge the second and third of the three exemptions.

**The revised exemption should only apply if (a) information had been supplied in confidence after the Act’s commencement (b) the authority lacked the power to compel its supply (c) the supplier had not other overriding incentive to supply it (e.g. to support a license application, or dissuade an authority from prosecuting) (d) disclosure would deprive the authority of similar information in future, and (e) this would substantially prejudice the authority’s work.**

There are sound precedents for overriding the normal approach to ‘in confidence’ information, for example, in the Data Protection Act 1998<sup>53</sup> and in the Food Standards Act 1999.<sup>54</sup>

This would make it clear that the ‘in confidence’ exemption exists to protect the *authority’s* interests in receiving information which it needs but cannot compel. The interests of the *supplier* of the information would be protected by the ‘commercial confidentiality’ exemption.

In addition:

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<sup>53</sup> The right of access under the DPA contains no exemption for information supplied in confidence.

<sup>54</sup> Under the Food Standards Act, the Food Standards Agency has wide powers to obtain information about food premises or businesses and to publish any information which it holds, whatever its source, in pursuit of its functions. These include providing information to assist the public in making ‘*informed decisions about food*’ [Food Standards Act 1999, s.7(2)]. In doing so, the agency must ‘*consider whether the public interest in the publication of the advice or information in question is outweighed by any considerations of confidentiality attaching to it.*’ [s 19(4)] The formulation of this provision indicates that the agency is not restricted by a common law obligation of confidentiality.

- Where information is accepted in confidence, this should be explicitly confirmed in writing. This would help to avoid circumstances in which one party, but not the other, assumed the communication had been in confidence.
- if a request for ‘in confidence’ information is received, the authority should be required to ask the person who supplied it for their consent to disclosure. Information which may have regarded as highly sensitive at the time it was provided, may no longer be so (eg because a negotiation has been completed) and the supplier may agree to its disclosure. A refusal of consent might be valid for, say, six months or a year, so that the exercise would not have to be repeated time after time for frequently requested information.

## **STATUTORY RESTRICTIONS**

Another exemption would apply to information whose disclosure is prohibited by statute. Some 250 of these statutory restrictions were identified in 1993, many of them UK-wide.<sup>55</sup> The UK Government’s approach is that such statutory restrictions will take precedence over the UK bill’s right of access. Existing restrictions are being reviewed with a view to repealing those considered unnecessary.

The Scottish Executive might consider two alternative approaches:

- for the right of access to take precedence over any statutory restrictions. A precedent can be found in the Data Protection Act’s right of access to personal files, which overrides all other restrictions.<sup>56</sup> A similar approach was advocated in Australia by the Australian Law Reform Commission<sup>57</sup>

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<sup>55</sup> These were listed in the ‘Open Government’ white paper of July 1993, Cm 2290

<sup>56</sup> Data Protection Act 1998, section 27(5)

<sup>57</sup> The ALRC said: “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 within 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.” *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*

- to allow the restrictions to be overridden by the FOI Act's public interest test. That is, information whose disclosure is prohibited by law would be disclosable on public interest grounds. This approach was adopted under Queensland's Freedom of Information Act.<sup>58</sup>

## **PRIVACY**

The consultation document proposes to retain the code's privacy exemption, for disclosures which could facilitate an 'unwarranted invasion of privacy'. We welcome this approach. It is a considerable improvement over the UK bill's exemption, which exempts all personal data whose disclosure would breach any of the 1998 Data Protection Act (DPA) principles.

The DPA makes no distinction between personal data about an official's private life and personal data about an official acting in an official capacity. Because even the name of an identifiable individual is 'personal data', the names of decision-takers or authors of documents could be regarded as exempt, unless a complex series of obscure conditions under the DPA were met.<sup>59</sup>

The difficulty of applying these tests may persuade authorities as a rule of thumb, to decide (as a matter of convenience rather than strict law) that individuals should not be identified in released documents unless they explicitly consent - even though there may be no real privacy interest at stake. The European Commission itself was recently rebuked by the European Ombudsman for adopting this approach.<sup>60</sup>

We think the consultation document's approach, which concentrates on whether any disclosure would involve an 'invasion of privacy' addresses the underlying issue more realistically.

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<sup>58</sup> 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."

<sup>59</sup> The Campaign's concerns on this issue are set out at length in Briefing No 5 for the House of Commons committee stage. See: "FOI Bill Committee Stage: Collected Briefings", available at [www.cfoi.org.uk/briefingpack.html](http://www.cfoi.org.uk/briefingpack.html)

<sup>60</sup> European Ombudsman, press release 8/2000

## RESEARCH, STATISTICS AND ANALYSIS

The consultation document proposes to repeat the code's exemption for:

'Information held only for preparing statistics or carrying out research, or for surveillance for health and safety purposes (including food safety), and which relates to individuals, companies or products which will not be identified in reports of that research or surveillance, or in published statistics.'

We regard this as one of the code's most objectionable exemptions, which should not be repeated in the Scottish legislation. It allows information about potential health and safety hazards to be withheld without any evidence of harm. No equivalent exemption appears in the UK bill.

## IMPROPER GAIN OR ADVANTAGE

The consultation document suggests that an explicit 'substantial prejudice' test may not be necessary for some exemptions, such as that for disclosures which might lead to 'improper gain or advantage'.<sup>61</sup> We question this assumption. The exemption in question could be reformulated so that it applies to disclosures which led to '*substantial* and improper gain or advantage'. A similar approach could be adopted for all exemptions which imply a test of harm.

## MISCLASSIFIED CLASS EXEMPTIONS

A number of the exemptions in Annex C are wrongly described as 'class exemptions'.<sup>62</sup> These do *not* apply to all information within a specified class and, on the contrary, involve tests of harm:

- Information relating to immigration cases. The exemption explicitly states that such information *will* be disclosed so long as disclosure would not *substantially prejudice*

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<sup>61</sup> An Open Scotland, para 4.11

<sup>62</sup> By being italicised

immigration controls

- Requests which are *vexatious* or *manifestly unreasonable*, or would require *unreasonable diversion* of resources. A ‘vexatious’ request is one made with the intention of harassing the authority – and does not refer to any class of information as such. The use of term ‘unreasonable’ implies that a judgement on what is ‘reasonable’ in the circumstances of the particular case.
- Information relating to incomplete analysis, research or statistics, where disclosure could be *misleading* or *deprive the holder of priority of publication or commercial value*. The words in italics indicate harm tests.
- *Unwarranted disclosure* to a third party of personal information about any person (including a deceased person) or any other disclosure which would constitute or could facilitate an *unwarranted invasion of privacy*. The terms ‘unwarranted’ and ‘invasion of privacy’ both imply harm tests.

## **PUBLIC INTEREST**

### **Should it be defined?**

We welcome the proposed ‘public interest’ test, which would require authorities to disclose exempt information where there was an overriding public interest in openness.

A statutory definition of the public interest might be possible,<sup>63</sup> but any definition of this far reaching and evolving concept may ultimately prove restrictive. Lord Hailsham’s comment is relevant:

“the categories of public interest are not closed, and must alter from time to time...as social conditions and social legislation develop”<sup>64</sup>

The difficulty in leaving the term entirely undefined is that, by default, the public interest test

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<sup>63</sup> Effectively, one appears in the Public Interest Disclosure Act 1998.

<sup>64</sup> Lord Hailsham, Lord Chancellor, in *D v NSPCC* [1978] AC 171, 230.

may follow that established under the civil law of confidence, which focuses on misconduct. In the context of a FOI, the term must have a broader meaning.

The wider considerations are highlighted in the Deputy First Minister's introduction to the consultation document itself. Jim Wallace stresses that the legislation is intended to '*strengthen government and empower people*' and reflects the belief that '*better government is born of better scrutiny*'. The proposals are described as reflecting the Scottish Executive's commitment to '*an inclusive approach to the development, consideration and scrutiny of policy and legislation*'<sup>65</sup> and an intention '*to make public authorities more accountable to the people they serve*'.<sup>66</sup>

**Such principles should appear in a purpose clause, where they would set the context for interpreting the statutory public interest test.**<sup>67</sup>

### **Scope of a public interest test**

Under the code, a public interest test applies only to *harm-tested* exemptions, not to *class* exemptions. In the UK bill the public interest test applies to both harm-tested and class exemptions, but with several exceptions.<sup>68</sup> **In our view there should be no exceptions.. An authority should always have to consider the potential *benefits* of disclosure and not just the potential *harm*.**

### **A separate stage?**

We have reservations over the proposal that consideration of the public interest 'should be a separate, identifiable step' in the disclosure decision.<sup>69</sup> In the UK bill, this has become a two-stage process. The decision on whether information is exempt is taken within 20 working

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<sup>65</sup> An Open Scotland, para 1.4

<sup>66</sup> An Open Scotland, para 2.1

<sup>67</sup> An Open Scotland, para 4.8

<sup>68</sup> Eight of the bill's exemptions are not subject to the public interest test, though the justification for excluding them is far from clear in many of them. These are: *Clause 38(1) and part of 38(2)* - personal data about the applicant; *Clause 39* - information subject to an obligation of confidentiality; *Clause 42* - disclosures prohibited by statute; *Clause 30* - information supplied to a public authority by a court, tribunal or inquiry; *Clause 43(2)* - information retrospectively exempted by order; *Clause 19* - information already reasonably accessible to the applicant; *Clause 21* - information supplied by bodies dealing with security matters; *Clause 32* - Parliamentary privilege;

<sup>69</sup> An Open Scotland, para 4.6. The same expression is used in para 3.18 of the UK white paper.

days but the decision on disclosing it in the public interest is taken over an unspecified longer ‘reasonable’ period.<sup>70</sup> This is likely to be damaging. There will be no fixed time limit within which authorities must ultimately decide whether to release information. This will allow indefinite delays, undermining public confidence in the legislation. Because applicants will have to wait for two separate decisions on each request, they will be able to make two separate complaints to the Commissioner, adding substantial burden to the Commissioner’s workload.

Neither the Scottish code, nor any overseas FOI law, adopts this approach and we hope the Scottish legislation will avoid it. Both exemption and public interest should be considered simultaneously and one final decision reached within a 20 day period. Where code requests have taken longer than 20 days, the difficulty was usually the problem in locating the records or delays caused by the need to consult third parties – not the public interest test.

## **PURPOSE CLAUSE**

We welcome the proposal to consider adopting a purpose clause. A purpose clause is a feature of the existing openness code<sup>71</sup> and many overseas FOI laws, of which New Zealand’s is the

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<sup>70</sup> See clauses 9(1) and 13(6).

<sup>71</sup> This states: ‘This Code of Practice supports Scottish Ministers’ policy of extending access to official information, and responding to reasonable requests for information. The approach to release of information should in all cases be based on the assumption that information should be released except where disclosure would not be in the public interest, as specified in Part II of this Code.

The aims of the Code are:

- to facilitate policy-making and the democratic process by providing access to the facts and analyses which form the basis for the consideration of proposed policy;
- to protect the interests of individuals and companies by ensuring that reasons are given for administrative decisions, except where there is statutory authority or established convention to the contrary; and

These aims are balanced by the need:

- to maintain high standards of care in ensuring the privacy of personal and commercially confidential information; and
- to preserve confidentiality where disclosure would not be in the public interest or would breach personal privacy or the confidences of a third party, in accordance with statutory requirements and Part II of the Code.’ *Code of Practice on Access to Scottish Executive Information, Part II, Purposes.*

most notable.<sup>72</sup>

**Anyone reading the proposed law will inevitably be struck by the number and breadth of the exemptions, which typically run over many pages. A purpose clause would help to set these in context and remind those administering the Act that its aim is to promote openness, not to formalise the grounds for withholding information.**

A purpose clause also provides a form of ‘tie breaker’ in cases where the arguments for and against disclosure are evenly balanced.<sup>73</sup> It can:

“be used to indicate clearly which of two or more competing values should be uppermost when a decision is made... It also sets the tone and spirit of the legislation, and encourages those charged with making it work to view it positively, rather than as a regulatory chore.”<sup>74</sup>

Finally, the officials (and ultimately the person who will initially apply any public interest balancing test) will need a strong indication of the factors to take into account. The public interest in *withholding* information will often be self-evident, and perhaps second-nature, to

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<sup>72</sup> Sections 4 and 5 of New Zealand’s Official Information Act 1982 state:

“4. *Purposes* –

The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament –

- (a) to increase progressively the availability of official information to the people of New Zealand in order – (i) to enable their more effective participation in the making and administration of laws and policies; and (ii) to promote the accountability of Ministers of the Crown and officials and thereby to enhance respect for the law to promote the good government of New Zealand;
- (b) to provide for proper access by each person to official information relating to that person;
- (c) to protect official information to the extent consistent with the public interest and the protection of personal privacy.

5. *Principle of availability* –

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.”

<sup>73</sup> In a New Zealand case the judge noted: “If the decision-maker, be he Minister or departmental head or Ombudsman or Judge adjudicating on a claim of denial of right, is in two minds in the end, he should come down on the side of availability of information. I say this...because the Act itself provides guidance in the last limb of s.5 [the purpose clause]” *Cooke P, in Commissioner of Police v Ombudsman [1988] 1 NZLR, p 391.*

<sup>74</sup> Public Administration select committee, HC 570-I, July 1999, para 55.

officials. The public interest in *disclosure* may not be at all apparent, particularly if it contradicts long-standing assumptions or appears to present some disadvantage.

We suggest that the concept of public interest should draw on two broad strands:

- The well-established public interest test under the law of confidence, which favours disclosure where it relates to *misconduct* or *danger* to the public;
- The desirability of promoting accountability, participation in decision-making, informed public debate and understanding of the role of public authorities.

The first of these strands is so well established at law as to be virtually inescapable. However, the second, would benefit from a clear statutory exposition in a purpose clause. We hope that one similar to that proposed in amendments to the Westminster bill will be adopted.<sup>75</sup>

## **A MINISTERIAL VETO**

Ministers acting collectively would have the right to overrule the Information Commissioner and veto disclosure where the Commissioner orders disclosure in the public interest of information within a class exemption.

**The fact that the Scottish veto could not be exercised over harm-tested exemptions is an important advance over the Westminster bill.** The requirement that it be exercised collectively by the whole cabinet is a further improvement, and may have contributed to the Home Secretary's undertaking that some form of collective agreement will also be required in

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<sup>75</sup> The proposed amendment, debated both at the UK bill's committee and report stage in the Commons, was as follows:

‘(1) The purposes of this Act are to extend progressively the right of the public to information held by public authorities to the maximum extent possible, consistent with the need to protect interests specified in exemptions, so as to promote—

- (a) the accountability of public authorities
- (b) informed public debate on public affairs
- (c) public participation in the making of decisions.
- (d) public understanding of the powers, duties and operation of public authorities.

(2) This Act shall be interpreted so as to further the purposes specified in subsection (1) and to encourage the disclosure of information, promptly and at the lowest reasonable cost.’

the UK.<sup>76</sup> **Nevertheless we regard the proposed veto as wrong in principle and potentially open to misuse.**

We note that the consultation document justifies the veto partly by reference to ‘the demanding harm test’<sup>77</sup> – yet the veto will *not* apply where there is a harm test. Its use is restricted to the *class* exemptions.<sup>78</sup>

By definition, the class exemptions include information whose disclosure would *not* cause harm. The only right to information in such cases would be on public interest grounds. The proposal raises the possibility of ministers vetoing a disclosure because of its potential to cause political embarrassment even though genuine harm is not involved.

**The requirement that the veto be exercised by ministers collectively is only a limited safeguard. Governments *collectively* also have interests in protecting themselves from embarrassment. We think the veto should be removed altogether, leaving the final word on disclosure to the Commissioner.**

**If a veto is retained its use should be removed from as many exemptions as possible.** For example, some of the class exemptions (eg for personnel records) appear to be based purely on administrative concerns.<sup>79</sup> It is hard to see in what circumstances a veto might be thought necessary.

**Where a veto remains, it should also be limited to cases where complying with the Commissioner’s ruling would cause *serious* harm.** The consultation document implies that this is intended, stating that the veto is necessary so that ministers can ‘*determine whether information of exceptional sensitivity or seriousness should be disclosed*’.<sup>80</sup> **A test of ‘exceptional seriousness’ should be written into the legislation. The court should be able**

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<sup>76</sup> The Home Secretary said: “I also told the House yesterday that we would ensure that written into the memorandum of guidance for Ministers was clear guidance as to how they ensured that, except in the area of quasi-judicial decision-making, decisions would be subject to collective agreement. I wish to inform the House that we are giving further and urgent consideration to whether it will be possible to write such provisions into the Bill. If we can do that, we will.” *HC Debates*, 5/4/00, col 1096

<sup>77</sup> An Open Scotland, Para 6.6

<sup>78</sup> An Open Scotland, Para 6.7

<sup>79</sup> The bulk of information held about public sector employees will be available to the employees themselves under the Data Protection Act. The class exemption in the code serves merely to prevent employees obtaining access to passing references to themselves which appear in documents which do *not* form part of their own personnel files.

<sup>80</sup> An Open Scotland, Para 6.6

**to overturn any veto exercised where such exceptional harm could *not* be shown.**

**A veto should also be subject to strict procedural rules, of the kind which apply under the New Zealand FOI law.**<sup>81</sup> It should, for example, also have to be laid before and debated by the Scottish Parliament. It should be judicially reviewable, and the costs of any review should be met from public funds unless the review itself was without merit.

Finally, it is not clear from the consultation document whether the veto could only be exercised on behalf of the Scottish Executive, or whether it could be exercised on behalf of other authorities too. If a veto is retained we think its use should be limited to essential government interests, and not available to other public bodies.

## **CHARGES**

The consultation document sets out three possible options for charging, based on the approach of (a) the Westminster bill (b) the existing code and (c) a flat fee (effectively, the existing Data Protection Act approach.)

The consultation document clearly regards the last of these as the least desirable,<sup>82</sup> a view we share.

The starting point should be the Westminster bill's approach, which would allow authorities to charge up to 10% of the marginal costs of finding the requested information. No charge could be made for the time spent deciding whether information should be disclosed.<sup>83</sup> However, the Westminster bill's approach should not be adopted wholesale.

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<sup>81</sup> Sections 32-34 of New Zealand's Official Information Act 1982 which is enforced by the Ombudsman, require that (a) A veto must be made by an Order in Council (b) it must be made within 20 working days from the date of the Ombudsman decision in question (c) it must be published in the Gazette and laid before the House of Representatives (d) it must contain the reasons and grounds for the veto, which cannot add to those placed before the Ombudsman initially (e) the lawfulness of the veto can be judicially reviewed by the High Court (e) the costs of a High Court appeal are normally paid by the Crown, irrespective of the outcome of the appeal (unless the appeal was not reasonably or properly brought)

<sup>82</sup> An Open Scotland, para 3.16

<sup>83</sup> This was confirmed by Home Office minister Mike O'Brien during the bill's House of Commons committee stage when he stated that the: 'marginal costs include the costs of staff time involved in locating the information, but do not include the costs of staff time involved in preparing the information or considering whether an exemption applies.' *Standing Committee B, 18/1/00, col 116*

An explicit proviso will also be necessary to prevent charges being made for information currently disclosed free of charge. Under the Westminster bill, *all* requests for information will be regarded as FOI requests, even if the applicant does not mention the legislation. In theory, the FOI charging regime could apply to hundreds of thousands of normal items of correspondence in which information is sought. These requests could *not* attract charges under the code.<sup>84</sup> It is presumably not intended to charge for answering such correspondence; but this possibility should be formally excluded.

We also have reservations about a provision in the Westminster bill which could allow authorities to aggregate *all requests* made by the same person for charging purposes.<sup>85</sup> This might severely limit the use made of the Act by representative organisations, which often seek information on a range of issues from a single department or authority. All such requests could be denied under the bill if the total cost of dealing with them exceeds the cost threshold.

We have a similar concern about the provision in the Westminster bill which could allow requests made by *different people* to be aggregated for cost purposes, where they appear to the authority to be acting in pursuance of a campaign.<sup>86</sup> This might effectively prevent bodies such as trade unions from encouraging their members to use the Act, since the requests that followed might be lumped together for charging purposes and refused en masse.

This problem partly flows from the Westminster bill's approach of allowing authorities to refuse requests altogether, once the £500 cost ceiling has been exceeded.<sup>87</sup> **Instead of an automatic right to refuse requests above this ceiling, we think a refusal should be possible only if compliance would *substantially and unreasonably* interfere with the authority's work.** This is the formula used in the Australian and Irish FOI laws.<sup>88</sup> The basis

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<sup>84</sup> Under the existing code, charges are effectively not permitted for such requests since: (a) the official guidance on the code explicitly states "Departments should not charge for the provision of information which it is necessary for the public to have as part of fair and accountable performance of their functions,' [Guidance on interpretation, Part I, Para 72] and (b) the initial period of between 1 and 5 hours free time permitted by departmental charging schemes rules out any charge.

<sup>85</sup> Clause 11(4)(a)

<sup>86</sup> Clause 11(4)(b)

<sup>87</sup> The bill originally would have required authorities to consider fulfilling requests costing more than this figure in the public interest – but this provision has since been dropped.

<sup>88</sup> Section 10(1) of Ireland's Freedom of Information Act 1997 permits a request to be refused if "granting the request would, by reason of the number or nature of the records concerned or the nature of the information concerned, require the retrieval and examination of such number of records or an examination of such kind of the records concerned as to cause a substantial and unreasonable

for such an approach already exists in a weaker form in one of the draft exemptions in Annex C.<sup>89</sup>

Any such refusal should be capable of being overturned by the Commissioner on public interest grounds. A similar provision existed in the UK bill, but was deleted by the government at report stage.

### **Vexatious requests**

The consultation document notes that charges are intended to ‘discourage the submission of vexatious requests’.<sup>90</sup> Charges are not, in fact, needed for this purpose, since authorities could refuse vexatious requests under an explicit exemption in Annex C.

Using charges for this purpose is also potentially dangerous. A ‘vexatious’ requester is not someone who makes a large number of requests, but someone whose requests are designed to harass the authority, or are obsessively repeated in the knowledge that there is no right to the information (eg because an authority’s refusal has already been upheld by the Commissioner). By definition a ‘vexatious’ requester is exceptionally tenacious. A charging regime capable of deterring such a requester would block most ordinary requests as well.

## **COMMISSIONER AND TRIBUNAL**

We welcome the proposal to establish a dedicated, free-standing Scottish Information Commissioner whose decisions will be legally binding and enforceable through the courts.<sup>91</sup> We also agree that the Commissioner should be able to resolve complaints through mediation.

We do not favour the establishment of a tribunal to hear complaints against the Commissioner’s decisions. This would create further delay, which will invariably be to requester’s detriment. Authorities may be encouraged to appeal to the tribunal purely to delay disclosure, recognising that by the time the information is released the opportunity to make effective use of it may have passed.

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interference with or disruption of the other work of the public body concerned.” A similar provision is found in section 24(1) of the Australian Freedom of Information Act .

<sup>89</sup> The exemption for ‘Voluminous or vexatious requests’ which allows requests to be refused if they would ‘require unreasonable diversion of resources’

<sup>90</sup> An Open Scotland, para 3.9

<sup>91</sup> An Open Scotland, Para 6.5

The Scottish legislation should follow the precedent of the Irish and New Zealand laws in which the Commissioner (or, in New Zealand, the Ombudsman) makes legally binding determinations, subject to judicial review or appeal to the court on a point of law, but not to review by a tribunal.

## **DESTRUCTION OF RECORDS**

We agree that it should be a criminal offence to destroy, alter or conceal records in order to prevent their disclosure under the Act.<sup>92</sup> An offence along these lines exists in the UK bill.<sup>93</sup> However, the UK bill also *allows* an authority to destroy a requested record if it intended to do so before receiving the request.<sup>94</sup> The Scottish legislation should not repeat this misguided provision. Instead, Scottish authorities should be under an express duty to preserve a record once a request for it has been received.

## **CULTURE CHANGE**

We welcome the measures to achieve a culture of openness set out in chapter 8 of the consultation document. However, in addition to the specific measures which have been described there are two other vital precursors for change.

The first is genuine political commitment to the long-term process of achieving it. **This involves a willingness to accept that FOI will sometimes involve disclosures which are inconvenient or embarrassing to government. If ministers react to such disclosures by blaming the official responsible, or imposing new internal checks to pre-empt politically sensitive disclosures, the change in culture will be limited.** Ministers must accept that FOI involves a loosening of their control over information, and that any disadvantages will be offset by substantial long term benefits in terms of improved decision-making and greater public trust in public authorities.

The second is that culture change cannot be considered in isolation from the contents of the legislation itself. It is only *partly* brought about by measures such as training, guidance and monitoring. A crucial element is a strong right of access which cannot ultimately be evaded.

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<sup>92</sup> An Open Scotland, para 6.5

<sup>93</sup> Clause 75

<sup>94</sup> Clause 1(6)

There must be an appreciation that to continue past practices unthinkingly, or to deliberately prevaricate or obstruct, will not only fail to prevent disclosure but be counter-productive, needlessly damaging an authority's reputation and relations with the community. **A powerful right of access will persuade authorities to accept the inevitable, and decide to implement the legislation in a positive spirit and reap the benefits.**

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