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Freedom of Information implementation

The *Freedom of Information Act 2000* is due to come into force on 1 January 2005. It offers rights to information held by around 100,000 public bodies, including individual schools and GP surgeries. There have been over four years since royal assent to prepare for implementation. In addition, there has been experience with the non-statutory *Code of Practice on Access to Government Information*, and lessons from overseas to draw on. Nevertheless, the impact of FoI on public administration and governance is difficult to assess. Finally, there are particular implications for Members, political parties and Parliament to consider.

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Summary of main points

- The main provisions of the *Freedom of Information Act 2000* are due to come into force on 1 January 2005. Separate FoI legislation will apply to information held by the Scottish Executive and the Scottish Parliament
- Public authorities have already been required to issue publication schemes, listing information which they already make publicly available
- A separate scheme applies for environmental information, and new regulations specifying the details are also expected to be implemented in January 2005
- Fees regulations are expected in December, which will make most requests free (part from possible disbursement costs). Only requests which take up to £450 of time to answer will be subject to a charge (£600 for government departments)
- Guidance on the administration of the Act is being drafted by the Information Commissioner and by the Department of Constitutional Affairs. Little is known about the likely volume of requests, or the main users -whether the general public or journalists and politicians
- Public authorities normally have 20 working days to respond to a request, which must be in writing (including emails)
- Although there are several exemptions, most are subject to a public interest test. Appeals lie to the Information Commissioner in the first instance. Implementation procedures overseas often appear to include tracking procedures for sensitive requests, causing delay
- The administration of Parliament becomes subject to FoI (and to data protection legislation), but information held by Members in their individual capacity is not subject to FoI even if stored physically or electronically at the House (or in constituency offices). Members are already subject to data protection legislation. Exemptions apply for parliamentary privilege and confidential advice.
- FoI is likely to be used by Members as a supplement to PQs and select committee enquiries. Political parties may also use FoI at local level to obtain information about local authorities, schools and hospitals.

CONTENTS

I Outline of the legislation

The main provisions of the *Freedom of Information Act 2000* are due to come into force on 1 January 2005, according to the implementation timetable outlined by the then Lord Chancellor, Lord Irvine of Lairg in November 2001.[1] The right of access will apply to information held by roughly 100,000 public authorities covered by the Act, even if the body is not the originator of the information.[2] Anyone will have the right to ask public authorities for any information, including people living abroad, non-UK citizens, journalists, political parties, lobby groups and commercial organisations. The Act is fully retrospective, in requests may be made for information held before its commencement.

Some parts of the Act are already in force, in particular the provisions which require public authorities to establish publication schemes. Under s19 of the Act public authorities are required to adopt and maintain a publication scheme, setting out details of information it will routinely make available, how the information can be obtained and whether there is any charge for it (see below). The provision in the Act which applies the *Data Protection Act 1998* to both Houses of Parliament is also expected to take effect in January 2005.[3]

It is important to remember that there is separate data protection legislation which allows the release of personal information according to data protection principles. The interface between data protection and freedom of information legislation is complex, and will be one of the more difficult areas for public authorities to administer.

The Information Commissioner website summarises the scope of the coverage of the Act:

> **Who the Act covers**
> The Freedom of Information Act applies to all recorded information held by English, Welsh and Northern Irish 'public authorities' (although access to environmental information will be dealt with according to the provisions of the Environmental Information Regulations and access to personal data will continue to be dealt with under the provisions of the Data Protection Act 1998).
> Public authorities are, broadly speaking, public bodies which exercise public functions, such as central government departments, local government, the police, the health service, the education service and their related offices and agencies. The Act either names these public authorities specifically or describes them in general terms. There are also provisions for other organisations to be brought within the scope of the Act by special Order.

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1 *Schedule for the Implementation of the Freedom of Information Act 2000 13 November 2001* Dep - 1/600

2 This includes individual schools and GP surgeries

3 See paras 2 and 3 of Schedule 6 of the *Freedom of Information Act 2000*

> The rights conferred by the Freedom of Information Act may be exercised by anyone, including, but not restricted to, people living abroad, non-UK citizens, journalists, political parties, lobby groups and commercial organisations.

Implementation of the Act will end the role of the non-statutory *Code of Practice on Access to Government Information*, which is currently overseen by the Parliamentary Ombudsman.[4] This Code of Practice applies to a much smaller number of public authorities: principally central government departments and agencies. FoI implementation will also affect the current statutory regime for the disclosure of local government information, which offers only restricted access to council papers and minutes.[5]

There has been no significant amendment of the text of the FoI Act since it was passed.[6] However, the Independent Review of Government Communications (Phillis report) concluded in January 2004:

> We found a culture of secrecy and partial disclosure of information which is at the root of many of the problems we have examined.
> *We recommend that, when implementing the main provisions of the Freedom of Information Act, the overriding presumption should be to disclose (page 23).*[7]

The report did not recommend legislative change, but argued that the s53 power of ministers to veto decisions in favour of disclosure by the Information Commission should not be used. The Government has not accepted this recommendation.[8]

A. FoI and devolution

FoI is a devolved matter in Scotland, but data protection is reserved to Westminster. The Scottish Parliament passed its own FoI legislation in 2002, creating its own Information Commissioner. There are differences in the schemes - for example in some of the phrasing of exemptions.[9] The main differences are:

- More rigorous 20 day response requirements. Scottish authorities must decide where the public interest lies within this timescale
- Test of 'substantial prejudice' rather than 'prejudice' in certain exemptions such as conduct of public affairs or commercial interests
- 'Information intended for future publication' exemption applies only where the information will be published not later than 12 weeks after the information request is made (in the UK legislation, the publication time is not specified)

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4 See http://www.dca.gov.uk/foi/ogcode981.htm for text of the Code, and Library Research Paper 97/69 *The Code of Practice on Access to Government Information*

5 See Library Standard Note 1583 *Access to Information in Local Government*

6 There have been some minor drafting changes, for example names of authorities in schedules

7 Cabinet Office January 2004 at http://www.gcreview.gov.uk/news/FinalReport.pdf

8 Speech to Campaign for Freedom of Information by Lord Falconer of Thoroton 1 March 2004

9 See text of *Freedom of Information (Scotland) Act 2002* at http://www.scotland-legislation.hmso.gov.uk/legislation/scotland/acts2002/20020013.htm

- More rigorous publication scheme requirements, such as allowing access to a wider body of information

The Scottish Information Commissioner's office has prepared a comparative table for the FoI Act and the Scottish FoI Act.[10] The scheme will also come into effect in January 2005. The UK Act applies to public authorities in Scotland which are carrying out public functions which are reserved, such as social security, or defence. The definition of a UK public body and a Scottish public body are mutually exclusive, so that both regimes cannot be applicable simultaneously. Wales will be covered by the UK Act, as is Northern Ireland.[11] Scottish and Welsh versions of the non-statutory Code of Practice are already in operation, and the Scottish Information Commissioner has held his first formal review of a complaint under the Code of Practice on Access to Scottish Executive Information.[12]

B. Publication schemes

S19 of the FoI Act requires each public authority to produce a publication scheme listing the 'classes' of documents which they will make available.[13] In general, public authorities that have so far produced publication schemes have tended mainly to include material that is published anyway. Publication schemes are initially approved for a period of four years (although the Commissioner reserves the right to vary this for particular publication schemes, if appropriate).

Model publication schemes were designed by the Commissioner's office where large numbers of public authorities hold similar information. However, the Information Commissioner is expected in due course to set higher standards when he reviews the operation of publication schemes. A review of nine schemes by the Constitution Unit of University College London found that it was often not possible to access the information listed very easily from websites.[14] Therefore, public authorities will be encouraged to release more of the types of papers which do not contain confidential information or fall within a specified exemption, but which at present are not formally published. A survey from the Campaign for Freedom of Information found that many Government departments had for example 'shied away from any general commitment' to publish internal guidance.[15] The House of Common's scheme is available at http://www.parliament.uk/parliamentary_publications_and_archives/foi_introduction.cfm

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10 http://www.itspublicknowledge.info/comparativetable.htm

11 http://www.itspublicknowledge.info/

12 "Scottish Information Commissioner concludes first case under open government code" 22 August 2004 from http://www.itspublicknowledge.info/

13 For further detail see *Freedom of Information Act 2001: Publication Schemes: Guidance and Methodology* at: http://www.dataprotection.gov.uk/dpr/foi.nsf

14 Cited in National Audit Office *Counting Down: moving from need to know to right to know* 2004

15 *Central Government Publication Schemes: Good Practice* February 2004

C. Environmental Information Regulations

Since 1992 the UK public has had a statutory right of access to environmental information held by public bodies and certain other bodies who have a duty to make arrangements for dealing with requests for environmental information.[16] Following the signing of the Aarhus Convention in 1998, the Government inserted a power (section 74) in the *Freedom of Information Act 2000* to allow the Convention's provisions on environmental information to be transposed into law in England, Wales and Northern Ireland. Comparable powers were taken in the FoI legislation for Scotland. The Information Commissioner will enforce any new regulations on environmental information which are made. But many documents held by public authorities are likely to contain both environmental information and other information and will be dealt with under both the FOI Act and the regulations. Not all provisions are identical, for example information held by public authorities on emissions, discharges and other releases to the environment which relate to European Community legislation may not be withheld for reasons of commercial or industrial confidentiality. Moreover, the EIRs apply to oral as well as written requests. The Information Commissioner's office has produced a flowchart to assist with determination of request under EIR, FoI or data protection.[17]

DEFRA issued draft regulations in 2003, but these have now been overtaken by a further draft in 2004, taking into account consultation responses. These are available on the DEFRA website, together with a draft Code of Practice and draft guidance.[18] To comply with the EU Directive on Public Access to Environmental Information the updated EIRs will need to be implemented by 14 February 2005. DEFRA plan for the EIRs to come into force on 1 January 2005 in parallel with implementation of the remainder of the FoI Act 2000.

D. Public records

Part VI of the Act also amends the existing public records legislation to bring it within the FoI legislation. Public records less than 30 years old become subject to the exemptions and the public interest test and most exemptions cannot be used to prevent the release of older records.[19] The Advisory Council on National Records and Archives will continue to advise the Lord Chancellor.[20] A code of practice on records management was issued in November 2002 under section46 of the Act.

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16 Further information is given in Library Standard Note no 3116 *Access to Environmental Information: Implementing the Aarhus Convention* at http://hcl1.hclibrary.parliament.uk/notes/ses/snsc-03116.pdf

17 http://www.informationcommissioner.gov.uk/cms/DocumentUploads/EIR%20-%20Flowchart%20to%20request%20information.pdf

18 http://www.defra.gov.uk/corporate/consult/envinfo/consultation.pdf

19 There are special provisions for matters relating to honours and communications with Her Majesty

20 http://www.nationalarchives.gov.uk/advisorycouncil/tor.htm

II Making a FoI request

The Act specifies that a request must be in writing – this includes emails-[21] and clearly state the name and address of the enquirer and the information sought. However, it is not necessary to use a special form or even to include within the request any reference to the Act. Therefore, any written request for information held by a public authority could be categorised as a FoI request. As a result, monitoring the use of the Act is expected to be a complex process.

The request must be complied with, unless one or more of the exemptions in the Act are relevant. These are set out in Part II of the Act. Most of the exemptions are subject to a public interest test, set out in Section 2(2) as follows:

> (b) In all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing the information

The Section 2 public interest test applies to seventeen exemptions as follows:

Exemptions

Section 22 information intended for future publication
Section 24 national security
Section 26 defence
Section 27 international relations
Section 28 relations within the UK
Section 29 the economy
Section 30 investigations and proceedings by public authorities
Section 31 law enforcement
Section 33 audit functions
Section 35 formulation of government policy
Section 36 effective conduct of public affairs (not subject to the public interest[22] test in respect of the House of Commons and House of Lords)
Section 37 communication with Her Majesty and honours
Section 38 health and safety
Section 39 environmental information
Section 40(3) (a)(i) right to personal information where the data subject has a right to prevent processing;
Section 42 legal professional privilege
Section 43 commercial interests

[21] See Section 8
[22] Available from http://www.dca.gov.uk/foi/guidance/index.htm

The test does not apply to the following eight exemptions:

Absolute exemptions

Section 21 information accessible by other means
Section 23 information supplied by security bodies
Section 32 court records
Section 34 parliamentary privilege
Section 36 in relation to conduct of public affairs in the House of Lords or House of Commons
Section 40 personal information (except 40(3) (a)(i))
Section 41 information provided in confidence
Section 44 prohibited by another enactment

The public interest is not defined, and this follows precedent in overseas jurisdictions which do not attempt a statutory definition in FoI legislation. The Information Commissioner's Office commissioned the Constitution Unit of University College London to undertake research on case law relating to the public interest in overseas jurisdictions and decisions of the Parliamentary Ombudsman in relation to the non-statutory *Code of Practice on Access to Government Information.*[23] This guide cites a comment from a leading academic authority:

> 5.3 The Act was intended to be no less open than the Code. The Long Title states that it is an Act '*for*' the disclosure of information. There is a presumption in favour of disclosure in the FoI Act created by the reverse emphasis in section 2 of the Act. This reversal of emphasis was a late amendment at the Lords stage of the bill, when the bill was going through parliament. The means that where the balance is even, the public interest in the particular disclosure should prevail.[24]

The Information Commissioner's Office has published a guidance note on the interpretation of the public interest test, which draws attention to the Constitution Unit guide.[25]

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[23] *Balancing the Public Interest: Applying the public interest test to exemptions in the UK Freedom of Information Act 2000* Constitution Unit 2003

[24] ibid. *Government and Information* Patrick Birkinshaw: (2001).The amendments in the Lords were made on 14 November 2000 c143. For a full discussion of changes to the drafting of the public interest test during the passage of the bill, see Library Research Paper 00/89 *The Freedom of Information Bill- Lords Amendments*

[25] *Awareness Guidance no 3 The Public Interest Test* Information Commissioner's Office 2004 http://www.informationcommissioner.gov.uk/cms/DocumentUploads/FOI%20AG%203%20The%20Public%20Interest%20Test.pdf

The DCA has now published guidance on the exemptions. It notes that for specific exemptions there is a formal ministerial role:

> **Role of Ministers and senior officials**
> In a limited number of circumstances, Ministers play a formal role in making a decision on releasing information. These are cases where the FOI Act specifically requires that a decision relating to the disclosure of information is taken at Ministerial level. This applies in relation to the following provisions:
> **S.36(2)**: Departments can only rely on the exemption in s.36(2) (prejudice to effective conduct of public affairs) if a 'qualified person' considers that disclosure of the information would be prejudicial. In relation to a ministerial Department, the 'qualified person' is any Minister of the Crown;
> **S.23(2)**: Where information was directly or indirectly supplied by one of the bodies that deal with security matters and that are listed in section 23(3), a certificate that conclusively evidences this fact can only be signed by a Minister of the Crown;
> **S.24(3)**: Where exemption from the right of access under the FOI Act is required for the purpose of safeguarding national security, a certificate which conclusively evidences this fact can only be signed by a Minister of the Crown; and
> **S.53(2)**: Only a Minister of the Crown who is in the Cabinet, or a UK Law Officer, can use the 'ministerial veto' that overrides a relevant decision of the Information Commissioner requiring disclosure.

The operation of certain exemptions are likely to attract particular attention. Sections 35 and 35, which deal with the formulation of government policy and prejudice to the effective conduct of public affairs respectively, may well come into play in relation to politically sensitive requests. Similarly, section 43 on commercial interests may well be the subject of early appeals concerning public sector contracts.

Section 53 allows a Cabinet Minister and certain other bodies to issue a certificate which will prevent enforcement action by the Information Commissioner to take effect, creating a ‘ministerial veto’. This was a controversial aspect of the legislation and the Information Commissioner has stated that he will issue a special report to Parliament, should the veto power be used.[26]

Section 10 requires the authority to comply with the request within 20 working days of receipt of the application; however there are circumstances when this time limit can be extended: for example, if a request needs to be clarified or a charge notice is issued, or where the public authority needs to consider whether the public interest test applies.[27]

There are provisions for the payment of fees and for dealing with requests which are vexatious or of disproportionate cost. Section 16 introduces a duty to provide advice and

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[26] See for example presentation on 12 May 2004 to Access to Information Conference 2004 Constitution Unit/Capita

[27] Schools may also discount school holidays for the 20 day limit

assistance, which is combined with a duty to conform with a code of practice issued by the Secretary of State for Constitutional Affairs under section 45. This governs areas such as transfers of requests between authorities, and procedures for handling complaints. The s45 Code must be laid before both Houses, and although a Code has already been produced, a new version is expected shortly.[28]

III Implementation arrangements

The Department of Constitutional Affairs has responsibility for ensuring the effective implementation of FoI for central government. It has published annual implementation reports as required by s87(5) of the 2000 Act. [29] There is a Ministerial Committee, MISC 28, to oversee Government strategy on implementation, with a membership of senior ministers.[30] The Constitutional Affairs Select Committee is planning to publish a report on FoI implementation shortly, and has held a number of evidence sessions in October and November 2004.

The Lord Chancellor and the Information Commissioner decided in 2001 to form an Advisory Group on Implementation of the Freedom of Information Act. The group is jointly chaired by Lord Filkin, Parliamentary Under Secretary at the Department for Constitutional Affairs, and Richard Thomas, the Information Commissioner.[31] There is also a Freedom of Information Practitioners' Group consisting of DCA and other central government officals. Other practitioner groups are being formed for the wider public sector. The DCA has drawn up guidance on the exemptions, in addition to that produced by the Information Commissioner, who has responsibility for the wider public sector. The DCA webpage contains details of its implementation plans. The Information Commissioner's website has a series of guidance notes for practitioners.[32]

The National Audit Office has issued a Good Practice Guide in conjunction with the DCA to assist public authorities with implementation.[33] This warns authorities of the difficulties of predicting demand and preparing contingency plans for all eventualities.

An assessment by the Information Commissioner of the readiness of central government departments found some confusion as to roles:

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28 A new version was issued on 24 November 2004 and is available at http://www.dca.gov.uk/foi/codepafunc.htm

29 These reports may be accessed at http://www.dca.gov.uk/foi/bkgrndact.htm#part2 .

30 See www.cabinet-office.gov.uk/cabsec/2003/cabcom/misc28.htm

31 Its minutes are available at http://www.dca.gov.uk/foi/agimpfoia.htm

32 http://www.informationcommissioner.gov.uk/eventual.aspx?id=77

33 National Audit Office *Counting down :moving from need to know to right to know* at http://www.nao.org.uk/publications/foiguidance.pdf

> While the respective roles of the DCA, as the lead government department, and the Information Commissioner, as the independent regulator, are in fact separate and distinct, there appears to be a certain amount of confusion in the minds of public authorities and some further clarification may be helpful.[34]

The Government have plans for a clearing house in order to secure consistency of approach and align responses to precedent setting. FoI advocates, such as the Director of the Campaign for Freedom of Information, Maurice Frankel, have expressed some concern about the potential alignment of responses:

> **Q117 Dr Whitehead:** I think this follows from the thoughts which have just been expressed. There is, I understand, to be a centralised system of lobbying and the processing of requests across public bodies as far as FOI is concerned. One of the suggestions about that particular way of doing things is that it, as it were, smooths out the potential for what one might call 'divide and conquer', which some people may regard as a good thing and other people may regard as a bad thing. What is your view of how that is likely to develop?
> **Mr Frankel**: Well, I can see perfectly reasonable reasons why departments would want to do it, but I think the danger is that it is vulnerable to the lowest common denominator approach and I think we are quite likely to see departments, who would want to do something positive in response to a request that has gone to other people, being urged to lower their ambitions, not to make it difficult for others.[35]

The Information Commissioner's office has also reviewed the preparations of local authorities, finding that there were no significant differences between the preparedness of different types of authority, whether county, metropolitan or district, nor between authorities in England, Wales and Northern Ireland. But there was variation in preparedness amongst individual authorities. Councils requested further guidance on implementation.[36] Local authorities will be required to be fully compliant with FoI. This involves a shift from a regime in which only a limited series of papers are disclosable to one where all local authority activities will be subject to the new right of access. Councils will not have had prior experience with the Code of Practice, and so there are likely to be greater training needs for their staff. Similar concerns apply to GPs, hospitals and schools. Lord Falconer has promised reimbursement of the additional costs of FoI for local government in 2005-5 and beyond on the basis of the 'new burden' doctrine.[37]

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[34] *Freedom of Information Act 2000 survey findings: Central Government Departments* Information Commissioner's Office November 2003 at http://www.informationcommissioner.gov.uk/cms/DocumentUploads/FOI%20Survey%20Central%20Government.pdf

[35] Uncorrected oral evidence to Constitutional Affairs Select Committee 12 October 2004 at http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/uc1060-ii/uc106002.htm

[36] *Freedom of Information Act 2000 survey findings: Principal Local Authorities* Information Commissioner's Office February 2004 http://www.informationcommissioner.gov.uk/cms/DocumentUploads/FOI%20Survey%20Findings%20for%20Local%20Authorities.pdf

[37] DCA Press Notice *'Freedom of Information: Fees* 18 October 2004

There may be difficult issues where private contractors carry out public functions, as these are potentially subject to FoI and may be designated as a public authority under section 5. There is likely to be an order designating bodies under s5 shortly after implementation. The Information Commissioner indicated in evidence to the Constitutional Affairs Select committee that local authorities varied greatly in their readiness for implementation.[38]

At the time of the passage of the bill, there was some interest in phasing in implementation. In the event, the Government decided on an all-at once-approach. This has provoked concern that the experience may be overwhelming:

> **Q87 Mr Soley:** Turning to the issue of implementation, do you think that the Department has got it right to implement in one day and have this sort of big-bang approach?
> **Mr Frankel**: No, I think that is bad verging on potentially catastrophic. I think what has happened is that central government could have done this much earlier, had a lot of experience from the Open Government Code and could have dealt with a lot of the problems which are going to come up relatively easily. Instead of that, every single authority in every sector is confronting the same problem simultaneously with no opportunity to learn from anybody going ahead. That is the first problem. I think the second problem, and there are three problems, is that, apart from the extra work caused to the public authorities, you have had a large turnover of staff who were on the ball when the Act was passed and have moved on since then and been replaced by people and very often the replacements have now left as well, so you are on a third generation of officials. The final problem is for the Information Commissioner who will start to receive complaints across the whole public sector at roughly the same time instead of having it come in sector by sector with some dividing time of months to adapt to.[39]

Measuring the effectiveness of FoI will be dependent on assessing whether the culture of public sector bodies has changed. Such assessment is qualitative rather than quantitative in nature.

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38 DCA Select Committee Minutes of Evidence 11 May 2004 from www.parliament.uk

39 Uncorrected oral evidence from Maurice Frankel of the Campaign for Freedom of Information to The Select Committee on Constitutional Affairs 12 October 2004 at http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/uc1060-ii/uc106002.htm

IV How much will FoI be used?

A. Experience of the Code of Practice on Access to Government Information

The Parliamentary Ombudsman has formal responsibility for appeals from the non-statutory Code of Practice on Access to Government Information. In practice, administering the Code of Practice has formed only a minor feature of the work of the Ombudsman's office, particularly as with all of the Ombudsman's work, appeals have to be submitted via an MP. However the Ombudsman has reported on the use of almost all exemptions in the Code, apart from the royal household, and so her decisions offer some insights into the interpretation of the exemptions and of the public interest test in the FoI legislation. The decisions are published periodically.[40] Members of Parliament have begun to make appeals under the Code in noticeable numbers in recent years.

The current Ombudsman, Ann Abraham, reported difficulties in obtaining the release of information concerning the interests of ministers following her recommendation for disclosure in July 2003 which was brought to the attention of Parliament.[41] The Government issued a certificate blocking disclosure of information about ministerial conflicts of interest on the grounds that it would be "contrary to the public interest under s11(3) of the *Parliamentary Commissioner Act 1967"*. The *Guardian* subsequently applied for judicial review, and the Government abandoned the attempt to use this statutory power.[42]

Subsequently, the Ombudsman negotiated a Memorandum of Understanding with Government departments to cover matters such as timescales for responses to her office. But it is notable that appeals to the Ombudsman can take months to resolve. Her most recent press release on Open Government cases in July 2004 noted:

> The 25 published cases [July 2003-June 2004] cover a range of departments and agencies. A high proportion of complainants were journalists, and MPs who had failed to get the information they wanted by asking parliamentary questions (PQs). The issues covered included the Attorney General's legal advice on the Iraq war, accidents involving nuclear weapons, background notes to PQs, details of ministerial meetings and supporting studies relating to the Euro. Many involved sensitive material and not all complaints were upheld.
> The Ombudsman said, "Often there is a legitimate public interest in releasing the information. But the real difficulty lies in establishing whether or not that interest outweighs any harm which might result from disclosure. The Code requires departments to be as open as possible about the information they hold. However,

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40 See http://www.ombudsman.org.uk/pca/document/aoi0304/index.htm for the latest report
41 HC 951 2002-3
42 "Open and shut case: Freedom of Information" *Guardian* 19 March 2004

> all too often their instinctive response is still to treat official information as non-disclosable without considering whether or not that is really the case."
> The Ombudsman also reported on departmental performance in relation to Code complaints. In an attempt to resolve previous difficulties, in July 2003 the Cabinet Office published a Memorandum of Understanding which reminded departments how they should deal with requests for information made under the Code and the timescales and procedures they are required to comply with once the Ombudsman has initiated an investigation. The Ombudsman reported that, with occasional exceptions, the requirements set out in the Memorandum of Understanding had been adhered to. However, in a minority of cases there had been problems, not only of delay in providing a response to the complaint, but also in providing the papers necessary to pursue the investigation. The Ombudsman described it as 'surprising and regrettable' that she still had to remind departments of her powers in relation to Code complaints.[43]

The Ombudsman's office is intending to publish a review of its ten year work in implementing the Code in early 2005. It is developing a Memorandum of Understanding to work with the Information Commissioner on cases being handled in the run up to FoI implementation. It is noteworthy that there is no statutory prohibition on complainants dissatisfied with the response of the Ombudsman from appealing to the Information Commissioner about the release of information. The FoI legislation may be used to request information which has previously been refused under the Code.

There have been annual reports on implementation of the Code. The most recent, for 2002, was published in October 2003. Its main conclusions were:

> In 2002, the number of Code requests measured in the monitoring data increased on the previous year. The vast majority of requests continue to be answered within the 20 working day target for response and the number of requests for internal review remains consistent with the previous year. Most requests come from individuals, MPs and Peers and the media. Of the 19 investigations the Parliamentary Ombudsman completed in 2002, the original decision was upheld in six cases and partially upheld in eight others.[44]

The report found that there were 5,212 recorded Code requests in the year 2002, representing an 12% increase on the 4,668 recorded Code requests received in 2001, but less than the 5,969 requests received in 2000. 24 per cent of requests came from MPs and 16 per cent from the media. There are definitional problems with the data, however, as the report defines a Code request as one:

- Which specifically mentions the code;

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[43] "Ombudsman reports on openness" 30 June 2004 Parliamentary Ombudsman website at http://www.ombudsman.org.uk/pca/press/pn01-04.htm

[44] *Code of Practice on Access to Government Information: Monitoring Report for 2002* http://www.dca.gov.uk/foi/codprac02/

- For which a charge or standard fee is paid; or
- Which is refused under one or more of the Code exemptions

As the report notes, an individual asking for information from a government department, or other body covered by the Code, does not have to specifically mention the Code of Practice when making their request. Any request for information to these bodies should be treated in accordance with the principles of the Code, irrespective of whether the applicant is aware of it or not. The FoI Act 2000 will operate on the same principle. 20% of recorded code requests (as defined above) were refused in 2002, an improvement on the 50% of requests refused in 1997.

The National Assembly for Wales and its Assembly-sponsored public bodies have had their own voluntary code since 2001. The Code of Practice on Public Access to Information established an access to information regime which adopts much of the Freedom of Information Act and goes further by adopting a substantial harm test and shortening the time for responses to 15 working days. Although it is a voluntary code, complaints about access to information are dealt with by the Welsh Administration Ombudsman.

B. Overseas experience

The UK has been relatively late in adopting FoI legislation. Therefore, it is possible to draw on overseas experience of implementation. Over 50 states have FoI legislation, including the US, Canada, Australia, New Zealand and most EU states. Federal states such as Canada and Australia also have sub-national systems of FoI which can be more comprehensive.[45] Around 50 states also have data protection or privacy legislation. Since September 11 2001 many of these states have introduced legislation to restrict access to information which might assist terrorism.[46] For example the US Homeland Security Act 2002 exempted 'critical infrastructure information' from FoI.[47]

The DCA has commissioned research on the management of FoI requests in other jurisdictions. The report may be found on the departmental website. [48] The research found that many states struggled to meet the deadlines for responding to requests.

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45 For a full list, see a survey maintained by David Banisar, Visiting Fellow at University of Leeds at http://www.freedominfo.org/survey.htm

46 Examples are given in the New Zealand Parliamentary Library Background Paper no 27 *Access to Official Information* May 2003

47 See Thomas S Blanton 'National Security and Open Government: Striking the Right Balance' in *National Security and Open Government* 2003 Campbell Public Affairs Institute from http://www.maxwell.syr.edu/campbell/opengov/

48 *Management of Freedom of Information Requests in other jurisdictions* Joyce Plotnikoff and Richard Wilson October 2003 http://www.foi.gov.uk/impgroup/07-07c.pdf

> Section 10(1) of the Freedom of Information Act 2000 allows public authorities a maximum of 20 working days to respond to requests. All countries contacted for this research also had statutory time limits within which agencies must respond. The limits ranged from two weeks in the Netherlands and Finland to 30 days in Canada and Commonwealth agencies in Australia. Some operated more than one time limit: Finland increased the time allowed to four weeks for complicated requests while permitted response times in the Australian State of Queensland depended on the age of the document, whether it was a 'personal affairs' document, and whether formal consultation was required. As with the Freedom of Information Act 2000, the legislation in most countries contacted allowed for the response time to be extended in prescribed circumstances.
>
> Alasdair Roberts felt that it was difficult to monitor compliance with time limits in Canada because it was not necessary for the requester to 'flag up' a FOIA request. He has detected 'systemic non-compliance' with time limits across agencies. This has a knock-on effect in swamping the system with complaints which leads to a break-down in enforcement because the Commissioner cannot keep pace.
>
> The Canadian government is looking at patterns of non-compliance across departments using 'report cards' which they submit on the proportion of requests not dealt with within the allotted time. If this exceeds 20% (a 'red alert'), senior civil servants can be asked to give evidence about the problem. Processing times are routinely exceeded where there is a need to consult the Cabinet Office and where requests come from political parties and journalists.
>
> Compliance with statutory time limits is even poorer among US Federal agencies. The OIP in the [Department of Justice] DoJ said that the only requests which they could respond to within 20 days were those where there had no responsive records. Various means were used to maximise the time available in which to respond. The clock only started when the OIP received and datestamped a request, not when it was received by the DoJ. The OIP then informed the requester of the official date of receipt, reference number, the analyst's name and a central phone number. If it was necessary to ask the requester for more information then that stopped the clock. Requesters could ask for their application to be expedited but it was up to the OIP to decide whether to accede to the request. As mentioned above, the automated system used to manage requests held the data needed to calculate due dates but these were not displayed. One system report showed the median time taken to deal with requests but time compliance was not otherwise monitored. The system could not report on the time taken to process requests by the tracks to which they were assigned. OIP staff estimated that response times for about 95% of requests exceed the statutory 20 days.
>
> The performance of the FBI in this respect was even worse. The FOIA team said that it processed 'practically no' requests within 20 days. Congress had doubled the time allowed in 1996 but it was still insufficient. The FBI writes to requesters and explains that there will be a delay but makes no time commitment.

The report also noted that there did appear to be resource implications for effective FoI implementation:

> The UK government does not envisage that extra resources will be needed by organisations in order to comply with the terms of the Freedom of Information Act 2000. This view conflicts with the experience of other jurisdictions, at least in

> the case of organisations that receive large numbers of FOI requests. Many of those to whom we spoke referred to the range of tasks performed by FOI staff and the level of skill required. Some tasks are not susceptible to automation, for instance reviewing incoming correspondence to identify requests for information to which the FOI legislation applies, interacting with requesters to refine and narrow the scope of requests, deciding on who within the organisation might hold records relating to a particular request, scrutinising responsive records for material that is exempt from disclosure and deciding which exemption applies to each redaction.

These illustrate that the most important criterion for an effective FoI regime is the extent of administrative compliance, rather than the legislative framework. A study by the academic Rick Snell, of compliance in Australia, Canada and New Zealand, found:

> Yet in each jurisdiction there is a constant stream of official reports, public statements by formal review bodies and academic studies that depict an alarming level and magnitude of non-compliance. The level and type of non-compliance varies within and between the three jurisdictions. On a sliding scale of concern Canada would occupy the highest level of concern. Australia would occupy the next slot although displaying an increasing drift towards a general state of non-compliance. New Zealand would occupy the zone of least concern due to a number of factors contributing to compliance covered in the final section of this paper. These factors include the legislative architecture, history and nature of the freedom of information constituency in New Zealand.[49]

Professor Alasdair Roberts has defined various types of non-compliance. [50]These are:

- Malicious non-compliance, eg. Removal of compromising information from files
- Adversarialism e.g. using several exemptions at once as a deterrent
- Administrative non-compliance e.g insufficient resources or deficient record keeping

FoI campaigners also argue that it is important to have an active user community for disclosure regimes to become effective, preventing the roll-back of legislation.

It has been common for other states to undertake official reviews of FoI legislation from time to time, offering a useful overview of the effectiveness of the legislation. In 1997 the New Zealand Law Commission reported in 1997 having been given a limited brief to evaluate the operation of the Official Information Act. The main problems were:

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[49] Rick Snell "Administrative Compliance and Freedom of Information in Three Jurisdictions" 1999, at http://www.ucc.ie/ucc/depts/law/foi/conference/snell99.html

[50] Alasdair Roberts, *Limited Access: Assessing the Health of Canada's Freedom of Information Laws*, Freedom of Information Research Project, April 1998, School of Policy Studies, Queen's University, at 47-50. Available at http://www.cna-acj.ca/client/CNA/cna.nsf/object/LimitedAccess/$file/limitedaccess.pdf

- The burden of large, broadly defined requests
- Tardiness in responding to requests
- Resistance by agencies outside the core state sector
- The absence of a co-ordinated response to supervision, compliance policy advice and education regarding the Act and other information issues[51]

New Zealand is seen as a key comparator for the UK, as its legislation is broadly similar, and complaints are handled by the Ombudsman, rather than official court hearings. (The UK will have a Commissioner, rather than using the existing parliamentary ombudsman) There are no official statistics on the number of FoI requests made- the only official statistics available are those published by the office of the Ombudsman on the number of complaints received. these are made available in the annual reports.[52]

The Australian FOI legislation was reviewed in 1995 by the Australian Law Reform Commission.[53] This found that most requests were succeeding in full (77 per cent) or part (18 per cent). The report concluded:

> 2.8 In the absence of any systematic or meaningful performance data about the operation of the Act, [20] and in view of the fact that many of the benefits of the Act are intangible, the Review has based its assessment of the effectiveness of the Act on submissions, consultations, FOI decisions and comparisons with other FOI legislation. The Review considers that the Act has had a marked impact on the way agencies make decisions and the way they record information. Along with other elements of the administrative law package, [21] the FOI Act has focused decision-makers' minds on the need to base decisions on relevant factors and to record the decision making process. [22] The knowledge that decisions and processes are open to scrutiny, including under the FOI Act, imposes a constant discipline on the public sector. The assessment is not entirely positive, however. A number of people, many of them dissatisfied users of the Act, consider that a more accurate title for the Act would be Freedom From Information.

It made a series of recommendations which have yet to be implemented.

Canada established a task force to review its legislation, which reported in 2002.[54] It made a series of recommendations and gave an overall assessment of performance:

> the **performance** of the federal access to information regime is largely **similar to that in other jurisdictions** in Canada and abroad. The challenges and **issues are**

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51 Taken from NZ Parliamentary Library Background Paper no 27 *Access to Official Information* May 2003 p27

52 See http://www.ombudsmen.govt.nz/download%20Annual%20Report/AR2002-2003.pdf

53 *Open Government: A review of the federal Freedom of Information Act 1982*, ALRC 1995 available at http://www.austlii.edu.au/au/other/alrc/publications/reports/77/ALRC77.html

54 *Access to Information: Making it Work for Canadians: Report of the Access to Information Task Force Review* http://www.atirtf-geai.gc.ca/report2002-e.html

> **strikingly the same**: timeliness of responses, problems in information management, transparency of new service delivery public bodies, managing growth in demand, resourcing of the access program, effective oversight and resolution of disputes, and creating and maintaining support for access to information both at the political level and throughout the public service

It found that the annual cost of implementing the legislation to the public sector was around 30m Canadian dollars annually.

One of the most recent comparators is the Republic of Ireland which implemented FoI in 1998 and created an Information Commissioner. During the first year he examined over 330 complaints, representing less than 10% of all requests.[55] In 2003 the Government successfully introduced amending legislation intended to restrict access to Cabinet information and communications, and to introduce an up-front fees regime.[56] However, the existence of FoI does appear to have hastened broader cultural change, for example the higher education sector took the decision to release examination scripts to all students without formally requiring students to invoke the Act formally.

The most frequent users of FoI have varied from country to country. There has been significant private sector use in the US, mainly to obtain details of government contract, but this has not been replicated elsewhere. In New Zealand, there has been significant use by politicians, in a way unforeseen by the creators of the legislation. Judge Anand Satyanand, one of the three NZ Ombudsman, noted in a recent conference speech:

> The Official Information Act, when drafted, envisaged the availability of information to the ordinary everyday citizen. It may not have been predicted that, within a 20 year period, the right to information would come to be exercised in a much wider fashion involving requests from lawyers, from members of the press and the media generally, and from Members of Parliament exercising rights to information in addition to, or aside from, those obtained under the Standing Orders of the House by parliamentary question.[57]

It is notoriously difficult to predict the number of FoI requests which may be expected following implementation of legislation. For example, the Australian Government expected over 100,000 requests in relation to immigration – in fact, only 1582 were received in the first year 1985-86.[58] However, it would not be safe to assume that there will be only minimal interest- the US received over 2.3m requests in 2000, of which over

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55 Presentation by Information Commissioner, Kevin Murphy Freedom of Information - One Year On", Dublin Castle, 23 April 1999 from http://www.ucc.ie/ucc/depts/law/foi/conference/oic99.html

56 *Freedom of Information (Amendment) Act 2003* from http://www.gov.ie/bills28/acts/2003/a903.pdf and see comments of Information Commissioner at http://www.oic.gov.ie/25b6_3c2.htm

57 *The Benefits of FOI – The New Zealand Experience* Presentation to Capita Access to Information Conference 12 May 2004

58 Source; presentation from Maurice Frankel, Campaign for Freedom of Information 27 February 2002 IIR Conference. See the NAO report *Counting down: moving from need to know to right to know* p13 for full data on number of FoI requests in Australia per year since 1982

1.2m were for records in the Department of Veteran Affairs. Clearly, this includes requests which would be classified as data protection ones in the UK context. [59] The unpredictability makes implementation planning particularly difficult. Various FoI advocacy networks exist which may promote mass campaigns, and there can be complex requests from outside the relevant state.[60] There is an exemption for vexatious requests, but international experience suggests that it has been rarely used in practice.

C. Monitoring arrangements

The DCA has been examining the question of monitoring arrangements for FoI requests. It produced a paper for the Advisory Group on Implementing FoI entitled *Computer systems for aiding the management and monitoring of requests*, which noted:

> 15. Most government departments already use an IT system to monitor requests for information, including correspondence monitoring systems and systems to monitor requests under existing access regimes. They are also working towards a deadline of December 2004 to implement electronic records management, and are at present procuring electronic records management (ERM) systems, testing and piloting them.
> 16. Research has been carried out into the systems government departments already have in place for monitoring requests for information and their plans for developing IT monitoring systems. The results of the questionnaires sent to government departments are analysed in the report "Departmental Questionnaire on Systems for Monitoring and Managing Requests for Information" attached at **Annex A**.[61]

The report of the questionnaire noted:

> 15…there is an urgent need for the Department for Constitutional Affairs to specify the data it will ask for from government departments to monitor how effectively the Freedom of Information Act is operating.

This task is far from easy because requesters do not need to specify that they are making an FoI request for it to be considered as one under the legislation. The Canadian FoI specialist, Professor Alasdair Roberts, has argued that the UK Government may face conflicts in implementing FoI while retaining a concern for news management. In a recent article he noted:

> ABSTRACT. The United Kingdom's new Freedom of Information Act is intended to empower citizens by granting a right to government documents. However, the law will be implemented by a government that has developed highly centralized structures for controlling the communications activity of its

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59 Frankel presentation 27 February 2002
60 See www.freedominfo.org for example
61 AG7/03 Available from http://www.foi.gov.uk/impgroup/07-07a.pdf

> departments. How will the revolutionary potential of the FOIA be squared with government's concern for "message discipline"?
> Experience in implementing Canada's Access to Information Act may provide an answer. The Canadian law was intended to constrain executive authority, but officials developed internal routines and technologies to minimize its disruptive potential. These practices restrict the right to information for certain types of stakeholders, such as journalists or representatives of political parties. The conflict between public expectations of transparency and elite concerns about governability may not be adequately accounted for during implementation of the UK Freedom of Information Act.[62]

Professor Roberts described the process used in Canada to 'tag' politically sensitive requests as follows:

> The procedure for handling politically sensitive requests is known within [Citizenship and Immigration Canada] CIC as the "amber light process." The name is telling: as it is to drivers, an amber light is a warning to officials to proceed with caution in their handling of an ATIA request. The aim of the process, according to a senior member of the CIC communications staff, is to "achieve the objective of proactive issues management" on ATIA[Access to Information Act} requests. CIC's amber light process begins at the moment an ATIA request is received by the department. A "risk assessment officer" reviews incoming requests to identify those which are potentially sensitive. In practice, there is a presumption of sensitivity for requests submitted by journalists or representatives of political parties, including the offices of Opposition Members of Parliament. Standard procedure requires that notice about media or partisan requests should be sent to the Minister's Office, and the department's communications office within one day.11 In addition, the ATIA office produces a weekly inventory of new and potentially sensitive requests for review by the Minister's Office and communications staff.
> The Minister's Office may then choose to tag an ATIA request for special attention. For a request to be tagged -- or "amber lighted," in departmental jargon "there must be potential for the issue/incident to be used in a public setting to attack the Minister or the Department." In 2002, about twenty percent of requests that were identified as potentially sensitive by the ATIA office were also amber lighted by the Minister's Office.
> The office that holds the records that relate to the request -- known as the Office of Primary Interest (OPI) -- is immediately advised that the request has been amber lighted. ATIA staff work with the OPI to "identify and assess issues for sensitivity and media product development." Communications staff will also work with the OPI to develop "media lines" -- a memorandum that outlines key messages that should be emphasized by departmental spokesmen in response to questions raised after the disclosure of information. "House cards," which provide

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[62] "Spin control and freedom of information: lessons for the United Kingdom from Canada!" *Public Administration* forthcoming, available from http://faculty.maxwell.syr.edu/asroberts/documents/journal/roberts_PA_Spin_2004.pdf

> the Minister with responses to questions that may be raised in Parliament, are also prepared.

Professor Roberts has drawn attention to internal minutes of the UK Practitioners' Group (see above) which discussed monitoring arrangements in January 2003. These noted: "an increasing level of anxiety at permanent secretary level" about inconsistencies in responses to Code requests sent to central government departments, and poor compliance with restrictions on disclosure relating to ministerial decision-making. A background paper for the Group suggested a range of options for dealing with these issues, including the possibility that consultation might be required with the then Lord Chancellor's Department when constitutional conventions could be harmed by disclosure of information.[63]

The procedural guidance issued by the DCA in October 2004 noted:

> …Within that context, it is imperative that authorities establish operating systems for managing access to information which deliver the new rights in full without diverting disproportionate resources away from core service delivery or inappropriately absorbing the time of senior officials, lawyers or ministers.The overwhelming number of requests for information may be able to be dealt with straightforwardly by desk officers as simple administrative decisions- either because it is clear that the information sought can and must be disclosed, or because it is equally clear that it cannot offer or must not be disclosed. But there will be a range of other situations when it is not clear which category a request falls into, or where a request requires more complex or sensitive handling for other reasons. Handling procedures need to be sensitive to the difference, and this guidance seeks to help authorities prepare for that.[64]

D. Fees and charges

The FoI Act 2000 does not require charges to be made, but public authorities have discretion to charge applicants a fee in accordance with fees regulations made under sections 9, 12 and 13 and subject to the negative resolution procedure.

The final fees regulations have not yet been made and are not expected until December, but there were indications in the summer 2004 that the level of fees being contemplated was to be higher than when the legislation was passed in 2000. [65] Draft fees regulations were issued before royal assent, allowing up to 10% of the reasonable marginal costs of complying with the request to be charged.[66]

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[63] The minutes of the January 24 meeting of the Practitioners' Group and the background paper can be accessed through http://www.foi.net.

[64] Available at http://www.dca.gov.uk/foi/guidance/proguide/index.htm , p2

[65] "Treasury accused as cost of information soars" *Guardian* 18 May 2004

[66] The effect of the draft fees regulations is described on the Information Commissioner office's website at http://www.informationcommissioner.gov.uk/cms/DocumentUploads/FOI%20Fees%20Regulations%20update.pdf

EDM 1269 calling for the draft regulations to be implemented has been signed by over 170 MPs. In a subsequent Commons debate, the junior minister, Christopher Leslie, said:

> We intend that the cost of handling information requests is borne substantially by the public sector; that is right and proper, as we are accountable to the public. I cannot give an undertaking that every aspect of the draft fees regulations is set in stone and will not change; it would imprudent to do so. However, the gist of the point is that the costs of freedom of information requests should be borne substantially by the public sector. That is the Government's commitment.[67]

Documents requested by an academic, Steve Wood, under the Code of Practice indicated that the fees issue was still unresolved in August 2004.[68] However, the *Guardian* reported in September that ministers had decided against levying higher fees.[69] The Scottish legislation allows for the first £100 of work to be free and then for 10 per cent of the cost of the work thereafter to be charged.[70]

On 18 October Lord Falconer announced that for information costing public bodies less than £450 to retrieve and collate there would be no charge and that a £600 limit would apply for central government. It will be possible to levy disbursement charges for costs of photocopying etc. No further detail is yet available.[71] Fees regulations are expected to be laid in December 2004.

The introduction of a new fees regime in Ireland in 2003 led to significant reductions in usage of the legislation, as noted in a report from the Information Commissioner, Emily O'Reilly:

- overall usage of the Act has fallen by over 50% while requests for non-personal information has declined by 75%,
- the media are now less likely to use the Act. Usage by journalists declined steadily throughout 2003. Between the first quarter of 2003 and the first quarter of 2004 the number of requests fell by 83% and still continues to decline,
- other users of the Act, individuals and representative bodies, use the Act far less than before to access information on decisions that affect them directly or indirectly,

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67 HC Deb 9 June 2004 c99WH

68 "Whitehall split on fees to access files" *Guardian* 24 August 2004

69 "Blair to drop fees for access to data" 21 September 2004 *Guardian*

70 Freedom of Information (Scotland) Act 2002. A Consultation on Charging Fees. http://www.scotland.gov.uk/consultations/government/cocf-00.asp

71 DCA Press Notice 18 October 2004 *Most Freedom of Information requests for free- Falconer*

- business requests to all bodies declined by 28% over the two years and fell by 53% between the first quarter of 2003 and the first quarter of 2004[72]

E. Handling appeals

FoI campaigners have expressed concern that the Information Commissioner's office may have difficulty in handling large numbers of appeals, given that there is no phasing-in process:

> ***Mr Frankel:*** The potential problem is very considerable. The Government seems to calculate there are now 100,000 public authorities subject to the Freedom of Information Act. Instead of phasing the Act in, they are going to bring it in on January 1, 2005. Authorities are going to have 20 days to reply to a request, then there may be a month for internal review, and by March 1, complaints to the Information Commissioner are going to be arriving by the van load and the Commissioner is going to have a very, very serious job on his hands adopting an efficient system for dealing with these which does not simply add to the delays that the applicant is already experiencing all the way down the line. That is a very real and difficult problem, particularly as these are not straightforward cases such as an authority taking too long to respond to a request where you just say, "Oh, they have exceeded the time limit, that is obvious." The exemptions are complex issues, they will take time for the investigators to get their minds round, and some of the cases will be very complicated.
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> ***Mr Hencke:*** On top of that going on, officially, at the same time, the 30 year rule—you know, let's rush to the National Archives—disappears. I certainly know, from sitting on the Advisory Committee and what the police have said, journalists or members of the public would think, "There are a lot of big issues: the poll tax riots, the miners' dispute, the Hillsborough disaster." On all these issues you could suddenly demand all the papers—I mean, in the case of the police, because there is no pending case or legal case any more on these. The Advisory Committee have been told that, I think, South Yorkshire police force know they have the equivalent of a room full of undisclosed documents on Hillsborough, and God knows what they have got on Orgreave and what happened there, and all this becomes legitimate for people to start requesting. I can see that if the authorities all over the place start blocking it—and local government is going to find the same, you see . . . I think that once ordinary people realise, there are going to be a lot of issues like your kid cannot get into the school you want; your hospital operation has gone wrong; there is some peculiar planning thing and you are a bit suspicious that the local council has done some deal with a dodgy developer, all this becomes freedom of information requests immediately. I can see that if you get authorities which are against this, there is going to be a flood of stuff and then the system will be discredited.[73]

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[72] *Review of the operation of the Freedom of Information (Amendment) Act 2003* http://www.oic.gov.ie/261e/Review.pdf

[73] Oral evidence to Public Administration Select Committee 15 January 2004 HC 41-ii Q125

The Republic of Ireland faced difficulties in FoI implementation, due to the backlog of appeals to their Commissioner, which had the effect of encouraging public authorities to delay disclosure. New procedures were instituted in 2001 to ensure that new reviews were dealt with immediately, rather than being added to the waiting list.[74]

There are more general issues about the stance of the independent official, the Information Commissioner and the extent to which his enforcement powers are likely to be used. There may be a contrast in approach between the UK Information Commissioner and the Scottish Information Commissioner. The UK legislation allows for further appeals from the Commissioner to the Information Tribunal under section 57. The Tribunal also hears appeals under data protection legislation. The extent to which appeals will be taken from the Information Commissioner to the Information Tribunal is also difficult to assess. It is possible that a considerable proportion may be appealed initially, so that definitive decisions are made on the purpose and extent of exemptions and the public interest test.[75] The UK Information Commissioner is negotiating a Memorandum of Understanding with government departments, following the precedent of the Parliamentary Ombudsman. This will concentrate on improving communications, when a request has become the subject of a complaint.

V FoI and Members of Parliament

The introduction of FoI is likely to affect both the way in which Members request information from public bodies and the way in which information about Members is disclosed to the public. Various aspects are considered below.

A. Parliament

1. Parliamentary administration

Public authorities, not individuals, are subject to FoI, with the implication that information held by Members in their individual capacity is not subject to FoI, even if stored, either physically or electronically, at either House.[76] When acting in other capacities, for example, as members of the House of Commons Commission, Members will be considered as part of the House of Commons public body. Members communicating with officials of the House on, for example, administrative business may also find that emails, letters etc are potentially disclosable.

There are special exemptions which apply to both Houses of Parliament, in respect of parliamentary privilege, and in relation to the conduct of public affairs. The first will

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74 See 2001 report from Information Commissioner at http://www.oic.gov.ie/23ca_3c2.htm

75 Appeals to the Information Tribunal are made under s57. Appeals to the courts are on points of law only

76 See for example the guidance on exemptions from the Department of Constitutional Affairs *Section 34 Parliamentary Privilege*, which points out that FoI does not apply to individual MPs, as opposed to the two Houses, as public bodies (para 1.4) http://www.dca.gov.uk/foi/guidance/exguide/sec34/chap01.htm

apply to proceedings in Parliament (such as the private deliberations of a select committee) and related matters; the second may apply to advice or discussions whose disclosure would prejudice the effective conduct of public affairs in a parliamentary context. The Speaker may issue certificates which are conclusive evidence that these exemptions apply. However, he may not issue a certificate on a class basis - each request for information must be considered on its merits. The Commons has its own FoI officer, based in the Office of the Clerk. The House of Lords is a separate public body for the purposes of the Act, and it is the Clerk of the Parliaments who has responsibility for issuing certificates.

It should be noted that implementation of the FoI legislation will also bring both Houses within the ambit of the *Data Protection Act 1998.*[77] Each House has already announced details of Members' allowances (expenses for Lords) on 21 October 2004 which are available on the parliamentary website[78]

2. Parliamentary questions

FoI has been increasingly used in other jurisdictions by parliamentarians and their staff to elicit information, but available evidence suggests that this is as a supplement to PQs.[79] There are no straightforward comparisons with overseas practice. The 1997 resolutions on ministerial accountability to both Houses made an explicit link between the Code of Practice and the reasons given for refusal to answer a PQ. It stated:

> Ministers should be as open as possible with Parliament, refusing to provide information only when disclosure would not be in the public interest, which should be decided in accordance with relevant statute and the Government's Code of Practice on Access to Government Information; [80]

The Public Administration Select Committee publishes an annual report into the operation of this resolution in respect of parliamentary questions. It has drawn attention to occasions where parliamentary answers did not appear to follow the exemptions stated under the Code of Practice. On occasion, the parliamentary ombudsman has become involved:

> As part of a series of parliamentary questions to Secretaries of State, Andrew Robathan MP asked the Home Secretary on how many occasions declarations of interests had been made by ministers under the Ministerial Code of Conduct. The Home Office refused to release the information citing two exemptions under the Code of Practice. Mr Robathan referred a complaint to the Ombudsman, who

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77 See paras 2 and 3 of Schedule 6 to the FoI Act.

78 http://194.128.65.30/allowances.htm

79 For example, the New Zealand Ombudsman has stated that he does not have jurisdiction to examine a complaint about a parliamentary answer due to the Bill of Rights 1688. See *Quarterly Review*, Volume 7, Issue 2 June 2001 http://www.ombudsmen.govt.nz/downloads%20Quarterly%20reviews/oqr7-2.pdf

80 For further information see PCC briefing note on the ministerial responsibility resolution and Library Research Papers 97/4 and 97/5

> upheld the complaint, ruling that the exemptions cited by the department were not relevant. The department refused to comply with a ruling of the Ombudsman, the first time a ruling under the Code has been refused.[47] This case highlights the problem with the role of the Ombudsman. The Ombudsman can only report to Parliament, to this Committee, and has no powers or sanction to require ministers to comply with an investigation or a finding.[81]

This option will not be available under FoI, due to the operation of parliamentary privilege, explained below. Some adjustment to the wording of the Ministerial Code is likely to be necessary following implementation of FoI, since it refers to duties relating to the Code of Practice.

The Public Administration Select Committee's most recent report on Ministerial Accountability and Parliamentary Questions was concerned that the rights of Members should not be disadvantaged vis a vis ordinary citizens:

> 10. The recent debate in Westminster Hall on our last Report reflected the concern in the House that Parliamentary Questions are not treated with sufficient priority by Departments and that Members would be disadvantaged in relation to the rights of ordinary citizens under the FOI Act. The Minister for the Cabinet Office sought to deal with these concerns in that debate by stating that "The Act is fundamentally blind to those requesting information, so it would be wholly wrong to suggest that its implementation would systematically and routinely disadvantage those Members of Parliament who wished to raise matters directly with Ministers. [82]

The Government response to the PASC report noted:

> **2. With the advent of the Freedom of Information Act, we recommend that the Government should give careful consideration to how best it might remedy the current, anomalous situation concerning the right of review and how the analogous rights of appeal in the new FOI regime should apply. We also recommend that in developing its guidance on the implementation of the FOI Act the Government should ensure clear advice is provided on the handling of Parliamentary Questions. (Paragraph 13)**
>
> The Government acknowledges that there has been some concern in Parliament that the implementation of the Freedom of Information Act might leave Members disadvantaged, in comparison to citizens, in obtaining information from Government. The Government is determined that greater access to information for the citizen should do nothing to undermine the crucial role of Parliament in holding Government to account.

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81 HC 1086 2001-2, paras 16-27
82 HC 355 2003-4

> Under the Freedom of Information Act, individuals who are dissatisfied with the response they receive from a public authority can in the first instance seek an internal review of the response from the authority or department. If they remain dissatisfied they can apply to the independent Information Commissioner for a review. Should the matter remain unresolved a further right of appeal against the Commissioner's decision can be made to the Information Tribunal. Accordingly the Government believes that the review system provides a proportionate and robust system for independent review (separate from the original department should that be needed).
>
> A Code of Practice providing guidance to all public authorities (as required by Section 45 of the Act) will include advice on procedures for dealing with complaints about the handling of requests for information This will make clear that there should be no inconsistencies between the provision of information in answer to Parliamentary Questions and information given to citizens under the Act. Where a member is dissatisfied with the answer to their Parliamentary Question there are well-established parliamentary routes Members may follow such as: tabling further Questions; seeking to raise the issues on the Adjournment; or complaint to the Public Administration Committee, which may seek to follow up the refusal with Ministers. Alternatively they may write to the appropriate Minister expressing their concern and setting out the information they are seeking. The Code will make clear that such correspondence shall be treated by departments as a new request for information requiring a full internal review and fresh decision. The request will attract all the provisions and appeal mechanisms afforded by the FOIA, including if necessary, an appeal to the Information Commissioner. Any investigation by the Information Commissioner will therefore be related to the correspondence and not extend to the Answer to the Parliamentary Question or to any other parliamentary proceedings which are protected by Parliamentary Privilege. In addition the Cabinet Office plans to issue revised *Guidance To Officials On Drafting Answers To Parliamentary Questions* taking account of the Freedom Of Information Act.[83]
>
> The Government expects that the Committee and the House authorities will wish to keep under review the relationship between the pattern of ministerial answers and the operation of rules about tabling Questions on a similar topic where a department has refused to answer the original question.

There are also implications in respect of data protection legislation. One Member, Steve Webb, has already used his rights under this legislation to elicit information which a parliamentary answer intimated was not available. The department made an official apology through the Speaker.[84]

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[83] *First Special Report of 2003-4 Government Response to Third Report of 2003-4* HC 1262 2003-4 at http://www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/1262/1262.pdf

[84] See para 6 of HC 136 2002-3 for full details

3. Select committees

The power of a select committee to send for persons, papers and records is derived from the right of the House itself to require witnesses to appear and answer questions and is set out in the Orders of Reference establishing the committee. Although select committees generally offer informal invitations to witnesses to appear, they do have formal powers to summon and a person who refuses to attend can be found to have committed a contempt of the House. Members of the Commons and Lords and Ministers may not be so formally summoned.[85]

In practice the executive has made the decision as to which civil servants may appear before select committees, issuing the Osmotherly Rules in 1980.[86] The Rules have never been formally endorsed by the Commons. In response to a wide-ranging enquiry into ministerial responsibility by the then Select Committee on the Public Service,[87] the Rules were amended in January 1997 to make explicit reference to the Code of Practice.[88] Following disquiet expressed by the Liaison Committee, the Prime Minister has undertaken to conduct a review of the Osmotherly Rules.[89] An initial draft was discussed at the most recent Liaison Committee meeting with the Leader of the House.

Select committees have the power to request papers which the House would normally ask for. Erskine May notes:

> In the case of a select committee with power to send for papers and records there is no restriction on its power to require the production of papers by private bodies or individuals, provided that such papers are relevant to the committee's work as defined by its order of reference.[90]

In respect of government departments, such rights are already available to select committees and their staff, as members of the public, on a non-statutory basis using the Code of Practice. But in considering requests departments have not necessarily cited exemptions when refusing access. The recent Clerks' Note to the Liaison Committee notes a series of recent difficulties in obtaining relevant witnesses and papers.[91] This was taken up by the Committee in its annual report.[92] The special report issued by the Foreign Affairs Committee listed a series of documents to which the committee was refused access, in contrast to the treatment given to the Intelligence and Security Committee and

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85 For further detail see *Parliamentary Practice*, 23rd edition, p759

86 For further detail see Library Standard Note no 2671 *The Osmotherly Rules* and Peter Hennessy "*The missing ingredient" The Tablet* 18 September 2004

87 *Ministerial Accountability and Responsibility*, HC 313 1995-96, paras 72-83

88 The current text is available at: http://www.cabinetoffice.gov.uk/central/1999/selcom/principles.htm

89 Evidence to Liaison Committee 3 February 2004, cited in 446 2003-4, para 90

90 ibid p263

91 *Scrutiny of Government: Select Committees after Hutton* Note from the Clerks 8 January 2004

92 HC 446 2003-4

the Hutton Inquiry. It asked the House to consider the procedures which should apply when a Minister refuses to supply papers to a select committee, amongst other points.

Although individual MPs have occasionally appealed to the Ombudsman to challenge refusals of information using the Code, select committees have not normally followed this route. The higher profile of a statutory scheme may encourage more individual action by Members. There is a precedent in the action of the Chairman of the International Development Select Committee in appealing to the Ombudsman for access to interdepartmental papers relating to the Ilisu Dam.[93] The Ombudsman found that whilst the documents themselves should not be released, there was a clear public interest in releasing the essential elements of the information sought. He provided an annex to the select committee report disclosing this information. It is expected that the Information Commissioner will follow the precedent set by the Ombudsman in recommending the release of redacted documents when this is the most convenient way of releasing information.[94]

The introduction of FoI would in theory provide select committees with a statutory basis on which to request papers, but for the operation of Article IX of the Bill of Rights 1689. This prohibits the impeachment or questioning of proceedings in Parliament by 'any court or place out of Parliament'. There is therefore a fundamental difficulty in accessing the appeals process operated by the Information Commissioner.[95] There are likely to be only minimal changes to select committee procedures, as nearly all bodies can be expected to comply with requests on a voluntary basis.

However, just as with parliamentary questions, Members may wish to use public access rights under FoI to request information, either to ensure that any papers not released are covered by a specified exemption, [96] or to obtain access to an independent system of appeal, or to ensure that the 20 day statutory deadline is used as a benchmark for a response. The legislation gives departments some leeway with the 20 working days, particularly when the request has to be clarified or fees may be levied, or where the public interest test comes into play. At present, there are instances where a select committee can suffer long delays in response to requests for information. The Note by the Clerks to the Liaison Committee stated:

> **Speed of provision**

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93 HC 395 2000-01

94 See for example, para 14 of Case A.02/03 *Failure to provide copies of progress reports on records released into the public domain under the Open Government initiative* PCA First Report HC 115 2002-3

95 For further detail on Article IX and parliamentary privilege, see Chapters 5 and 6 of *Parliamentary Practice* (23rd edition 2004)

96 For example, select committees have been denied access on occasion to information on the grounds of commercial confidentiality. Norman Baker has compiled a memorandum on the increasing use of this exemption by departments. See. HC 1036 2001-2, para 13 for details

> 19. One further minor but significant contrast emerges from the Hutton experience: the speed with which papers are supplied, in marked contrast to the record of some departments in supplying information and responding to requests.[97]

B. Elected Representatives and Political Parties

Political parties are not public bodies for the purposes of the *Freedom of Information Act 2000* and will therefore not have to apply the provisions of the Act to any written requests for information that they themselves receive. However, parties, or their elected representatives, communicate with a range of public bodies that are covered by the Act. Information which is passed to these bodies, and that the bodies retain, might be subject to an FoI request. The Act applies not only to central government, but also to independent public bodies such as the Electoral Commission and the BBC, Parliament and local government. Thus, for example, a written request from a mobile phone company to a local authority asking for copies of correspondence with the local MP and councillor about the siting of a phone mast would come within the ambit of the Act.

The Act is fully retrospective and will apply to information recorded by public bodies prior to commencement in January 2005. Separate data protection legislation continues to apply and there is a complex interaction between the two regimes. At central government level, correspondence on policy issues affecting political parties is likely to be held by central government departments. There are major implications for political parties at a local level, since local authorities, GPs and schools are public bodies subject to FoI requests.[98] Local councillors need to consider their position carefully. The Act gives a general right of access to information held by public bodies, whether or not the body is the originator of the material. Information which is entirely related to the activities of a political group is not likely to be caught, but there may be difficulties in disentangling this from local authority business.

In practice, much material generated by political parties and held by public bodies is likely to fall within one of the exemptions, the most likely being policy formulation under section 35. This exemption will be subject to the public interest test except as it relates to Parliament. There are some difficult areas for political parties to consider.

Individual councillors are likely to be considered as part of the authority as a public body, since local authorities are executive bodies. So, unlike individual MPs, information held by local councillors may well fall within the scope of FoI. There are major implications for political parties here, as no definitive advice has emerged in respect of the records of party groups within local authorities. New executive arrangements have raised issues

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97 *Scrutiny of Government: Select Committees after Hutton* Note from the Clerks 8 January 2004

98 For the current regime applicable to local authorities, see Library Standard Note 1583 *Local Government: Access to Information* at http://hcl1.hclibrary.parliament.uk/notes/pcc/snpc-01583.pdf

about access to policy documents for councillors with a scrutiny role. The Information Commissioner's office has issued the following advice with respect to emails by councillors:

> **Party political communications**
> A common example of party political communications would be emails between councillors which discuss party political matters. In this context the author will be communicating in their party political capacity and the emails would not relate to the functions of the public authority. These communications would therefore not be "held" for the purposes of FOI.[99]

However the guidance noted that there may be issues with hybrid emails where the message contains a mixture of official business and personal comments.

Finally, political parties have statutory requirements under the *Political Parties, Elections and Referendums Act 2000* to submit details of election expenditure. These communications are usually with the Electoral Commission, a public body under the Act. In addition, local election expenses returns are submitted to Acting Returning Officers. Correspondence relating to the submission of returns is potentially within the scope of the Act, unless it fits within a specified exemption and the public interest lies in non-disclosure.

C. How Members and political parties may use FoI

Political parties are themselves likely to use the legislation to obtain information at both central and local government level. There has already been some experience with requests under the non-statutory Code of Practice on Access to Government Information.[100] The Public Administration Select Committee's report on ministerial accountability and parliamentary questions notes how use of the Code of Practice by MPs has grown in recent years.[101] Experience in New Zealand indicates the potential attractiveness of the FoI route as a supplement to parliamentary questions. It should be pointed out, however, that FoI requests in the UK, unlike in New Zealand, are likely to be subject to a fee charging regime. Widespread use of this route may therefore require some financial resourcing.

Political parties are also likely to use FoI to assist with obtaining information from local government, particularly when an individual council is under the control of another political party. There have already been changes to data protection legislation to enable

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99 *Freedom of Information Awareness Guidance no 12 When is information caught by the Freedom of Information Act?* Information Commissioner's Office 2004 at http://www.informationcommissioner.gov.uk/cms/DocumentUploads/FOI%20Awarness%20Guidance%2012.pdf

100 See the *July 2003 to June-2004 Report on Access to Official Information from the Parliamentary Commissioner for Administration*, for selected examples, HC 701 Session 2003-4

101 HC 2003-4, para 6

MPs and councillors to correspond about constituency cases. The *Data Protection (Processing of Sensitive Personal Data) (Elected Representatives) Order 2002* makes use of the power under schedule 3 of the 1998 Act enabling the Secretary of State for Constitutional Affairs to add to the list of circumstances in which the processing of sensitive personal information is allowed. The order applies to Members of Parliament and various other elected representatives, including elected members of local authorities.[102] FoI may also be a supplement for MPs and councillors who wish to pursue constituency cases at a local level. The non-statutory Code of Practice did not apply beyond central Government, so it is difficult to assess the likely level of use of FoI here.

FoI will enable political parties to ask for a much wider selection of policy documents from local authorities. As GPs and schools are subject to FoI, there is potential for local candidates and their supporters to gather information relevant to election campaigning. Until they are formally adopted as a candidate it is difficult to see how this activity would be counted against election expenditure limits.

[102] For further information see Library Standard Note 1936 *Data Protection: Constituency Casework* at http://hcl1.hclibrary.parliament.uk/notes/has/snha-01936.pdf