The Code of Practice on Access to Official Information

Research Paper 97/69

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This Paper looks at the background to the introduction of the non statutory *Code of Practice on Access to Official Information* in April 1994, and examines its implementation, with a particular assessment of its integration into codes of practice governing accountability to Parliament. The new Government has promised a White Paper on Freedom of Information in the coming months. Finally the proposals for a Freedom of Information Act are assessed briefly. This Paper replaces Research Paper no. 93/17 *The Right to Know Bill*. Library Research Paper 94/107 *Openness and Transparency and the current open government debate* covers developments in the European union. The treatment of public records under the *Public Records Acts 1958 and 1967* (*Public Records (Scotland) Act 1937 for Scotland*) is not specificially addressed and the *Official Secrets Acts 1911 and 1989* is also beyond the scope of this Paper.

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Summary

In April 1994 a *Code of Practice on Access to Official Information* came into force. The Code is non-statutory and applies to the civil service and associated public bodies. The Parliamentary Commissioner for Administration handles complaints about the administration of the Code. Under the Code the public may apply for information relating to policies, actions and decisions of a particular department or body. A new edition of the Code appeared in January 1997 following reports from the Select Committee on the Parliamentary Commissioner for Administration and the Select Committee on Public Service. Requests by the public under the Code have been few and the Ombudsman has commented on a number of occasions that awareness of the Code amongst officials is low.

The Code of Practice on Access to Official Information occupies a central position in the codes of practice which govern accountability to Parliament (Research Paper no. 97/5, The *Accountability Debate: Codes of Guidance and Questions of Procedure for Ministers*). References to the Code are to be found in *Questions of Procedure for Ministers*, the Osmotherly Rules (*Departmental Evidence and Response to Select Committees*), the *Guidance on Answering Parliamentary Questions: Basic Do's and Don'ts*, the *Civil Service Code*, and the new *Parliamentary resolution on ministerial accountability to Parliament.*

The PCA Select Committee concluded in their 1996 Report[1] that a Freedom of Information Act was preferable to a Code. The EU directive on Data Protection[2] is due to come into force on 24 October 1998; changes are necessary to UK law on data protection (principally the *Data Protection Act 1984*) and forthcoming legislation on data protection announced in the Queen's Speech will also cover freedom of information in that it will assist individuals to secure access to the records which Government holds on them. The new Labour Government has promised a White Paper setting out proposals for a Freedom of Information Bill before the summer recess, and some broader FOI legislation is expected in this Parliament.

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1 HC 84 1995/96

2 95/46/EC

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I Background

Pressure for greater freedom of information (FOI) grew in the 1960s and 1970s fuelled by the adoption of FOI laws abroad. Between 1979 and 1984 four private members' bills promoting FOI were introduced; none reached the statute book. In 1977 the Croham Directive issued by the then head of the Civil Service Sir Douglas Allen, was intended to secure the release of more of the background detail and information behind Ministerial decisions. The Directive added "that when policy studies were being undertaken in future the background material should as far as possible be written in a form which would permit it to be published separately, in the minimum of alteration, once a Ministerial decision to do so had been taken".[3] The Croham Directive is judged to have been ineffective[4] by the Select Committee on the Parliamentary Commissioner for Administration.

In 1979 the Labour Government produced a Green Paper on Open Government[5] which favoured a Code instead of FOI legislation. No further action was taken when Mrs Thatcher came to power. The Campaign for Freedom of Information (CFI) was launched on 5 January 1984 and rapidly gained the support of many organisations and politicians of all parties. CFI has been a major factor in placing and keeping open Government on the political agenda.

CFI's broad objectives are set out below:[6]

Objectives of the Campaign for Freedom of Information

The Campaign for Freedom of Information aims to eliminate unnecessary official secrecy and to give people legal rights to information which affects their lives or which they need to hold public authorities properly accountable.

It campaigns for a Freedom of Information Act. The USA, Australia, Canada, New Zealand, France, Sweden, Norway, Denmark and Holland already have such laws. They give people the right to any official information unless the government or public authority can show that disclosure would cause real harm to essential interests such as defence, security, law enforcement or privacy. Under the Campaign's proposals, people would be able to challenge any unreasonable withholding of information by appealing to a Commissioner and Tribunal with power to order disclosure. The Campaign also presses for more disclosure in the private sector, if the information is of public interest.

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3 The text of the Directive is given in a Written Answer (HC Deb vol 942 c.691-4 26.1.78)

4 1995-96 HC 84, 2nd Report: Open Government

5 *Open Government* Cm 7520/1979

6 *Campaign for Freedom of Information Objectives* (1997)

The Campaign seeks to repeal the 1989 Official Secrets Act and replace it by a narrower measure applying only to information whose disclosure would cause serious damage to defence, Security, international relations, law enforcement or safety. It should be a defence to show that there was an over-riding public interest in disclosure, or that the information had previously been published.

The Campaign is an all-party body, supported by a coalition of around 80 national organisations. It has promoted a series of successful private members bills, which give people the right to see their own medical, social work and housing records and information about environmental and safety hazards. It has also promoted amendments to government legislation, to increase public rights to information. It encourages authorities to disclose more information voluntarily. At its annual Freedom of Information Awards ceremony, it recognises individuals who have campaigned for greater openness and authorities and companies which have taken important initiatives in releasing more information. It publishes an occasional newspaper called *'Secrets'.*

The policy of CFI is to move gradually towards full freedom of information and this has been assisted by a number of legislative initiatives introduced by backbench MPs. Those which have been enacted include the *Local Government (Access to Information) Act 1985*; the Access to Personal Files Act 1987; the *Access to Medical Reports Act 1988*; the *Environment and Safety Information Act 1988*; and the *Access to Health Records Act 1990* (the last four all inspired by CFI). The *Data Protection Act 1984*, a Government measure, provided individuals with statutory rights of access to data held about them on computer. It is probably fair to point out that these measures relate more to access by individuals to information held about them than to information about the process of Government itself.

A Bill introduced by Richard Shepherd MP[7] which proposed a revised, enforceable, official secrets law, provided an opportunity for a full debate on official secrets, and in November 1988 the Government introduced its Official Secrets Bill. The *Official Secrets Act 1989* removed the 'catch-all' provisions of S.2 of the *Official Secrets Act 1911* and replaced it with provisions which restrict the application of the criminal law to specific categories of information. Critics pointed out that the 1989 Act did not offer new rights to information.

Archy Kirkwood introduced a FOI Bill[8] on 4 December 1991 designed to create a general public right of access to records held by public authorities, and a similar Bill was introduced in the following session by Mark Fisher on 19 February 1993.[9] Both were promoted by CFI which produced a detailed commentary.[10]

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7 *Protection of Official Information Bill* [Bill 20 of 1987/88] Second Reading was on 15 January 1988 (HC Deb vol 125 cols 563-638) Reference Sheet 88/7 and Research Note no. 437 give background information on this topic

8 Bill 22 of 1991/1992

9 *The Right to Know Bill* [Bill 18 of 1992/93]

10 *A Freedom of Information Act for Britain - Draft Bill and Commentary* November 1991

The Conservative Party manifesto for the 1992 election promised a review of the statutory restrictions which exist on the disclosure of information, greater access to personal records held by Government and less secrecy about the workings of Government.[11]

On 19 May 1992 the Prime Minister announced the publication of *Questions of Procedure for Ministers*[12] and the names and membership of the standing ministerial committees, sub-committees and working groups.[13] In addition, Douglas Hurd, then Foreign Secretary, announced on 15 May a review of all papers for which he was responsible and which have been withheld from the Public Record Office for more than 30 years. This was followed by a review of the criteria presently used to determine the extended closure and retention of public records in general.

On 2 July 1993, Mark Fisher's *Right to Know Bill* was talked out at Report State in the Commons.[14]

On 15 July 1993, the Government issued a White Paper '*Open Government*'.[15] It reviewed progress already made in making more information available to the citizen, citing the *Citizens Charter*, and the publication of *Questions of Procedure for Ministers* amongst other initiatives. It recommended a new Code of Practice on Access to Government information, with its implementation to be monitored by the Parliamentary Commissioner for Administration (The Ombudsman). The White Paper also proposed two new statutory access rights to personal records held by public bodies, and to health and safety information [Chapters 5 and 6].[16] The White Paper also reviewed the current statutory prohibitions on disclosure,[17] and proposed a presumption in favour of 'harm tests' into this area of the criminal law, in line with the approach in the *Official Secrets Act 1989*. The aim would be to standardise such tests to ensure consistency of approach on disclosure. Finally, there were proposals to reduce the amount of material subject to retention beyond the normal 30 year rule for public records.[18] Following the 1992 review, records would not be closed for longer than 30 years unless actual damage would be caused in specified areas, or sensitive personal information was removed.

The White Paper stated that the proposed Code of Practice would protect the public against unnecessary secrecy, with the Ombudsman able to make informed criticism of the Government decisions [para. 3.40]:

> 3.40 The Code of Practice proposals in Chapter 4 and Annex A below will protect the public interest against unnecessary or unjustifiable secrecy, and

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11 p.16 *The Best Future for Britain: The Conservative Manifesto 1992*

12 see Library Research Paper no. 97/5 for further details

13 HC Deb vol 207 c.65

14 HC Deb vol 227 c.1285

15 Cm 2290

16 The personal records right would broadly mirror rights to access to personal data held on computer under the *Data Protection Act 1984*

17 currently over 200, listed at Annex B of the White Paper

18 *Public Records Acts 1958, 1967*

> have the potential to expose any use of secrecy to conceal injustice, maladministration or other forms of wrong doing. Where there is a finely balanced judgement to be made between the public interest in openness and the public interest in confidentiality in a particular case, the Code of Practice will allow (through the Parliamentary Ombudsman's reports) informed criticism of the Government's decisions, while retaining the principle that Ministers are accountable to Parliament for their actions. It will remain the function of auditors to guard against misuse or unauthorised use of funds, and the function of the courts to guard against injustice to the individual.

A draft Code appeared as Annex A of the White Paper. It was proposed that the Ombudsman would use his existing powers under the *Parliamentary Commissioner for Administration Act 1967* to investigate complaints of a failure to produce information under the Code, without the complainant having to demonstrate consequent injury or disadvantage [para. 4.19].

The Ombudsman was favoured over an Information Commissioner proposed in the 1992/93 *Right to Know Bill* because the Ombudsman was an Officer of Parliament, and "many of the decisions on access to information involve a fine balance between the public interest in disclosing information, and the public interest in withholding it. There is a case for retaining a element of parliamentary accountability for such decisions, and the flexibility to weigh and assess the balance of factors". In addition, a 'legalistic' approach was seen as potentially restrictive and costly when compared with the practical success of the Ombudsman since 1967.

The White Paper looked at the potential demand under the new Code and the proposed new statutory access rights, concluding that if the UK followed the same pattern of demand as under Australian and Canadian Federal access laws one might expect to see the number of additional requests for information to central government and national public bodies to be between 50,000 - 100,000 a year [para. 7.5]. The intention was that charges for information should cover 'reasonable costs' [para. 7.7].

The first edition of the Code was issued in April 1994, together with Guidance on interpretation.[19] The Guidance is not binding on the Ombudsman, as he made clear in one of his first Open Government Reports.[20] Officials were identified in each department and agency with specific open government responsibilities to promote awareness and best practice.

There is a separate Code of Practice on openness in the NHS (revised ed. 1997)[21] and a good practice note published by the local authority associations applicable to local government (see Appendix 1).

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[19] *Code of Practice on Access to Official Information* (1994) Cabinet Office

[20] *Ninth Report of the PCA Session 1994/95 Selected Cases Volume 4: Access to Official Information HC 758 p.14*

[21] *Code of Practice on Openness in the NHS (England) NHS Executive 1997*

II The Code of Practice on Access to Official Information

The most recent edition of the Code took effect from February 1997. There have been some drafting changes since the first edition of March 1994, and the major changes are given below. The general principles of the Code are set out in Part I:

Purpose

1. This Code of Practice supports the Government's policy under the Citizen's Charter of extending access to official information, and responding to reasonable requests for information. The approach to release of information should in all cases be based on the assumption that information should be released except where disclosure would not be in the public interest, as specified in Part II of this Code.

2. The aims of the Code are:

- to improve policy-making and the democratic process by extending access to the facts and analyses which provide the basis for the consideration of proposed policy;
- to protect the interests of individuals and companies by ensuring that reasons are given for administrative decisions, except where there is statutory authority or established convention to the contrary; and
- to support and extend the principles of public service established under the Citizen's Charter.

These aims are balanced by the need:

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

This is generally seen as a more positive drafting than the 1994 edition since para.1 states explicitly that the assumption is that information should be released except where disclosure would not be in the public interest.

The Code is non statutory, and applies to departments and public bodies under the jurisdiction of the Ombudsman;[22] it also applies to functions performed by contractors on behalf of

[22] These are listed in Schedule 2 of the *Parliamentary Commissioner Act 1967*

departments, agencies or public bodies which the scope of the Code.[23] The Security and Intelligence Services are not within the scope of the Code.[24] See the Ombudsman's comments in one of his first reports[25] on an attempt to investigate Security Service records on the discrepancy between Code and Guidance. The Code now states explicitly that the Services are not within its scope. The OPS monitoring report for 1996[26] noted that the opportunity was taken to make the exclusion explicit but that the revision would lead to no loss of openness since the position remained the same as it had since the introduction of the Code in 1994 (para. 39).

The information covered by the Code is defined as follows:

Information the Government will release

3. Subject to the exemptions in Part II, the Code commits departments and public bodies under the jurisdiction of the Parliamentary Commissioner for Administration (the Ombudsman):

i) to publish the facts and analysis of the facts which the Government considers relevant and important in framing major policy proposals and decisions; such information will normally be made available when policies and decisions are announced;

ii) to publish or otherwise make available, as soon as practicable after the Code becomes operational, explanatory material on departments' dealings with the public (including such rules, procedures, internal guidance to officials, and similar administrative manuals as will assist better understanding of departmental action in dealing with the public) except where publication could prejudice any matter which should properly be kept confidential under Part 11 of the Code;

iii) to give reasons for administrative decisions to those affected;

iv) to publish in accordance with the Citizen's Charter:

- full information about how public services are run, how much they cost, who is in charge, and what complaints and redress procedures are available;

- full and, where possible, comparable information about what services are being provided, what targets are set, what standards of service are expected and the results achieved.

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[23] see Code of Practice on Access to Government Information Guidance on Interpretation 2nd ed 1997 Part IV Functions delivered by contractors

[24] Code paragraph 6 and Guidance (para. 66). The *Security Service Acts 1989 and 1996* and the *Intelligence Service Act 1994* govern the security services

[25] HC 758 1994/95

[26] *Code of Practice on Access to Government Information 1996 Report* (OPS) Cabinet Office

v) to release, in response to specific requests, information relating to their policies, actions and decisions and other matters related to their areas of responsibility.

4. There is no commitment that pre-existing documents, as distinct from information, will be made available in response to requests. The Code does not require departments to acquire information they do not possess, to provide information which is already published, or to provide information which is provided as part of an existing charged service other than through that service.

The revised 1997 Guidance on interpretation notes that although the public has no right to a *particular* document, "the Ombudsman has indicated that on occasion the simplest way in which to meet a request for information may be by release of an actual document" [para. 54].

The target for responses to requests is given as 20 days, with the Guidance recommending that "applicants should be notified if it is going to take more than 20 working days to respond to their request" [para. 64]. Departments and agencies make their own arrangements for charging [para. 7] which should be reasonable since the Guidance warns "unreasonable charges are one of the matters on which the public may complain, through a Member of Parliament, to the Ombudsman"[27]

The Code warns that the Code cannot override statutory provisions [para. 8]:

Relationship to statutory access rights

8. This Code is non-statutory and cannot override provisions contained in statutory rights of access to information or records (nor can it override statutory prohibitions on disclosure). Where the information could be sought under an existing statutory right, the terms of the right of access takes precedence over the Code. There are already certain access rights to health, medical and educational records, to personal files held by local authority housing and social services departments, and to personal data held on computer. There is also a right of access to environmental information. It is not envisaged that the Ombudsman will become involved in supervising these statutory rights.

The White Paper on Open Government (Cm 2290) proposed two new statutory rights to information:

an access right to personal records, proposed in Chapter 5;

an access right to health and safety information, proposed in Chapter 6.

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[27] Guidance, para. 76

Where a statutory right is proposed but has yet to be implemented, access to relevant information may be sought under the Code, but the Code should not be regarded as a means of access to original documents or personal files.

The new wording in paragraph 8 notes that a statutory right takes precedence over the Code.[28] The Campaign for Freedom of Information has called this new wording a "very significant drawback" in terms of access to environmental information since if information is sought under the Environmental Information Regulations, a refusal could only be challenged through the courts via judicial review - rather than through the Ombudsman.[29] The Select Committee questioned Roger Freeman, then Chancellor of the Duchy of Lancaster, on this point and he gave a full response[30] which stated that the Code would not affect the disclosure of environmental information, and that the amendment was designed to ensure that those asked to give information under the Code could not unwittingly breach the law by disclosing information whose disclosure was governed by statute.

It is made specific that the statutory rights of access to public records are not affected by the Code, and that information held by courts or contained in court documents is not within the scope of the Code.

Complaints are handled by the Ombudsman, after a process of internal review by the department or agency. The Guidance warns that internal review should be a simple process [para. 90] and that "The Ombudsmen's procedures for investigating complaints may include access to papers and records, and it should be noted that he has powers to see all papers relevant to a request, except for Cabinet papers" [para. 91].

Exemptions

Part II of the Code lists exemptions from the Code. The preamble introduces an important 'harm test' as follows:

PART II

Reasons for confidentiality

The following categories of information are exempt from the commitments to provide information in this Code. In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

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[28] There was a similar statement in the wording of the 1994 Guidance, but elevation to the Code indicates that it is intended to have greater weight than Guidance

[29] *Financial Times* 10/1/97 "Tories campaign against information act". See also evidence from CFI to the Public Service Committee's First Report *Ministerial Accountability and Responsibility* HC 234 1996/97

[30] in Appendix 4 to HC 234

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.

The exemptions will not be interpreted in a way which causes injustice to individuals.

The 1997 wording has been strengthened to state explicitly that the presumption remains that information should be disclosed unless the harm would outweigh the public interest. In the 1994 edition the wording was not so clear; the original draft of the Code contained in the 1993 White Paper did not contain a reference to the public interest at all, but it was added following the consultation period.

The exemptions are listed as follows:

1. Defence, security and international relations

a) Information whose disclosure would harm national security or defence.

b) Information whose disclosure would harm the conduct of international relations or affairs.

c) Information received in confidence from foreign governments, foreign courts or international organisations.

2. Internal discussion and advice

Information whose disclosure would harm the frankness and candour of internal discussion, including:

- proceedings of Cabinet and Cabinet committees;
- internal opinion, advice, recommendation, consultation and deliberation;
- projections and assumptions relating to internal policy analysis; analysis of alternative policy options and information relating to rejected policy options;
- confidential communications between departments, public bodies and regulatory bodies.

3. Communications with the Royal Household

Information relating to confidential communications between Ministers and Her Majesty the Queen or other Members of the Royal Household, or relating to confidential proceedings of the Privy Council.

4. Law enforcement and legal proceedings

a) Information whose disclosure could prejudice the administration of justice (including fair trial), legal proceedings or the proceedings of any

tribunal, public inquiry or other formal investigations (whether actual or likely) or whose disclosure is, has been, or is likely to be addressed in the context of such proceedings.

b) Information whose disclosure could prejudice the enforcement or proper administration of the law, including the prevention, investigation or detection of crime, or the apprehension or prosecution of offenders.

c) Information relating to legal proceedings or the proceedings of any tribunal, public inquiry or other formal investigation which have been completed or terminated, or relating to investigations which have or might have resulted in proceedings.

d) Information covered by legal professional privilege.

e) Information whose disclosure would harm public safety or public order, or would prejudice the security of any building or penal institution.

f) Information whose disclosure could endanger the life or physical safety of any person, or identify the source of information or assistance given in confidence for law enforcement or security purposes.

g) Information whose disclosure would increase the likelihood of damage to the environment, or rare or endangered species and their habitats.

5. Immigration and nationality

Information relating to immigration, nationality, consular and entry clearance cases. However, information will be provided, though not through access to personal records, where there is no risk that disclosure would prejudice the effective administration of immigration controls or other statutory provisions.

6. Effective management of the economy and collection of tax

a) Information whose disclosure would harm the ability of the Government to manage the economy, prejudice the conduct of official market operations, or could lead to improper gain or advantage.

b) Information whose disclosure would prejudice the assessment or collection of tax, duties or National Insurance contributions, or assist tax avoidance or evasion.

7. Effective management and operations of the public service

a) Information whose disclosure could lead to improper gain or advantage or would prejudice:

- the competitive position of a department or other public body or authority;

- negotiations or the effective conduct of personnel management, or commercial or contractual activities;

- the awarding of discretionary grants.

b) Information whose disclosure would harm the proper and efficient conduct of the operations of a department or other public body or authority, including NHS organisations, or of any regulatory body.

8. Public employment, public appointments and honours

a) Personnel records (relating to public appointments as well as employees of public authorities) including those relating to recruitment, promotion and security vetting.

b) Information, opinions and assessments given in confidence in relation to public employment and public appointments made by Ministers of the Crown, by the Crown on the advice of Ministers or by statutory office holders.

c) Information, opinions and assessments given in relation to recommendations for honours.

9. Voluminous or vexatious requests

Requests for information which are vexatious or manifestly unreasonable or are formulated in too general a manner, or which (because of the amount of information to be processed or the need to retrieve information from files not in current use) would require unreasonable diversion of resources.

10. Publication and prematurity in relation to publication

Information which is or will soon be published, or whose disclosure, where the material relates to a planned or potential announcement or publication, could cause harm (for example, of a physical or financial nature).

11. Research, statistics and analysis

a) Information relating to incomplete analysis, research or statistics, where disclosure could be misleading or deprive the holder of priority of publication or commercial value.

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

12. Privacy of an individual

Unwarranted disclosure to a third party of personal information about any person (including a deceased person) or any other disclosure which would constitute or could facilitate an unwarranted invasion of privacy.

13. Third party's commercial confidences

Information including commercial confidences, trade secrets or intellectual property whose unwarranted disclosure would harm the competitive position of a third party.

14. Information given in confidence

a) Information held in consequence of having been supplied in confidence by a person who:

- gave the information under a statutory guarantee that its confidentiality would be protected; or
- was not under any legal obligation, whether actual or implied, to supply it, and has not consented to its disclosure.

b) Information whose disclosure without the consent of the supplier would prejudice the future supply of such information.

c) Medical information provided in confidence if disclosure to the subject would harm their physical or mental health. or should only be made by a medical practitioner.

15. Statutory and other restrictions

a) Information whose disclosure is prohibited by or under any enactment, regulation, European Community law or international agreement.

b) Information whose release would constitute a breach of Parliamentary Privilege.

The main changes from the 1994 draft are a relaxation of the immigration and nationality exemption,[31] the redrafting of the law enforcement and legal proceedings exemption, and at exemption 10[32] an additional harm test designed to prevent unnecessary planning blight. The OPS monitoring report for 1996 noted that it was decided not to exempt from disclosure information which could not be disclosed through the common law duty of confidentiality, noting that it would keep the position under review (para. 41). The Guidance on Interpretation has also undergone redrafting, and the new Guidance describing the general principle behind exemptions notes as follows:

Preamble to exemptions

The following categories of information are exempt from the commitments to provide information in this Code. In those categories which refer to harm or prejudice, the

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[31] See p. 18

[32] publication and prematurity in relation to publication

presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

Reference to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.
The exemptions will not be interpreted in a way which causes injustice to individuals.

0.1 The preamble governs interpretation of all the exemptions in the Code. Because the Code is not statutory it cannot set aside restrictions on disclosure which are based in law. These will include those statutory provisions restricting disclosure which leave no discretion to disclose in the public interest. It may also in some circumstances include circumstances where there is a common law duty of confidentiality.

0.2 Subject to these statutory and legal constraints, decisions on disclosure will require judgement and discretion. As with other functions, decisions may be made by officials acting in accordance with the general policy and instructions of the Minister, and of the Government collectively as expressed in this Code. It is for Ministers to arrange with their Departments how far they wish decisions to disclose or not disclose information to be referred to them or brought to their attention.' Civil servants have no duty independent of such Ministerial instructions, and the Code does not release them from their broad duty not without authority to disclose information which is held in confidence within Government.

0.3 Where an exemption refers to harm or prejudice, it is not necessary to prove that actual harm or prejudice is certain to result from disclosure, although the harm or prejudice which may result must be serious enough to override the general presumption in favour of disclosure. Risk or reasonable expectation of harm can be taken into account. The weight to be attached to risk depends on the nature of the harm that could occur. Where the harm arising from disclosure could be extremely serious - as for example with certain security risks or damage to the effectiveness of the armed forces in the event of war - it would not be necessary to show that harm is likely to occur to take it into account. But where a risk is neither likely nor grave, it should be given less weight. "Reasonable" may be taken to mean "not irrational, absurd or ridiculous". The public interest in making information available should also be taken into account. However, potential embarrassment which may be caused to civil servants or Ministers should not be a factor in deciding whether information should be made available.

0.4 When applying the harm test, departments should bear in mind that the sensitivity of information will reduce over time, although some information will remain sensitive for many months, if not years, after the relevant decision is made. When considering whether to release information in response to a specific request, departments should always weigh up the harm which could result from disclosure at the time the request is made rather than by reference to when the relevant decision was taken.

0.5 The balance of public interest in disclosure cannot always be decided solely on the basis of the effect of a specific disclosure. The exemption covering the proceedings of Cabinet and Cabinet committees, for example, is based on the need for confidence in the confidentiality of such discussions, and not primarily on whether the disclosure of particular information would cause harm.

> 0.6 The statement that exemptions will not be interpreted in a way which causes injustice to individuals reflects the need for the Code not to be interpreted in a way which undercuts the existing functions of the Ombudsman in investigating maladministration leading to injustice. Where he would have been likely to find that failure to give particular information amounted to maladministration causing injustice, nothing in the Code restricts his ability to reach such a finding. As noted in paragraph 10 of Part I of the Code, the Code is not intended to change the existing arrangements by which the Courts decide what disclosure is necessary in the interests of justice in criminal and civil proceedings.

There is additional phrasing explaining that the definition of 'harm' does not include potential embarrassment to civil servants or Ministers [para. 0.3], and that sensitivity of information decreases with time [para.0.4].

The Guidance also adds a new paragraph noting that the disclosure of information falling within the internal discussion and advice category should be decided on a case by case basis[33], and that a new administration does not have access to the papers of a previous administration [paras. 2.1-2.6].[34] The new paragraphs on law enforcement and legal proceedings warns that information should not be denied *solely* because they relate to a matter which *might* become subject to proceedings at some future date [para. 4.6].

The Code now commits the Government to providing information relating to immigration, nationality consular and entry clearance cases 'where there is no risk that disclosure would prejudice the effective administration of immigration control or other statutory provisions '(5). This phrasing had existed in the original Guidance but it is now inserted into the Code. However, the Code emphasises that disclosure would *not* be through access to personal records. Exemption 10 (Publication and Prematurity in relation to a Planned or Potential Announcement or Publication) now includes a harm test (as noted above), and the Guidance notes that premature release of information could cause harm, for example, creating unnecessary planning blight [para. 10.1]. Elsewhere, the new Guidance offers clarification, for example, when a refusal is made on the grounds of a statutory prohibition the applicant should be told of the precise enactment (or regulation) prohibiting disclosure [para. 15.2].

Part IV of the Guidance (Functions delivered by Contractors) notes that contractors should abide by the Code, since 'ministers remain accountable to Parliament and the public for the functions provided by contractors' [para. 4]. There are paragraphs which deal with contractual processes and prices, and protection of confidentiality by contractors. Finally, a new Part V gives the text of the new 'Guidance to Officials on drafting Answers to Parliamentary

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[33] See the evidence from CFI to the Public Service Committee (HC 313 Session 1995/96 Memorandum 39) on the internal discussion and advice exemption

[34] on the last matter, see generally Section VIII of Research Paper 96/55 30.4.96

Questions'. The Guidance to Officials notes the relevance of the Code in decisions about the drafting of Parliamentary Answers.

III The Operation of the Code

The CFI expressed initial criticism of the Code as unenforceable and lacking access to actual documents, but wished to encourage its use 'both to benefit from any improvements it may bring and to reveal its shortcomings'.[35] It was also concerned that a number of NDPBs and public bodies not within the jurisdiction of the Parliamentary Commissioner for Administration under the 1967 Act would not be subject to the Code. There was also apprehension at what the CFI described as 'punitive charging schemes' for information, with the most prominent example being the National Rivers Authority whose photocopying charges ranged between £50 and £100 for a single page.[36] It complained that departments had been allowed to set their own fees and as a result there were wide variations.

The Ombudsman commented in his first general report on complaints under the Code on the operation of the Code[37], that there was not enough awareness amongst officials about the workings of the Code. This continued to be one of the main themes of his reports on the operation of the Code, another being that the public were insufficiently aware of its existence. The Ombudsman set out his interpretation of his new duties under the Code as follows:

> 3. The Government's decision to introduce a Code has not changed my responsibilities or jurisdiction under the 1967 Act. Now that the Code is in force I regard complaints about failures to abide by it in the same way as I regard other complaints that maladministration on the part of a body within my jurisdiction has led to an unremedied injustice. If I am satisfied that there is a arguable case, I use my powers under the 1967 Act to investigate the complaint. Those powers include, where necessary, sending for departmental papers or taking evidence from Ministers or officials. The one distinction I draw, referred to in paragraph 4.19 of the White Paper, is this. When considering a conventional complaint I expect to be shown some evidence that the complainant concerned has sustained a personal injustice, but when considering complaints about breaches of the Code I am prepared to accept that a refusal to release information which should have been released is itself enough to found a complaint. The White Paper argued that my powers to send for departmental papers, my independence from Government, and my ability to make reports to Parliament would all help to generate confidence in the public and in Parliament in the working of the Code and would preserve Parliamentary accountability. It maintained that that was a better way to influence departmental cultures and reduce the risk of the bodies within my jurisdiction adopting an unduly cautious legalistic approach to requests for information. Time will tell whether that is the case.

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35 *Testing the Open Government Code of Practice. Open Government Briefing no.1,* May 1994

36 *CFI Press Release* 9/11/94, 'Cost of information prices right to know out of public reach'

37 Parliamentary Commissioner for Administration Second Report. Access to Official Information: The First Eight Months HC 91 Session 1994/95

He noted that the area of the Code most likely to throw up difficult and contentious issues was seen as the tension between the 'harm test' and the public interest in making the information available (para. 16).

At the Code's launch the Ombudsman's target was to complete an investigation of a complaint by 13 weeks, but the CFI has noted that in 1995 the average investigation doubled to 32 weeks attributable partly to departmental obstructiveness and partly to complexity. The most recent cases had taken on average 52 weeks to complete.[38]

When examined by the Select Committee on the Parliamentary Commissioner for Administration for its enquiry into Open Government, the Ombudsman repeated his concern over the lack of use of the Code, and the fact that no paid publicity had been given to its establishment.[39] A Written Answer of December 1994[40] gave the Government's total expenditure on the Code in 1994 as £51,157, although expenditure has since increased.[41]

In May 1995 the Nolan Committee on standards in public life produced its first report.[42] It identified one of the seven 'principles of public life' as openness:

'Holders of the public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands (p.14).

Its recommendations on NDPBs were relevant in that it drew up a code of best practice for openness, requiring NDPBs to adopt a specific code on access incorporating the Government Code 'and building on it where possible' (p.95).

The Government response[43] accepted that arrangements for access to information in NDPBs outside the Ombudsman's jurisdiction should be put on a more formal footing, and guidance was subsequently issued to these NDPBs to set up their own codes of openness. Most recently, the new Ombudsman, Michael Buckley who took up his post at the beginning of 1997, has commented on the low level of complaints. From April 1994 until December 1996 119 complaints about access to information were received; 66 were not suitable for

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38 *Independent* 4/2/97, 'Struggle to open Whitehall files'

39 Q2 Evidence 8/3/95 HC 84 1995/96

40 HC Deb vol 251 20.12.94, c.1013w

41 See evidence from the CFI which suggests that expenditure was lower HC 84 1995/96 p.39. However, the OPS 1996 Report noted 'Expenditure on this campaign was double that spent on Code publicity in the previous two years combined (para 43)

42 *Committee on Standards in Public Life* Cm2850

43 Cm 2931 July 1995

investigation mostly for lack of evidence. In the 26 investigations completed so far, the complaint was upheld or partly upheld in 17 cases and found not to be justified in 9 cases.[44]

The Office for Public Service has published an annual report on the implementation of the Code, following a commitment from the then Chancellor of the Duchy of Lancaster.[45] The reports monitor the use of the Code, and the current charging regimes and publicise other information volunteered by departments, as part of the general Code requirement to release information except where disclosure would not be in the public interest. The most recent report issued in March 1997, *Code of Practice on Access to Government Information 1996 Report*, found an increase in Code requests in 1996 of 30.3 per cent over 1995, bearing in mind the definitional difficulties of a 'Code Request'. The actual figure was 2,033 requests (para. 20).

The monitoring report found an increase in requests from private individuals, from 36.4 per cent in 1995 to 46.8 per cent in 1996[46] (8.5 per cent came from campaigns and lobby groups) and showed that 9.1 per cent of requests were being refused as opposed to 8.4 per cent in 1995 (para. 26). The exemptions cited as a reason for refusal were analysed in detail in the report:

Exemptions

27. Whenever information is withheld under the *Code of Practice*, departments must inform applicants of the *Code* exemptions on which they are relying, as well as informing them of their right to request an internal review. Appendix one contains details of the exemptions cited by departments at internal review in support of their decisions to withhold information.

28. There were considerably more internal reviews in 1996 than in the previous year (40, compared with 25 in 1995). In upholding decisions not to disclose information, the exemptions cited most often at internal review were exemptions 2 *(internal discussion and advice); 4 (law enforcement and legal proceedings);* and 9 *(voluminous or vexatious requests).* Other exemptions cited more than once were exemptions 1 *(defence, security and international relations); 7 (effective management and operations of the public service); 12 (privacy of an individual); 13 (third party's commercial confidences); 14 (information given in confidence); and* 15 *(statutory and other restrictions).* (In a number of cases, refusal to disclose information was justified on grounds of more than one exemption.) In seven cases, the internal review confirmed that no information held by the department had been withheld.

29. Since the introduction of the *Code*, the five exemptions most often cited at internal review stage when upholding decisions not to disclose information have been exemptions 2 (14 times); 7 (11 times); 4 (10 times); 13 (9 times); and 14 (9 times).

30. If applicants are not satisfied that they have received all the information to which they are entitled following an internal review, they may take their case through an MP to the

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[44] Press Notice issued by the Parliamentary Commissioner for Administration summarising First Report Session 1996/97. Selected Cases Vol.1 HC 231 30.1.97

[45] HC Deb. vol 240 28.3.94 c.633

[46] para. 23

Ombudsman. In the four cases published by the Ombudsman in 1996 and the eight cases published in January 1997 which were investigated during 1996 (many of which were considered in the light of more than one *Code* exemption) the Ombudsman upheld the withholding of information under exemption 2 (twice); exemption 4 (four times); exemption 7 (twice); exemption 11 (once); exemption 13 (once); exemption 14 (once); and exemption 15 (once). He did not uphold citations of exemptions 7, 9, 12 13 and 15 (once each).

The OPS report has emphasised that the Code of Practice involves more than answering requests for information. The Code also commits government to give facts and analysis with major policy decisions, to make available internal guidance about dealings with the public, to give reasons for administrative decisions, and to provide information under the Citizen's Charter about public services. The government is also committed to re-reviewing previously withheld material as part of its openness programme. The OPS report gives examples where new information has been volunteered, such as internal staff manuals on the new Job Seeker's Allowance, and the release of 3,500 documents from the FCO archives, including the wartime Duke of Windsor papers. The 1996 report has a useful summary of the investigations by the Ombudsman carried out in that year:

Lessons from 1996 Ombudsman's cases

- The Ombudsman emphasised that all requests for information (except those explicitly excluded by the *Code)* should be treated as requests under the *Code,* whether or not the *Code* was explicitly referred to by the applicant when making the request.

- The Ombudsman found that an NDPB was mistaken in thinking that the *Code* did not apply to premature requests for information relating to civil proceedings. However, the Ombudsman upheld the decision to withhold the information in question.

- The Ombudsman found that a single request to have access to a file did not fall under exemption 9 *(voluminous or vexatious requests).*

- The Ombudsman did not accept that all third party communications with a department were necessarily exempt from disclosure.

- The Ombudsman criticised a department for not clarifying with the applicant ambiguities in his request, thereby raising his expectations as to the information he would receive and contributing to the disappointment he later felt.

- The Ombudsman criticised an executive agency for originally charging for providing a copy of internal guidance. He said that such documents should either be available for inspection or issued free of charge.

- The Ombudsman stated that it was not acceptable to refuse to answer correspondence on the grounds of pressure of work.

- The Ombudsman rejected the applicant's argument that a department was obliged to consider releasing information that attracted legal professional privilege on public interest grounds, since the harm test did not apply to this category of information. However, he also stated that even where information is covered by legal professional privilege, it is open to departments to consider its release.

The Ombudsman's annual report for 1996[47] published in March 1997 noted that a total of 44 complaints had been received from 41 Members of Parliament, and that while departments were making good progress in making internal guidance available to the public, there were indications that in some departments awareness of the Code had not been sufficiently fostered amongst officials likely to deal with Code requests.

The Parliamentary Ombudsman is also the Health Service Ombudsman. Until 1997 this was Sir William Reid and his successor is Michael Buckley. In a special report in November 1996[48], Sir William Reid found that the NHS Code of Practice on Openness, which had come into effect in June 1995, had been used very infrequently, and that awareness of its provisions amongst staff and patients was low. The Select Committee on the Parliamentary Commissioner for Administration's report in March 1997 on the work of the Health Service Ombudsman[49], received evidence from Sir William Reid which suggested that there was less scope for disclosures in the public interest under the NHS Code than under the standard Government code. The Select Committee recommended that the NHS Code be reworded to make clear that there should be equivalent scope for disclosure in the public interest.

The CFI have welcomed the Code as 'a significant advance', although one that has substantial weaknesses. The Code has helped to take the debate forward and as the PCA Select Committee said in its report, provided a "foundation on which it is possible to build".[50] It considered that the Code limited the ground for withholding information, provided an independent mechanism of review of official decisions on release of information, introduced "the important principle that even exempt information may be disclosed if there is an overriding public interest in openness" and committed departments to releasing the internal guidance they use in dealings with the public.

In the CFI's view the serious drawbacks included the fact that it offered information not documents, that its scope was limited and exemptions excessively broad. Departments could ignore Ombudsman's recommendations, although there was pressure for them to comply. The length of time to investigate complaints ran to many months in a number of cases, and so the Ombudsman route could not be said to be avoiding the need for long and expensive disputes. Part of the reason for delay lay with Departments.

It should be noted that the Code applies to Northern Ireland where it is administered by the PCA for Northern Ireland. In her 1995 evidence to the PCA Select Committee, the Commissioner noted that she had not received any complaints under the Code.[51] No complaints were received for Northern Ireland in 1996 either.[52]

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47 HC 386 1996-97

48 HC 62 1996-97

49 First Report HC 93 1996-97

50 CFI Briefing *Experience of the Code of Practice on Access to Government Information for Debate on the Estimates 10/12/96*

51 HC 84 1994-95 para. 7

52 *Code of Practice on Access to Government Information 1996 Report,* OPS Cabinet Office March 1997

A. The PCA Select Committee Report

The Select Committee on the Parliamentary Commissioner for Administration undertook an investigation into the operation of the new Code, and a report was published in March 1996.[53] The Government responded to the report in July 1996[54] but some recommendations were not responded to until November 1996[55] after the Public Service Committee had issued their report on Ministerial responsibility and accountability. The report summarised the benefits of Freedom of Information: greater accuracy and objectivity of personal files, improved decision-making by Ministers and civil servants, informed public debate on the issue of the day [para. 20].

The principle of availability of information established by the Code was welcomed by the Committee which recommended that the aims of the Code (as opposed to the Guidance) be revised to reflect the principle more fully [para. 25].[56] The public interest test was welcomed with a recommendation that the guidance make clear that 'harm' did not include 'possible embarrassment to individual civil servants' [para. 27]. This recommendation has been implemented in the 1997 Guidance. The Ombudsman had made clear from the start that he expected departments, when refusing information, to persuade him that any harm would outweigh the public interest in making the information available.[57]

The Role of the Ombudsman

The PCA Committee noted that the intervention of the Ombudsman had, on a number of occasions, led to a change of policy on the disclosure of class of document [para.32] and concluded that 'in a short time, and with only a few complaints to investigate, the Ombudsman has been remarkably successful both in securing information for the public and in building up the rudiments of an informal 'case-law' on FOI matters' [para. 33]. It also noted that the Ombudsman had made it clear that he was at liberty to disagree with the view given on exemptions [para. 35]. It commended the Office of Public Service (OPS) practice of circulating Ombudsmen's 'case-law' amongst departments, and asked that the OPS give explanations for any refusal under the Code [para. 35]. This recommendation was not accepted by the Government,[58] which did, however, promise to set out its views on the Ombudsman's recommendations for change in the Code or guidance in any future reviews (p.vi). The CFI have commented that in several cases Departments had 'forced' the Ombudsman to discontinue his case and argue that there is greater potential for conflict between Ombudsman and Government than in conventional maladministration cases.[59]

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[53] HC 84 1995-96
[54] HC 556 1995-96 July 1996
[55] HC 75 Session 1996/97 November 1996
[56] This has been implemented in the revised 1997 Code
[57] Evidence Q2 HC 84 1995-96
[58] HC 556 1995/96
[59] Briefing p.17

The Committee was concerned at the tendency of departments to be over-defensive in their response to investigations by the Ombudsman noting that 'it should not be left to the Ombudsman to apply harm and public interest tests' [para. 111]. It was concerned about the jurisdiction of the Ombudsman in certain specified areas:

The Jurisdiction of the Ombudsman

112. Although there are strong arguments in favour of the Ombudsman/Information Commissioner model for external review, there are problems with the Government's strategy of adding on FOI to the Ombudsman's other responsibilities without any change to his powers. The Ombudsman drew the Committee's attention to the current restrictions to his jurisdiction, a matter which we discussed in detail in our Report on 'The Powers, Work and Jurisdiction of the Ombudsman'. We therefore recommended that the 1967 Act be amended so as to specify exclusions rather than inclusions to the Ombudsman's jurisdiction. The Government accepted this recommendation but has yet to act on it. The introduction of FOI responsibilities makes the need for this amendment all the more acute. There are certain departments and agencies, such as the Cabinet Office, currently exempt from the Ombudsman's remit most probably because they had minimal administrative dealings with the public. The likelihood, therefore, of maladministration leading to injustice was very remote. Once Whitehall acquires responsibilities to provide information these departments are as susceptible to requests as any other and should come within the Ombudsman's jurisdiction. There are also Non Departmental Public Bodies and quangos outside his jurisdiction. The Campaign identified the current limits to the Ombudsman jurisdiction as one of the drawbacks of the Code, 'important areas of the public service sector fall outside the scope of any code'. Among the bodies excluded are the Atomic Energy Authority, the Monopolies and Mergers Commission, the Civil Aviation Authority, the Crown Prosecution Service, the Bank of England, the National Curriculum Council, the Broadcasting Standards Council and Training and Enterprise Councils. As the Campaign put it, it is unlikely that anyone devising an open government scheme from first principles would exclude such bodies from its scope.

113. In addition to the restrictions placed on the Ombudsman's jurisdiction by the framing of Schedule 2 to the 1967 Act, there are also restrictions on the subject-matter he can investigate found in Schedule 3. There are similar restrictions within the body of the Act. The Campaign gave an example of a request which had been foiled by such a restriction. The Campaign had applied to the Lord Chancellor's Department for the report of an interdepartmental working group which had considered the implications of a legal ruling (*Pepper v Hart*) of some constitutional significance. The request was refused by the Department, citing Exemption 2. The Campaign appealed to the Ombudsman who accepted their complaint for investigation. However, "the investigation was abruptly discontinued after the Lord Chancellor's Department refused to supply the requested report to the Ombudsman. Although the Ombudsman has wide powers of access to departmental information, section 8(4) of the Parliamentary Commissioner Act 1967 expressly denies him the right to obtain information or documents 'relating to proceedings of the Cabinet or of any committee of the Cabinet'. The case raised a serious anomaly - as was pointed out earlier, Cabinet papers are not automatically exempted under the Code from release. A harm test applies. Yet the Ombudsman, the Government's preferred route of external appeal, cannot adjudicate in such cases because he has no access to the relevant documents. This is clearly unacceptable. **We note the recommendation previously made by this Committee in 1978 that 'no harm would be done by allowing the Commissioner access to Cabinet or Cabinet committee papers in the very rare cases where he considered it necessary, except where the Attorney-General certified that such and would itself be 'prejudicial to the safety of the**

> **State or otherwise contrary to the public interest'. This is also our view and we recommend to this effect.**
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> 114. There is pressing need for the reform of the 1967 Act. Previous recommendations of this Committee, on the appointment and financing of the Ombudsman and on the redrafting of Schedule 2, still await enactment and are all the more urgent in the light of the Ombudsman's new FOI responsibilities. To these reforms we would add the removal of the absolute ban on access to Cabinet papers and a review of the provisions of Schedule 3 to the Act. Mr Freeman accepted that reform of the ombudsman's jurisdiction was a 'third candidate' for legislation, along with two new proposed statutory rights, and he hoped to make progress. The Government should conduct a thorough review of the current legislation along the lines we have indicated. **We recommend the thorough revision of the 1967 Act to remove the omissions in the Ombudsman's current jurisdiction, to implement the past recommendations of the Committee on the extension of his jurisdiction, and to ensure that the Ombudsman has comprehensive and effective powers in his consideration of FOI disputes.**

The Committee did recommend that the Ombudsman remain the external review mechanism [para. 112]. The Government response welcomed this but did not accept the need for a fundamental revision of the 1967 Act (p.x).[60] It noted that executive NDPBs outside the jurisdiction of the Ombudsman had been asked to put in place independent or quasi-independent review mechanisms to handle complaints arising from requests under their own codes of openess.

The final Government response did not accept the Committee's recommendations on the Ombudsman's inability to gain access to Cabinet or Cabinet Committee papers noting that proceedings 'should remain confidential to preserve the frankness and candour of internal discussion and protect the principle of collective responsibility underlying Cabinet Government'.[61]

The final response continued as follows (p.vii):

> The disclosure of such material would cause participants to lose confidence in the privacy of Cabinet and Cabinet Committee exchanges, so that important factors in the decision-making would be recorded incompletely or not at all. It could also be used to exploit differences between Ministers and officials, particularly in the case of recent decisions. This would damage the relationship of trust among Ministers and officials, such that Ministers could no longer be confident that they were receiving frank and forthright advice. Hence there is a presumption that disclosure would be harmful to the public interest.

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[60] HC 556 Session 1995-96 July 1996

[61] HC 75 p.vii 1996-97 November 1996

In a debate on 10 December 1996 James Pawsey, Chairman of the PCA Committee, considered the denial of access to Cabinet papers to be a continuing 'serious anomaly'[62], noting that such information would not have to be disclosed.

Since the final response was published the Ombudsman has published details of another investigation where the bar on access to Cabinet material affected his ability to pursue the complaint.[63] The CFI consider that the lack of access to Cabinet papers is 'clearly unacceptable' and argue instead for a Commissioner with statutory powers.[64]

A White Paper published in February 1997[65] as part of the follow-up to the first two Nolan Reports announced that the Government now proposed to extend the Ombudsman's jurisdiction over executive NDPBs not already within his remit, thereby bringing them within the ambit of the Code of Practice. It would also consider bringing advisory NDPBs with the ambit of the Code, under the Ombudsman. Thus the earlier policy of encouraging NDPBs to develop their own codes was to be superseded, the Paper acknowledging that one Code would 'produce a system more comprehensive to the public; more straightforward for officials working within the bodies concerned and more effective by providing it with the policing powers of the Ombudsman and the advisory services of the Cabinet Office (OPS)' [para. 185]. Note that the Ombudsman's jurisdiction would under these proposals also extend to his maladministration role [para. 103]. No time scale for these changes were announced.

The Code in practice

A major concern of the Select Committee was that there had not been any 'agreed criteria applied across departments in defining a Code request' [para. 51]. The OPS did not define criteria for a Code request in its monitoring exercise from departments, and so departments used a variety of criteria [para. 51].[66] It recommended that where a request for information had been considered by an official in the light of the Code a department in responding to the request should mention this fact, and requests be included on the return to the OPS of the number of Code requests [para. 53]. The Government response, however, considered that *all* requests for information should be considered in the light of the Code, and it would not be sensible for officials to make specific reference to the Code when responding routinely to requesters.[67]

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62 HC Deb. vol 287 c.152

63 Case No. A.1/95 in PCA *First Report* Session 1996/97 *Selected Cases Volume 1: Access to Official Information*

64 Briefing p.15

65 *The Governance of Public Bodies: A Progress Report* Cm 3557 February 1997

66 For further detail, see evidence from Andrew Whetnall, OPS Q.109-12

67 556 1995/96 p.vi

In response to another recommendation [para 31] on publicising cases where information is released under the Code, the Government response noted that departments would specifically be asked to record examples of Code requests as part of the annual OPS monitoring exercise for inclusion in future OPS annual monitoring reports identifying where they have resulted in a change of policy towards disclosure.[68]

The Committee also called for OPS to take a more positive role in making clear to departments and agencies their obligation to publicise the Code [para. 58]. However, the Government response did not accept the need to be 'prescriptive' about the production of leaflets etc. by individual departments.[69] The response also noted that the Committee's recommendation [para. 55] that front-line staff in the Civil Service have open government duties specified in their job description would lead to duplication with the Civil Service Code which is circulated to every civil servant making clear his obligation to give Parliament and the public as much information as possible (p.vi).

The internal review process was considered and recommendations made to ensure that the right of internal review was publicised to requesters [para. 84] and that it be a single stage process [para. 86] with a time limit of 28 days for completion [para. 86]. A single stage process was accepted by the Government which did not wish to impose a uniform time limit. Instead departmental target times would be introduced (p.ix). The CFI have noted that internal review was not a feature of all countries' FOI legislation, instancing New Zealand and Canada and have argued strongly for a fixed time limit for internal review.[70]

The Select Committee examined possible reasons for the under use of the Code, citing lack of public awareness which might have been created had legislation been used to implement the Code and lack of publicity by the Government. It recommended a considerable increase in funds devoted to publicising the Code, noting that the Code was a Citizen's Charter initiative [paras. 58-59]. The Government response promised an increase in central Government funding (p. vii). The final response[71] noted that the lack of public awareness of entitlement to information was being 'systematically addressed' (p.vii). The 1996 report from OPS concluded that some part of the increase in requests for information under the Code in 1996 was due to increased publicity (para.21).

Recommendations on the production of annual reports on open government and FOI by the OPS and recognition of the OPS role as monitor and advocate of open government within the

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[68] HC 556 1995/96 p.v

[69] HC 556 1995/96 p.vii

[70] Debate on The Estimates 10/12/96 *CFI Briefing: Experience of the Code of Practice on Access to Government Information*

[71] HC 75 1996/97

public service were accepted by the Government. The role of OPS in monitoring response times was also commented upon, while the Select Committee noted that generally the response target of 20 days was being met [para. 66-67]. The Committee recommended that the OPS should actively monitor the fees and charging regimes of departments and ask for justification of unusual charges [para. 75]. The Government response noted the continuing OPS remit to monitor fees (p.ix). The CFI had not itself experienced problems with the level of charges, but its memorandum of evidence stressed inconsistencies in current charging policies and argued for a minimum of free time or non-charged costs.[72] It believes that charges should be waived where there is a public interest in the disclosure of the information.[73]

The Committee accepted the need for exemptions to the Code, noting that FOI legislation overseas contained similar exemptions. The Ombudsman's regulations about the blanket exclusion under no. 5 (immigration, nationality, consular and entry clearance cases) were taken up by the Committee which noted that the 'harm test' did not apply. It recommended that the exemption be removed from the Code altogether [para. 40]. The Government response did not accept this recommendation, but instead proposed a revision of the wording to make clear that information would be provided (though not through access to personal records) where there was no risk of prejudicing the effective administration of immigration controls or other statutory provisions [p.vi].

The exemption relating to frankness and candour of internal discussion (no.2) was also commented on, with the Committee recommending that a clear separation be made in the drafting of documents between factual analysis and sensitive policy advice [para. 44]. It also considered that the exemption relating to unreliable information should be removed [para. 45]. The publication of the minutes of the monthly meetings between the Chancellor of the Exchequer and the Bank of England was commended, noting the Consumer Association's view that "publication of meeting notes between the Chancellor and the Governor of the Bank of England - arguably, the apex of official policy advice - has given the lie to the view that publication of policy advice eg. after a short time lag is per se damaging" [para. 46]. It recommended that confusion between the wording of the Guidance and the Code on exemption no. 2 be clarified, since the Code (but not the Guidance) made clear that the exemption was subject to the "harm and public interest tests [para. 49].

The final Government response[74] noted as follows in response to these recommendations:

1. We recommend that in all internal documents there should be a clear separation made in the drafting between factual analysis and research on the one hand, and sensitive

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[72] Evidence 22/3/95 p.43

[73] *Debate on Estimates* CFI Briefing 10/12/96

[74] HC 75 1996/97

policy advice on the other. In other words, drafting of all documents should be so undertaken as to allow maximum disclosure. [Para. 44]

There has been a presumption in favour of publishing analytical and factual background material since the Croham Directive of 1978 and this is reflected In the *Code of Practice on Access to Government Information* which commits departments to publish the facts and analysis of the facts relevant to major policy proposals.

The Government agrees that, so far as is practicable, the separation in internal documents of factual analysis and research on the one hand and sensitive policy advice on the other would be desirable. It also notes the following comments of the New Zealand Ombudsman, quoted by the PCA in his 1995 Annual Report:

> "There is a need for well structured reports which identify the issue, set out the options for addressing it and the advice offered on the options. This approach will ensure the separation of the factual information from advice and will enable information to which one of the withholding provisions may apply to be identified much more easily. Many reports currently contain an unclear mixture of fact and advice making application of the withholding provisions difficult and time consuming This often results in frustration for the requester's expectation for the early release of the requested information."

The Guidance on Interpretation already stresses the need to decide at the earliest stages of policy preparation which factual information is to be published when the policy is announced. The Government will expand this section to draw departments' attention to the New Zealand experience. However, it is mindful that the separation of advice from background information will not always be possible or practicable given the inevitable intermingling of the two in the day-to-day development of internal advice, whose primary purpose is to facilitate effective decision making often to very tight deadlines. This will necessarily limit the possibility of separating the two as a matter of routine. Nevertheless, the format in which information is presented will not affect the commitment which already exists to provide factual and analytical information.

2. We recommend that the exemption relating to information deemed unreliable be removed. We also recommend that Exemption 2 be redrafted explicitly to exclude "factual analysis and research" from those categories of information whose disclosure might harm the frankness and candour of internal discussion. [Para. 45]

The Government accepts that, while potentially misleading information should only be released with suitable disclaimers as to its accuracy, it should be left to the recipient of the material to interpret the information, and not for the Government to prejudge what that interpretation might be. In view of this, the Government proposes to delete from paragraph 4 of the Code the words: "to provide material which the Government did not consider to be reliable, information".

Part I of the Code already commits departments to publish the facts and analysis of the facts which were relevant and important in framing major policy proposals and decisions. However, this does not commit the Government to the disclosure of all internal analysis, projections and assumptions. It is not always easy to separate "factual analysis" from sensitive policy advice. While in some circumstances it may he in the public interest to publish analysis of alternative and rejected options, the Government does not believe it would be in the public interest to create an invariable obligation to do so. From time to time, it is necessary to access options or proposals which are not the Government's preferred options or

which are unpopular or difficult. Wide disclosure of such analysis might in practice limit analysis of policy options within government. In addition, the actual facts surrounding an issue may sometimes be in dispute, in which case the resulting analysis is by implication likely to be contentious, and to have the potential to damage public confidence. Because of this, the Government does not propose specifically to exclude "factual analysis and research" from Exemption 2. Each case should be considered on its merits. As with all information, the presumption should be in favour of disclosure but information may be withheld where the harm caused would outweigh the public interest in disclosure.

4. We recommend that the Guidance be amended to make clear that the harm test applies to the first two categories listed in Exemption 2. [Para. 49]

The Government accepts that the Guidance on Interpretation is ambiguous on whether the harm test is applicable to the first two categories listed In Exemption 2. Where any discrepancy exists between the wording of the Code and the Guidance, it is the Code which prevails and which binds departments. The Code clearly states that the harm test does apply to the whole of Exemption 2 and the Government agrees to amend the Guidance to reflect this.

In the case of Cabinet and cabinet Committee papers in particular there is a presumption that disclosure will be harmful to the public interest by weakening the principle of private deliberation at the highest level of Government. It is a long-standing convention, observed by successive Governments, that proceedings of Cabinet and Cabinet Committees should remain confidential to preserve the frankness and candour of internal discussion and protect the principle of collective responsibility underlying Cabinet Government.

The disclosure of such material would cause participants to lose confidence in the privacy of Cabinet and Cabinet Committee exchanges, so that important factors in the decision making would be recorded incompletely or not at all. It could also be used to exploit differences between Minister and officials, particularly in the case of recent decisions. This would damage the relationship of trust among Ministers and officials, such that Ministers could no longer be confident that they were receiving frank and forthright advice.

Indeed, by its very nature information in the categories in the internal discussion and advice exemption will often be particularly sensitive. Because of this, it is important that departments consider the effect that disclosure might have on future internal discussion; It is not possible to consider a request for this type of information in isolation without considering the overall harm which might result to the internal decision making process. However, it will be for departments to decide on a case by case basis whether information falling within any of the categories in the exemption should be released.

The final response also largely accepted the recommendation that the Guidance consider the case for release of internal discussion documents after the decision had been taken [HC 75 p.v]. The CFI have also drawn attention to Exemption 11(b) (Research statistics and analysis) which exempts the disclosure of information held for surveillance for health and safety purposes, including food safety.[75] It also considered that commercial confidences were over protected in Exemptions 13 and 14.

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[75] *Debate on the Estimates 10/12/96 CFI Briefing*

The Committee compared the commitment to provide information rather than documents with FOI legislation abroad [para. 78]. It also noted that the Ombudsman considered that "to ask for all the information in a document can usually only be met by provision of the document". A number of departments released documents as a matter of course, and the 1996 wording was considered unnecessarily restrictive and negative [para. 83].

In response the Government noted:

5. We recommend that the wording of the Code and the accompanying Guidance be amended to assert a right of access to documents, subject to the exemptions. [Para. 83]

The Government acknowledges the importance of documents as a source of information available under the Code, and the Chancellor of the Duchy of Lancaster made this clear when he appeared before the PCA Select Committee in January 1996. Except in very limited circumstances the Code contains no prohibition on making documents available in response to requests for information and, indeed, many departments routinely release documents. However, the Government does not agree that granting a right of access to documents would necessarily be a helpful approach for either departments dealing with Code requests, or members of the public seeking information.

It believes that this would lead to too great an emphasis on the form of the material rather than its substance, drawing attention to irrelevant matters of lay-out and handling (and inviting, for example, speculation on the way in which a particular document is circulated within Whitehall and to whom, rather than concentrating on the substance of the material itself). It could also lead to authors of documents being identified and associated with a particular policy stance, thus compromising their impartiality and consequently their ability to establish a relationship of trust with current or future Ministers.

Quite apart from these considerations there are also strong practical reasons against granting a right of access to documents. As was explained in the 1993 White Paper on Open Government "the progress of information technology means that information relevant to a particular request can often he prepared more efficiently by using word processors and computers than by referring to paper records and editing them". Three years later, this point is even more cogent, since an increasing amount of information is now being held on computer which may never be translated into paper form.

As the Code currently stands, members of the public have a right of access to information, however it may be held. Documents written for a one-off purpose may not provide the applicant with a full picture. By summarising the information contained in documents, departments may he able to bridge the gaps, for example, drawing on unrecorded recollection of events to fill out a particular point.

The CFI have called this response 'astonishing' citing the Hong Kong 'Code of Access on Information' whose official Guidance stated that it was 'preferable' to provide a copy of the original record.[76]

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[76] *Briefing 10/12/96 Estimates Debate p.13*

A survey by the Press Gazette[77] found a difference in response from government departments and agencies to requests for information, with some offering enthusiastic assistance and others unwilling to follow the Code.

IV The Code of Practice and Accountability to Parliament

The role of the Code in increasing accountability to Parliament was addressed by the Ombudsman in his report on the first eight months of the Code.[78]

> 21. The charge that misleading or incomplete information has been given can come up in various guises. I have been asked if I am able to validate or vouch for the accuracy of information which Ministers have given in Parliamentary statements, Parliamentary answers and so forth. The answer to that is "no". I can, however, investigate a complaint that, after making a request for information under the Code outside Parliament, a Member of Parliament (or any other complainant) has been given inaccurate or only partial information. Such a complaint in the case of a Member would, however, need to be referred to me by a second Member. It is not possible under the 1967 Act for Members of Parliament to put to me complaints on their own behalf.

The PCA Committee did not examine the issue of the MP filter in their report of March 1996, but had earlier recommended its retention when considering the Ombudsman's maladministration role.[79] However, the Public Service Committee also looked at the operation of the Code of Practice in the context of their enquiry into Ministerial accountability and responsibility:

> 65. The Ombudsman could, in fact, at present receive complaints from Members of Parliament about refusals of access to Government Information under the Code of Practice. This could not apply, however, to refusals contained in answers to Parliamentary Questions. The Ombudsman is empowered only to investigate the administrative actions of the Departments and other public bodies within his jurisdiction: a statement made by a Minister in Parliament cannot be regarded as an 'administrative action'. Under the present statutory provisions, he may only consider a complaint if it is referred to him by a Member of Parliament (who, under the PCA Act, cannot be the person making the complaint). Therefore, if a Member receiving an unsatisfactory answer to a Parliamentary Question wished to complain via the Parliamentary Commissioner he could do so only by recasting the Question as an ordinary inquiry to the department, and awaiting a repeat of its refusal to supply the information; and then by complaining to a fellow MP who would refer the complaint to the Commissioner. We note that the arrangement by which complaints have to be referred to him by a Member of Parliament (the 'MP filter') has recently been considered by the Select Committee on the Parliamentary Commissioner for Administration, which recommended its retention. It did not, however, consider the special case of a Member who wished to complain on his behalf about the withholding of information by a government department: indeed, the

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77 reported in *FDA News*, 'Departments failing secrecy test', April 1997

78 HC 91 1994/95

79 HC 33 1993/94 para. 76

circumstances under which this would be most relevant would not then have arisen, as the Code of Practice on Access to Government Information had not then been introduced. **We recommend that the Parliamentary Commissioner Act be amended to allow Members of Parliament (and Members of Parliament only) to make a complaint to the Ombudsman directly concerning the withholding of information by a government department, without having to act through another Member.**

The Committee decided against giving the Ombudsman powers to investigate statements made in Parliament [para. 66]. It recommended that the Government make it a standard practice when withholding information in an answer to a Parliamentary Question to explain the grounds on which information has been withheld [para. 70] and also recommended that the refusal be related to a particular aspect of the Code, and clarify whether the refusal of information was subject to the public interest 'harm test' [para. 154].

In November 1996, the Government response[80] acknowledged the case made by the Committee against the MP filter with reference to complaints by MPs concerning the withholding of information, but noted "as the Ombudsman was created explicitly as a channel for investigating complaints against the Executive by private citizens the proposals would constitute a major department from the basic principles of the 1967 Act and could involve a diversion of the Ombudsman's limited resources from his original customers" [HC 67 p.ix]. It would therefore welcome the views of the PCA Select Committee before giving a substantive response. It accepted that in future reasons should invariably be given when information is being refused in response to a PQ and that reasons should generally relate to the exemptions laid down in the Code. However, it considered that there might be cases in the fields of defence, security and international relations where specifying the reason in any detail might prejudice the public interest. Since the Code made explicit which exemptions were subject to the public interest 'harm' test, this information would not be repeated in the PQ.[81]

More generally, the Public Service Committee report on Ministerial accountability and responsibility commented on how the Code of Practice was achieving a new importance in enforcing Ministerial accountability to Parliament.[82]

It noted:

154. As we have said above, balancing the public interest in disclosure with the public interest in confidentiality is a difficult task, which is, at present, entrusted to Ministers, although the "public interest test" means that they have to scrutinise their decisions very carefully; and that their decisions are subject to examination by the Ombudsman. The Campaign for Freedom of Information have described the test as the introduction of "the important principle that even exempt information may be disclosed if there is an overriding public interest in openness". It is noticeable that Ministers are now referring to it in their answers to Parliamentary Questions. Sir Richard Scott said "the way in which the public interest exception is used is critical so far as the ability of an individual Member of Parliament

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80 *Public Service Committee First Special Report* HC 67 1996/97

81 HC 67 1996/97 p.xv

82 For further background see Library Paper no. 97/5 *'Codes of Practice and Questions of Procedure for Ministers'*

> to get information from Ministers is concerned". The Ombudsman told us that he had considered the balance between the public interest in disclosure and the risk of harm or prejudice if information is disclosed, in three of the investigations which he had conducted. In one of them, he noted in his conclusions that "the issue of when the public interest in disclosure would override any harm or prejudice which might arise from disclosure was a matter of judgement in the light of the facts of each individual cases".

The Government response noted that the new *Guidance on Answering Parliamentary Questions basic do's and don'ts* (which had been drafted to assist officials when drafting responses to PQ as a result of the Public Service Committee enquiry) specifically referred to the need to consider the provisions of the Code when deciding whether information should be disclosed and in particular the need to reach a judgement as to whether disclosure would not be in the public interest.[83]

In addition, reference to the Code of Practice has been inserted into new paragraph 1(iii) of "Questions of Procedure for Ministers" which reads as follows:[84,85]

> "Ministers must not knowingly mislead Parliament and the public and should correct any in advertent errors at the earliest possible opportunity. They must be as open as possible with Parliament and the public, withholding 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" [Annex B].

The Public Service Committee noted that QPM gave the only explicit statement of how Ministers should discharge their obligations to Parliament. A new version of QPM following the General Election, is expected shortly.

The Osmotherley Rules[86] have also been revised to strengthen references to the Code. The PCA Select Committee had considered the earlier reference to be 'unacceptably casual' [para. 61] and recommended that the rules be revised to take full account of the provisions of the Code [para. 61]. The Government accepted that recommendation, insisting 'Parliament must expect that any answers it receives to requests for information at least meet the standards set down in the Code".[87] New paragraph 8 of the Rules sets out their central principles:

Central Principles

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[83] HC 67 1996/97 p.xv

[84] Government response to Public Service Committee HC 67 1996/97

[85] For the full history of QPM see Library Research Paper no. 97/5 *The Accountability Debate: Codes of Guidance and Questions of Procedure for Ministers*

[86] *Departmental Evidence and Response to Select Committees January 1997.* See Library Research Paper no. 97/5 for further details

[87] HC 556 1995/96 p.vii

8. The Government regards Select Committees as having a crucial role to play in ensuring the full and proper accountability of the executive to Parliament. Ministers have emphasised therefore that, when officials represent them before Select Committees, they should be as forthcoming and helpful as they can in providing information relevant to Committee inquiries. In giving evidence to Select Committees, as elsewhere, officials should be guided by the Government's Code of Practice on Access to Government Information

Section 4B of the Rules[88] makes more explicit reference to the Code which is described as "the authoritative instruction from Minister to officials on the provision of information to Parliament and the public" [para. 63].

Thus the Code which is only three years old has already become a major coping stone in the structure of Ministerial accountability to Parliament.

The PCA report and the Government response were debated on 10 December 1996.[89] Much of the debate concerned the need or otherwise for a Freedom of Information Act rather than the details of the recommendations. This general issue is considered below in Section V. However, Roger Freeman, Chancellor of the Duchy of Lancaster commented on the recent achievements of an open Government policy [c.172]:

> I want to place on record what the Government have done to change the culture. It is a slow process, but change is forthcoming. We now publish information memorandums on privatisation opportunities for the private sector. Previously, the civil service would say, "You cannot publish it because it is commercially confidential and there is no justification for it being placed in the Library of the House of Commons." I am pleased to say that we changed that during the past two years.
>
> Today, we published "Public Bodies 1996", which gives information on the remuneration of chief executives of public bodies. There is guidance on answering parliamentary questions, as the right hon. Member for Bishop Auckland knows because he has questioned me about it in the past. We now require that openness guidance to be included in each parliamentary question folder before the civil servant completes advice on answering a question.
>
> I assure the House that when we produce the next monitoring report on the work of the ombudsman and the code of access to information, we will include experience in each of the public Departments. As I said in the Govemment's response to the Select Committee:
> "Departments will therefore in future be specifically asked to record examples of Code requests as part of the annual OPS monitoring exercise for inclusion in future annual monitoring reports, identifying (wherever possible) where they have resulted in a change of policy towards disclosure."
>
> That is a significant change and I hope that it will be helpful.

The new Resolution on ministerial accountability to Parliament which was passed by Parliament on 19 March 1997 just before the General Election refers to the Code as follows:[90]

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[88] formerly entitled *Limitations on the provision of information* - now titled "*provision of information*"

[89] HC Deb. vol 287 c.145-173

[90] HC Deb. vol 292 19/3/97 c.1046-1047

MINISTERIAL ACCOUNTABILITY TO PARLIAMENT

[Relevant documents: Second report from the Public Service Committee of Session 1995-96, on ministerial accountability on responsibility (HC 313), the Government's response thereto (HC 67 of Session of 1996-97) and the first report from the Public Service Committee of Session 1996-97, on ministerial accountability and responsibility (HC 234).]

Motion made, and Question put forthwith, pursuant to Order [19 March],

That in the opinion of this House, the following principles should,govern over the conduct of Ministers of the Crown in relation to Parliament:

(1) Ministers have a duty to Parliament to account, and be held to account, for the policies. decisions and actions of their Departments and Next Step Agencies:

(2) It is of paramount importance that Ministers give accurate and truthful information to parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister;

(3) 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 (Second Edition, January 1997);

(4) Similarly, Ministers should require civil servants who give evidence before Parliamentary Committees on their behalf and under their directions to be as helpful as possible in providing accurate, truthful and full information in accordance with the duties and responsibilities of civil servants as set out in the Civil Service Code (January 1996).

This Parliamentary resolution was not debated by the Commons but is the culmination of work by the Public Service Committee on ministerial accountability. A similar resolution was passed in the Lords.[91]

[91] HL Deb 20/3/97 vol 579 c.1055-1062

V A Freedom of Information Act?

Arguments for a legislation on FOI rather than a non statutory code take on two forms. Firstly, there is the argument of principle that a citizen should have the legal right to information about the activities of his state, and secondly there are pragmatic arguments on the desirability of legislation to rationalise the existing access provisions both in UK and European legislation. The arguments of principle have been summarised by the Information Commissioner of Canada in a speech in 1993 that access to information "is a declaration of public information rights whose principles are that a free society must also be an open society, that public information is owned by the public, held in trust by government and, unless explicitly restricted by law, openly available to the public".[92] Rodney Austin has argued that those exercising power cannot properly be held responsible and accountable to Parliament if they have exclusive possession and control of the information upon which their decisions, policies and actions are based.[93] Sir Douglas Wass has noted that FOI "would sharpen the perception of the sovereignty of Parliament as a reality, and not merely as a form to be respected for form's sake".[94]

The Scott inquiry[95] has inevitably created demands for FOI Act. Patrick Birkinshaw[96] has noted that a FOI Act would probably have not prevented Matrix Churchill from occurring but 'it would have made the task of concealment that much more difficult' (p.180).

Sir Richard Scott stressed that Ministers should never withhold information on the basis of convenience as for avoiding political embarrassment[97] but did not discuss the issue of an FOI Act in his Report.

In evidence to the Public Service Select Committee inquiry into ministerial accountability and responsibility[98], Sir Richard Scott said:

421. A Freedom of Information Act, do you think there ought to be one?	*(Sir Richard Scott) I* have debated this on many occasions with many people. My view on it has changed over the past few years. I used not to think there would be any great value in a statutory

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92 *Freedom of Information in Canada*: paper given at a conference on Freedom of Information: International Experience and Prospects for Britain organised by the CFI, February 8 1993

93 'Freedom of Information: The Constitutional Impact' in *The Changing Constitution* (1994) 2nd ed. Jeffrey Jowell and Dawn Oliver

94 'Scott and Whitehall' in *Public Law*, Autumn 1996, pp.461-471

95 *Report of the Inquiry into the Export of Defence and Dual-Use Goods to Iraq and Related Prosecutions* HC115 1996-1997

96 *Parliamentary Affairs*, January 1997, 'Freedom of Information'

97 para. K8.8 p.1802

98 HC 313 Session 1995/96

Freedom of Information Act, but I have changed my mind. I have changed my mind rather subject to reservations because the value of it would depend on what was in it; it would be possible to have a Freedom of Information Act which was really rather restrictive. At the moment there is not an Act, there are obligations to provide information which are unwritten and to which attention can be paid and which can be prayed-in-aid when asking for information. If you get a Freedom of Information Act you will not get any information which is not required by that Act to be given. On the other band, there is an advantage in such an Act. There would be two particular changes, apart from its content and we would have to see that to know what the impact of that would be, but there would be a change in culture, would there not, with a statute for the first time conferring rights to acquire information where such rights do not at present exist? At the same time as conferring those rights what you would be doing is producing rights which would be justiciable in the courts because as soon as rights are conferred they are enforceable, and the courts are where they would be enforced. There would be those two changes but the actual impact, the substantial impact, would necessarily depend on the contents of the Act.

The CFI evidence to the Public Service Committee claimed that an FOI Act would have made a difference to the outcome of the Matrix Churchill case:[99]

THE MATRIX CHURCHILL CASE

Would a Freedom of Information Act have made any difference in relation to the arms to Iraq affair? Ministers have argued that it would not, suggesting that most of the relevant information would have been protected under the various exemptions in any such legislation, for example relating to policy advice, commercial confidentiality and the work of the security services.'

We believe that FOI legislation would have made a difference, though whether it would have been so substantial as to have prevented the Matrix Churchill affair altogether is another matter. The Scott Report identifies many examples of information which was withheld without good reason, and which would presumably have bad to be disclosed under any reasonably effective FOI Act. These include a list of the arms-related exports to Iran, disclosure of which was refused even though the official concerned acknowledged it could have been disclosed in aggregate form and despite the fact that Sir Charles Powell, the Prime Minister's foreign policy adviser, was in favour of its disclosure;' the number of export licenses granted to both Iraq and Iran for chemical warfare defensive equipment;' and the size of the credits granted by the Export Credits Guarantee Department to the individual countries.' These and other items of information could have been obtained under an FOI Act, perhaps even by Members of Parliament themselves.

Even more sensitive, exempt, information could in theory also be disclosable under the "public interest override" provisions that might be expected in such an Act. The Right to Know Bill, introduced by Mark Fisher MP in 1993, allowed exempt information to be disclosed if there had been wrongdoing and if in the circumstances the potential harm from the disclosure was outweighed by the public interest in openness.' A comparable public interest override appears in the Code of Practice on Access to Government Information.' Such provisions would mean that, in circumstances such as those which led to the setting up of the Scott Inquiry-where a

[99] HC 313 - Memorandums 39

clear public interest justifying exceptional disclosure had been acknowledged-much normally confidential information would become available.

Finally, a Freedom of Information Act might provide for a public interest defence to charges under the Official Secrets Act 1989 and protection against disciplinary action for civil servants who disclose information in the public interest in particular circumstances.

The Select Committee on the PCA noted in its 1995/96 Report the relevant legislation already in existence:

IV. FREEDOM OF INFORMATION LEGISLATION

87. Discussion on Open Government in this country often revolves around whether or not to have freedom of information legislation. The terms of the debate, however, are misconceived. The United Kingdom already has a number of examples of freedom of information legislation on the statute books and the Government has promised two significant additions to the list. In this section we propose to describe briefly the FOI legislation currently operating and the Government's proposals for legislative change. Significant legislation relating to FOI includes the Data Protection Act 1984, the Local Government (Access to Information) Act 1985, the Access to Personal Files Act 1987, the Access to Medical Reports Act 1988, the Access to Health Records Act 1990 and the Environmental Information Regulations 1992.

Data Protection Act

88. The Data Protection Act provides access to personal information under Principle. 7 of the Data Protection Principles found in Schedule 1 to the Act: 'An individual shall be entitled, (a) at reasonable intervals and without undue delay or expense - (i) to be informed by any data user whether he holds personal data of which that individual is the subject; and (ii) to access to any such data held by a data user; and (b) where appropriate, to have such data corrected or erased". The detailed provisions to bring this principle into effect are found in Part III of the Act (Rights of Data Subjects). The Act contains various exemptions to this right. If a "data subject" (that is, an individual about whom data is held) considers that he has been improperly denied access to information held on him, or has been denied the opportunity to have it rectified or erased, he can complain to the Data Protection Registrar. She is able to investigate such a complaint and if necessary enforce compliance with her recommendations through the issuing of notices and the taking of an offending data user to court. Mrs Bowtell told us that 'quite large numbers' applied under the Data Protection Act to see details held on them by the Child Support Agency. It is important to note that the Data Protection Act, whilst including a 'subject access right', is not primarily an example of FOI legislation, but of privacy legislation.

Environmental Information Regulations

89. The Environmental Information Regulations 1992 put into effect EC Directive 90/313/EEC on the freedom of access to information on the environment. They give a right of access to any information which relates to the environment held both by Government departments and local authorities. A maximum time limit is placed on the authority within which to respond to a request. The regulations contain a list of exemptions, including, for example, confidential material and information relating to national defence and public security.

Should the authority not comply with their statutory duty, there is a right of appeal to the High Court or the equivalent Court of Session.

Other Statutory Access Rights

90. The Local Government (Access to Information) Act 1985 "enables access to local authority meetings as well as the relevant associated papers. This allows better informed community debate on the issues being considered by local authorities". The Access to Personal Files Act 1987, the Access to Medical Reports Act 1988 and the.Access to Health Records Act 1990 all relate to access to certain personal files with rights to amend or append comments.

Appendix 2 of this Paper gives background on the environmental information regulations.

The Open Government White Paper of 1993 proposed a new right of access to personal records to cover a wide range of public service bodies to mirror the provisions in the *Data Protection Act 1984* for access to personal data held on computer. There has been no progress with this legislation, but an EU directive on Data Protection (95/46/EC) is due to come into force by 24 October of 1998.

The changes to UK law which are necessitated by the Directive are summarised in a consultation paper issued by the Home Office in March 1996:[100]

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[100] *Home Office Consultation Paper on EC Data Protection Directive 95/46/EC*

DIRECTIVE	1984 ACT
Applies to automatically processed and certain types of manually processed data.	Applies only to automatically processed data.
Applies only to activities within the scope of Community law.	Applies to all activities.
Contains a wide definition of "processing" (ic. everything from collection to destruction).	Contains a narrower definition of processing,.
Establishes data protection principles with which processing must comply.	Makes similar provision.
Sets conditions which must be met before personal data may be processed.	No express equivalent provision. Relies on data protection principles.
Sets tighter conditions for the processing of 'Sensitive" data (eg. data about racial or ethnic origin).	Allows special conditions for "Sensitive" data to he set by Order. No Order has been made.
Provides for certain exemptions for journalism etc.	No corresponding provision.
Requires individuals whose data are processed to be provided with certain information (eg. about the purpose of processing).	No express equivalent provision. Relics on data protection principles.
Gives individuals the right of access to their personal data, and the right to have inaccurate data amended etc.	Makes broadly equivalent provision, but with some important differences.
Gives individuals the right to object to lawful processing of their data.	No equivalent provision.
Gives individuals the right to object to their data being used for direct marketing purposes.	No express equivalent provision. Relies on data protection principles.
Places restrictions on fully automated decision-making.	No equivalent provision.
Sets specific requirements for security of processing operations.	Relies on data protection principles.
Requires registration of some categories of automated processing operations. Requires prior checking in some circumstances.	Requires registration of all automated processing operations. No requirement for prior checking.

Requires information about processing operations to be publicly available.	Requires register of data users to be available for public inspection.
Requires Member States to provide remedies for breach of the Directive.	Provides for remedies for breach of the Act.
Sets detailed conditions for transfer of personal data to countries outside the EU.	Contains much simpler provision.
Requires a national supervisory body to be established, and specifies its powers.	Establishes the Data Protection Registrar, with supervisory powers.
Establishes arrangements for monitoring of the Directive at Community level.	Not applicable.

The major change is that the 1984 *Data Protection Act* only applies to computerised records, whereas the Directive also applies to manually-processed data. The Directive must be implemented in UK law by 24 October 1998, although there are transitional arrangements which will allow existing manual record systems to be bought within the scope of the Directive over a longer period.

The consultation paper issued by the Government in March 1996 stated :

> 1.2 The Government believes that the United Kingdom's data protection regime should be the least burdensome for business and other data users, while affording the necessary protection for individuals. The Government has long recognised the importance of effective data protection controls: that is why it enacted the 1984 Act and ratified the Council of Europe Data Protection Convention. It believes, however, that those provisions are sufficient, both for the protection of individuals, and as a means of ensuring the free flow of data between European partners. Indeed, the existing law itself has been criticised as being unnecessarily regulatory in certain respects. An example is the requirement for all data users to register with the Data Protection Registrar. Over-elaborate data protection threatens competitiveness, and does not necessarily bring additional benefits for individuals. It follows that the Government intends to go no further in implementing the Directive than is absolutely necessary to satisfy the UK's obligations in European law. It will consider whether additional changes to the current data protection regime axe needed so as to ensure that it does not go beyond what is required by the Directive and the Council of Europe Convention.

The Data Protection Registrar holds the view that incorporation of the Directive should be used as an opportunity to improve current laws on data protection in a comprehensive way, and that the most legally secure way of implementing the Directive would be by primary legislation rather than secondary legislation.[101]

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[101] See Appendix 1 of *Questions to Answer: Data Protection and the EU Directive 95/46/EC*, Data Protection Registrar, April 1996

In her final response to the Home Office consultation[102] the Registrar reiterated her call for a thorough review:

1. Introduction: The Registrar calls for a thorough review of data protection legislation, not the minimalist implementation of the Directive proposed by the Government. Although she favours a completely new Act, the Registrar proposes a short Bill establishing principles and data subjects' rights, and giving authority for secondary legislation. The Registrar highlights the Directive's flexibility, continuity with the 1984 Act and emphasis on privacy.

2. Data Protection Legislation and Privacy: The Directive and the Act share a common starting point: the 1981 Council of Europe Convention (Treaty 108). The Directive's first objective is to protect 'the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.' The Act, despite its origins, contains no reference to privacy. To establish beyond doubt that data protection legislation provides a right to privacy, albeit limited, the first objective of the Directive should be incorporated in domestic legislation. This right to privacy relating to personal information is limited by the provisions of the Directive. The Directive, like the Act, seeks to balance the controller's legitimate information processing needs and protection of the data subject's personal information.

3. Method of Implementation: Transposition by regulations under the European Communities Act 1972 would limit amendments to those required by the Directive and to processing within the scope of community competence, leaving other processing still subject to the Data Protection Act 1984. The resulting dual data protection regime, without clear boundaries between regimes, could create a new burden for those affected. De-regulatory benefits flowing from the Directive would not be available to all. Transposition of the Directive by primary legislation could provide for the continuation of the current seamless data protection regime and also enable other useful amendments to be made to modernise data protection legislation. Enforcement of all legislation dealing with access to information could be brought together under one regulator. Acknowledging the pressure on Parliamentary time, the Registrar recommends a combined approach to implementation: primary legislation to establish objectives and the general approach, supplemented by appropriate regulations to supply the detail.

The Registrar also proposed that her office be re-designated as Information Privacy Commissioner.[103]

In the Queen's Speech the new Labour Government announced plans for a Bill to strengthen Data Protection controls. This commitment has been welcomed by the Registrar.

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102 *Our Answers. The Data Protection Registrar: Using the Law to Protect Our Legislation*, July 1996

103 *Summary Our Answers*

The 1993 White Paper also promised to create a new statutory public right of access to information concerning human health and safety held by public authorities, subject to exemptions protecting necessary confidentiality, to be mirrored on the Environmental Information Regulations. Once again, there has been no further progress on this proposal. The PCA Select Committee noted:[104]

> 93. The reason given for the introduction of statutory rights in these areas is that 'the rights of individuals are directly involved". Mr Whetnall expanded on the need for legislation in the areas of health and safety and the environment, "the information the Government has is often, though not always, collected in a regulatory context, and it is already rather thickly set about with statutes which may cause problems for the Ombudsman ... Therefore, because there is already a statutory basis in these areas, it is probably helpful in the longer run towards greater openness to have a statutory approach, so other statutory conditions do not get in the way ... the regulators who have pretty well unrestricted access to all the premises in the country acquire a good deal of commercially sensitive information and the rights of people supplying that information have to be respected too. So some kind of statutory description of how the balance is to be struck is important in those areas".
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> 94. The White Paper also mentions the fact that there are approximately 200 Acts of Parliament which contain restrictive provisions on the release of information. Most, but not all, of the provisions contain criminal sanctions against the unauthorised disclosure of information. There are also a large number of pieces of secondary legislation which are similarly restrictive. Some of the restrictions are there to protect necessary privacy. Others seem less justifiable - as the White Paper puts it, "views on what should legitimately be kept confidential change". The White Paper admits that 'the sheer number of criminal sanctions identified, and the possibility that they have enhanced a 'climate of secrecy', justifies a reexamination of the alternatives". We were told by Mr Whetnall, "we did not find any prosecutions going on for disclosure under those provisions". The Government proposed the inclusion of 'harm tests' in all future legislation on disclosure 'and to review existing provisions as and when legislative opportunities arise".
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> 95. The Open Government White Paper was published in July 1993. In March 1996 we are still waiting for any of these statutory reforms to be introduced. Even in March 1995 Mr Whetnall admitted that "only part of the package is implemented". In January 1996 Mr Freeman accepted that "there has been a delay which I regret". One reason for the delay was "the crowding of the parliamentary session with many other prior commitments".

He promised "to discuss with my colleagues the importance of Bills on these two issues". Nor had any harm tests been added to any of the statutory prohibitions on disclosure. The Government was looking at the use of Deregulation Orders as a way of relaxing such prohibitions. We will discuss the Government's plans in greater detail in a later section. Here we simply record our disappointment at the Government's delay.

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[104] HC 84 Session 1995-96

The Select Committee concluded that, on balance, a Freedom of Information Act was preferable to a Code:

A Freedom of Information Act

120. It has not been the intention of this Report to produce a detailed blueprint for a freedom of information regime in this country. That would take us beyond the confines of our inquiry. We have attempted, however, to lay down some prerequisites for a successful system. One last issue has to be addressed. This is whether the Code is sufficient or whether there is a need for a Freedom of Information Act.

121. We have already discussed one advantage of a Freedom of Information Act, namely the publicity attending its preparation and passage through Parliament and the consequent public awareness of their access rights. Publicity alone, however, is not enough to justify primary legislation and any shortfall in publicity could be compensated by a determined effort from Government. A more powerful reason given for a statute by those we met when we visited Australia and New Zealand was the need to change governmental culture from one of secrecy to one where openness is accepted and there is a willingness to allow the public to participate to a greater degree in the processes of government. It is perhaps too early to say whether the culture in the United Kingdom public service has changed. It will in any event be a process rather than a sudden event. The Committee noted that New Zealand had a directive in place prior to the Act but this was, however, later deemed to be ineffective. Indeed in the United Kingdom the so-called Croham Directive of 1976 from the then Head of the Civil Service instructed civil servants to release as much background material to policy decisions as possible. The Directive added 'that when policy studies were being undertaken in future the background material should as far as possible be written in a form which would permit it to be published separately, with the minimum of alteration, once a Ministerial decision to do so had been taken". The Croham Directive is judged to have been ineffective - indeed the fact that renewed commitments to volunteer information had to be made under the Code suggests that the Directive was ignored. Will the Code meet the same fate? We have quoted initial assessments from a number of sources which suggest that the climate is changing and the release of more information is occurring. Central to this greater effectiveness is the existence of the Ombudsman as an independent adjudicator of appeals. It may well be too early to make a final judgement as to the effectiveness of the Code in changing Whitehall culture. We believe, if the Code scheme is reformed on the lines recommended in this Report, and putting to one side issues further discussed in the following paragraphs, that it has a good chance of furthering such cultural change.

122. The Government has made clear that it remains opposed to a single Freedom of Information Act. Mr Freeman explained why:

> "First of all, I think the system we have at present, which is a Code plus a number of specific Bills which are now on the statute book ... provides a much more flexible system. We can amend the Code and we can extend the Code far quicker than we can with legislation; we can be more responsive. Secondly, I think our procedure is cheaper and quicker in delivering action. I think to have the Ombudsman pursue individual concerns that remain after the department has considered a request which has not been immediately met provides a free, sensible and very efficient service. Thirdly, and finally, I think that to introduce the courts with a general remit to safeguard the provision of information disclosure and transparency would in some way confuse and diminish the accountability of ministers and departments to Parliament".

123. Often the argument against a Freedom of Information Act is framed in terms of the disadvantages that would spring from the involvement of the courts. There are now plenty of examples, cited above, of FOI regimes established by statute with an Ombudsman or commissioner rather than the court as the external appeal mechanism. There may well be recourse to the courts on a point of law or as a form of judicial review but such recourse need not be common. To introduce a statute with the Ombudsman as the final appeal process (apart from the possibility of judicial review) would seem to meet Mr Freeman's concern to avoid the court and retain the Ombudsman as the form of external review.

124. As to the objection of inflexibility, some might see the ease with which the Code can be amended by Government to be a disadvantage, rather than an advantage, of the current system. There has been no parliamentary approval or sanction given to the contents of the Code. Furthermore, such a Code is extremely vulnerable to slight amendments at the behest of departments finding the Code uncomfortable to live with. Thus the purpose of the Code might be wholly negated. But even taking Mr Freeman's point, if Parliament thought it appropriate it could legislate in such a way that later changes could be made by secondary legislation, which would preserve parliamentary approval whilst providing a fairly speedy mechanism for amendment.

125. The arguments of publicity and effect on civil service culture may not in themselves be enough to justify primary legislation. A more compelling argument, however, follows from the Government's advocacy of the advantages of the Ombudsman. The Government is, however, planning to remove from the Ombudsman's FOI jurisdiction all requests for personal information (which account for a high percentage of requests in other FOI regimes). The suggestion in the White Paper is that such requests come under the remit of the Data Protection Registrar who will thus become our version of a Privacy Commissioner. In New Zealand the Ombudsman previously had responsibility for personal information requests but they have recently been taken over by the Privacy Commissioner. In Australia the Privacy Commissioner defers on personal information matters to the Ombudsman. Other FOI regimes combine an Information and Privacy Commissioner in a single office. This Report does not attempt to explore in any detail privacy issues. How best to deal with personal information requests should be further debated. The point we would make is a simpler one. To include personal information within a privacy statute while retaining other access rights in a Code is to put the Ombudsman and open government concerns at a disadvantage. They can always be overruled by privacy considerations which have statutory authority. It is, however, difficult always to judge where privacy considerations end and public interest considerations begin.

126. The Government also proposes that environmental and health and safety information be removed from the Ombudsman's jurisdiction, being placed on a statutory, footing, perhaps with a tribunal as an external appeals mechanism. It is hard to reconcile this with the advantages elsewhere cited for an Ombudsman scheme. Neither the Data Protection Registrar nor the envisaged tribunals would be as able to encourage the extension of good practice in open government, which is one of the benefits of the Ombudsman's new role. Moreover, with at least three different access regimes in place the dissemination of clear and consistent precedents for the consideration of access requests will be undermined with such complex issues as candour, harm, confidentiality, public interest being differently interpreted by different authorities. The Ombudsman and the Code would be left with the 'rump' of government information, sometimes obstructed or overruled by the impinging of statutory judgements on their own remit. This system seems complicated and effectively to cancel the very advantages for the Ombudsman's involvement which the Government advanced. We have recently seen in the Health Service a complicated complaints mechanism, established piecemeal over the years, reformed in favour of a comprehensive and unitary system. It would

be unfortunate at this crucial moment to make a similar mistake, only to unravel it in a few years. It is precisely because we accept the arguments advanced by the Government for an Ombudsman supervision that we conclude that there should be a single Freedom of Information Act encompassing all access rights. This would preserve the Ombudsman's important role, maintain the consistency of open government judgements and ensure that the various considerations that inform any decision on access all carry similar statutory weight. it would also give Parliament the opportunity to approve in detail the contents of the Code. We are convinced that on balance the advantage lies in favour of legislation. **We recommend that the Government introduce a Freedom of Information Act.**

Appeals machinery under a FOI Act

The Select Committee examined FOI appeal systems operating in other countries, noting the choice between Tribunal, Court and Ombudsman/Information Commissioner. It concluded in favour of the Ombudsman model, noting that the states which had most recently enacted FOI laws had used this model, and that negotiation and persuasion were more likely to succeed than adversarial relationships (para. 109). The Constitution Unit recommended an FOI Commissioner with order making powers as the best model of enforcement under an FOI Act:

An FOI Commissioner with order-making powers represents the best model. The Commissioner would need powers to see the information in dispute, to summon witnesses and enter premises; to hold hearings when necessary (like a tribunal); to mediate; to issue binding orders; and to publish case law. Overseas experience shows that three-quarters of cases can be disposed of by mediation.

The FOI Commissioner could be an independent body, or the office could be combined with that of the Ombudsman; or with the Data Protection Registrar. The Registrar:

- would only be appropriate if the legislation were confined to access to personal files.
- is not primarily interested in access, which forms only 10% of her complaints caseload.
- is a relatively low profile agency.
- has expressed her preference that individuals should be able to secure their own remedies and compensation by suing in the courts" (Our Answers, July 1996).

The Ombudsman might therefore be more suitable. Whether he could combine the office of FOI Commissioner depends in part on caseload. At present this is very slight. In 1994-95 the Ombudsman received only 44 complaints under the Open Government Code of Practice, while he had 1,709 complaints in his general jurisdiction, and 1,784 complaints as Health Service Commissioner But overseas experience suggests the number of FOI complaints could eventually grow to 1,500 - 2,000. The Ombudsman would require extra resources; and might be uncomfortable with an order-making power, which could make his decisions more susceptible to review by the courts.

The EC directive requires a right of appeal through the courts against the enforcement authority's decisions. Overseas jurisdictions have a limited second stage of appeal, usually to a tribunal or the courts. This could be on a point of law only; or with a full rehearing.

The Constitution Unit has produced a short briefing on FOI which set out three choices for the then Government to incorporate the EC Directive:[105]

Drafting Legislation for the UK Link with Data Protection

The major policy options facing a new Government will be whether:

- to legislate to comply narrowly within the EC Data Protection Directive.
- to legislate to create a general right of access to personal files held by government.
- to enact a comprehensive Freedom of Information Act, covering personal files and official information held by government.

The present Government is following the first course. If possible the Government will give effect to the EC Directive by secondary legislation under the European Communities Act 1972, The legislation would be limited to files within EC competence, so that (for example) police, immigration and most tax records would not be covered; but the legislation would extend to the private sector. Enforcement would be by the Data Protection Registrar.

The second option would create a wider and more public access right to personal files held by government. it would require primary legislation, which would need to be introduced in 1997-98 to be in force by the EC implementation date of October 1998. Enforcement would be by the Data Protection Registrar or by the Ombudsman.

The third option would introduce a common access regime for personal and general files. This is the model followed in Australia, but not elsewhere. Canada and the USA have separate Privacy Acts regulating access to personal files; and New Zealand has since followed suit, in the Privacy Act 1993.

Ideally there should be a single access regime policed by a single enforcement body. This will not be possible to achieve. The broad choice lies between a single access regime for all information held by government, as in Australia; or a single access regime for all personal information held by the public and private sector, as is emerging with data protection. The latter is the starting point in the UK. A new Government will need to decide whether to build from that starting point; or whether to start afresh, and to make freedom of information the dominant regime.

Wherever the boundary is drawn, separate rights of access make for more complicated legislation, causing confusion for the public and for administrators because of the difficulty of working with two sets of rules. Looking at the current patchwork, the Select Committee recommended a single Freedom of Information Act encompassing all access rights to government information. Ideally such an FOI Act should be dovetailed with the legislation to implement the EC Directive, or should supersede it. In the time available in 1997 this might not be possible to achieve. It might be necessary for some years to live with dual access regimes for personal records held by government: to allow the legislation implementing the EC Directive to proceed, but to have a wider-set of access rights under the FOI Act and to allow applicants to choose which access route to use.

The Labour Party and the Liberal Democrats have been committed to a Freedom of Information Act for years. Tony Blair has been quoted as saying that an FOI Act 'would also signal a culture of change that would make a dramatic difference to the way Britain is governed.[106] *The Report of the Joint Consultative Committee on Constitutional Reform*, the joint Liberal Democrat and Labour report, published on 5 March 1997 noted as follows:

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[105] Consultation Unit Briefing *Introducing Freedom of Information* 1996

[106] CFI annual awards March 1996

Freedom of Information

24. The public have a right to know what government is doing in their name. Open and accountable government and freedom of information are essential to a modem democracy, yet the Government still continues to hide the workings of government behind a veil of secrecy.

25. Both parties are committed to a Freedom of Information Act. This would give the public proper confidence in matters of current public concern such as, for example, public health and food safety. It would also give proper access to information about the workings of government and allow individuals to see information held on them by government agencies.

26. Despite a promise to legislate on access to personal files, the present Government has failed to do so. The existing code of practice is welcome but does not go far enough in ensuring that people have proper rights of access to information. Freedom of information has been introduced in many Western democracies. Last year the House of Commons Select Committee on the Ombudsman added its weight to calls for a Freedom of Information Act.

27. There would of course be a need for exemptions in areas like national security, personal privacy and policy advice given by civil servants to Ministers, but the proposed legislation would establish independent machinery and procedures to achieve these purposes and shift the balance decisively in favour of the presumption that government information should be made publicly available unless there is a justifiable reason not to do so.

There was no timescale set in the report for the implementation of FOI, beyond the current Parliament.

It is possible to introduce a Freedom of Information Act without amending the *Official Secrets Act 1989*; the CFI however, would like to see a public interest defence inserted into the 1989 Act, and an overhaul of the whole legislation. There was no commitment by Labour to reform the Official Secrets Act in their 1997 manifesto.

1997 Queen's Speech

Following the general election on May 1, the new Labour Government was expected to introduce an FOI Bill. After some initial confusion in the press[107] the Queen's Speech contained a commitment to a White Paper on Freedom of Information prior to the introduction of a Bill. The Cabinet Office press notice issued on 14 May stated:

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[107] *Guardian* 9/5/97, 'Watch out: Secrecy's about-again'

COMMITMENT TO FREEDOM OF INFORMATION BILL AND MORE OPEN GOVERNMENT REAFFIRMED

Dr David Clark, Chancellor of the Duchy of Lancaster, today reaffirmed the Government's commitment to open government through a Freedom of Information Act. He said:

"The Queen's Speech proposes a White Paper setting out proposals for a Freedom of Information Bill. I hope to publish the White Paper before the summer recess. I want to ensure there is full consultation before the Bill is introduced. I do not want quick fixes for this complex area.

"In a short time, Government has already begun to act in a more open, transparent, and accountable way. For example, the whole area of food and food safety is being opened up after many years of unnecessary secrecy.

"The advantages of legislation on Freedom of Information include:

A proper Statutory Right of Access to Government. Decisions on disclosure will ultimately be subject to judicial review. This was not possible with the Code of Practice.

A proper Statutory mechanism to review complaints against non disclosure. An information commissioner could be appointed who would have statutory powers.

The introduction of a "public interest override,, which would allow the setting to one side of a long list of statutes barring disclosure or making disclosure discretionary in individual cases.

In the meantime, action on openness includes:

The Data Protection Bill included in the Queens Speech, which will help individuals secure access to the records Government holds on them.

Revision of Codes, if necessary, to ensure that the whole of Government is geared to a more open approach.

The White Paper can be used to establish minimum acceptable standards of openness in Government pending the passing of the Act; and could include:

More liberal interpretation of existing Codes of Practice in central government, the *NHS* and elsewhere. For example a more liberal definition of 'public interest,' when considering whether information should be disclosed."

In the debate on the constitution on 15 May 1997 Donald Dewar, Secretary of State for Scotland said 'the freedom of information bill will be part of our programme'.[108] However, there was no specific commitment to introduce a Bill in the current session of Parliament. Lord Irvine, Lord Chancellor, said in the Lords debate on 19 May, 'we will not rush in legislation that does little more than put the existing and unsatisfactory Code of Practice on a statutory basis ... we will introduce legislation in an open and inclusive way'.[109] Andrew Puddephatt, Director of Charter 88, the pressure group for constitutional change, has, however,

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[108] HC Deb vol 294 c.282
[109] HL Deb vol 580 c.148

drawn attention to the incorporation of the E*uropean Convention on Human Rights* as another avenue to achieve freedom of information, since Article 10 gives 'a right to receive and impart information and ideas without interference with public authority'.[110] He accepted that a specific FOI Act would be needed later, but considered that commitment to incorporation would be 'a significant statement of intent by the new government'.[111] Incorporation of the 'main provisions' of the ECHR was promised in the Queen's Speech for the current session but final detail is not yet available.

Ann Taylor, Leader of the House, announced on 22 May that a number of draft bills, including one on freedom of information, would be published for consultation.[112]

The Constitution Unit briefing[113] noted that the FOI regimes of Australia, New Zealand and Canada had been extensively studied by civil servants on travelling fellowships and that the Commonwealth models showed that "FOI can readily fit into a Westminster style. Collective responsibility is protected by the exemption for Cabinet and Cabinet committee papers; civil service neutrality is protected by the exemption for opinion and advice; and Ministerial accountability to Parliament is strengthened through the greater flow of information".

Overseas Experience

There has been a gradual introduction of FOI legislation abroad as illustrated in the following table.

1949	Sweden	*Freedom of the Press Act*
1951	Finland	*Publicity of Documents Act*
1966	United States	*Freedom of Information Act*, as amended
1970	Denmark	*Access of the Public to Documents in Administrative Files Act* concerned with public access to documents in administration
1978	France	*De la liberté d'acces aux documents administratifs* as amended
1978	The Netherlands	*Access to Official Information Act*

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110 See Library Research Paper no 97/68 *The European Convention on Human Rights*

111 *Independent*, 9/5/97, Letters

112 Cabinet Office News Release 22/5/97 Record number of draft bills to be published - Ann Taylor

113 *Introducing Freedom of Information* , October 1996

1982	Australia	*The Freedom of Information Act,* as amended
1982	New Zealand	*The Official Information Act 1982*, as amended
1983	Canada	*Access to Information Act,* as amended
1986	Greece	*Access to Information Law*
1995	Hong Kong	*Administrative code on Access to Information*
1997	Ireland	*Freedom of Information Act* (passed 10 April)

It is usual to examine the experience of FOI on those countries with a Westminster style of Government: Canada, Australia and New Zealand. Each has now experienced FOI legislation for 10-15 years. In general the legislation brought fewer changes than feared. The Constitution Unit briefing found that each had broadly similar sets of exemptions and an independent source of appeal. Each Act has been reviewed from time to time as the Select Committee on the PCA noted in its report on Open Government:[114]

> 13. In Australia and New Zealand the Committee was able to hear views on the effects of open government from those who have seen FOI regimes at work for over a decade. The consensus of those we met was that open government had been of considerable benefit to public life. There were problems and inadequacies to be tackled but it was not suggested that it was either possible or desirable to return to the situation prior to the passing of the FOI legislation. The principle of FOI was no longer a contentious issue but part of the social and political fabric.
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> 14. The Australian Law Reform Commission and the Administrative Review Council recently published a review of the experience in Australia of the federal Freedom of Information Act. The review concludes "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, the FOI Act has focused decision-makers' minds on the need to base decisions on relevant factors and to record the decision making process. The knowledge that decisions and processes are open to scrutiny, including under the FOI Act, imposes a constant discipline on the public sector"".
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> 15. There was a consensus in Australia and New Zealand that the right of access to personal files had resulted in far greater objectivity in the recording of information. It used not to be uncommon to find subjective and even abusive comments on file. That had ended with the awareness that the files were now open to inspection and comments had to be justified. Requests by individuals for personal information constituted the greatest single use of FOI legislation. One of the benefits of FOI in Australia had been that members of the public had found that the Government did not keep extensive files on them.

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[114] HC 93 Session 1996/97

16. The benefits of FOI went beyond an improvement in the standard of personal files. FOI resulted in a greater informal release of information. The drafting of documents had become more focused and relevant. Standards of administration had improved in that FOI had encouraged objective, reasoned and defensible decision-making. In Australia such improvements were a result not only of the awareness of possible outside scrutiny of documents but also of the requirement to give reasons for decisions, and of the review and appeals system established for administrative decisions in the 1970s.

17. There was an increasing awareness from Ministers and civil servants that public administration could not be capricious. Oral communication was no substitute for written records, as a recent Australian Minister found out when the lack of a written audit trail of the reasoning behind a particularly contentious decision resulted in her resignation. There was also in place a system of administrative review which would take a severe view of any decision made without filed justification. The dire forecasts made at the introduction of FOI as to its effect on candour of advice had not been borne out by events.

Each FOI regime provides for exemptions which normally include defence, national security, intelligence and international relations, detection and prevention of crime, protection of the economy, particularly currency and reserves, efficient administration of the public service, and protection of third parties from breach of confidence or invasion of privacy.

Nevertheless, as the Information Commissioner in Canada, John Grace, noted in his annual report to Parliament in June 1996 in some departments official attitudes were hardening against the public's right to know.[115] In the United States there has been concern about the corporate use of FOI legislation for business purposes. There appears to be no realistic prospect of abolition of FOI in the States which have introduced it.

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[115] Web Site http://infoweb.magi.com/^accessca/index.html

Appendix 1: Access to Information in Local Government[116]

The *Local Government (Access to Information) Act 1985*[117] places certain freedom of information obligations on local authorities (excluding town, parish and community councils, which are covered by the less onerous *Public Bodies (Admission to Meetings) Act 1960*). Nevertheless the Act does not require local authorities to give free access to all information in their possession. In particular, the Act only requires that documents be made available when they are relevant to meetings which are open to the public. In practice, this means that documents relating to most major policy decisions taken by the authority should be available, although the Campaign for Freedom of Information has identified a number of important exceptions to this rule of thumb (see below). The rules contained in the 1985 Act are summarised below. In addition, councils must of course comply with any other statutory requirements on access to information, for example the *Data Protection Act 1984*.[118]

Local authority meetings, including committee and sub-committee meetings, must be open to the public and press, subject to certain exceptions [*Local Government Act 1972*, s100A(1)]. The main types of business where the public may or must be excluded are described later. Copies of the agenda for a meeting and copies of any report for the meeting must be available for inspection by members of the public at the council's offices, at least three days beforehand [s100B(1)], although the general rules on access to documents do not apply to those connected with confidential and exempt agenda items [s100B(2)]. A list and full set of background papers (documents which have been used in the preparation of reports for council meetings) must also be made available for inspection in advance of the meeting in question [s100D], subject, again, to the exemptions listed below.

A member of the public (or press) has the right to copy documents covered by these provisions, or request a photocopy, subject to copyright [s100H(2)]. A "reasonable fee" may be charged for making a copy. Obstruction of this right "without reasonable excuse" is an offence subject upon conviction to a £200 fine [s100H(4)].

Under Schedule 12A of the *Local Government Act 1972* local authorities must prepare minutes of the proceedings of each meeting of the full council and all of the council's committees and sub-committees. Minutes and other documents covered by the access to information rules must be kept available for inspection for a period of six years after the

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116 provided by Edward Wood, Home Affairs Section

117 The 1985 Act inserted a new part V A into the *Local Government Act 1972* in England and Wales and a new part III A into the *Local Government (Scotland) Act 1973*
References below are to the 1972 Act but the Scottish access to information provisions, contained in sections 50A - 50K and Sch. 7A of the 1973 Act, are very similar to the rules in England and Wales

118 See the 1995/96 Report of the Select Committee on the PCA, the relevant part of which is reproduced in part V of this paper

meetings to which they relate [s100C(1)]. Again, those parts of the minutes which cover the discussion of exempt or confidential items are excluded from this requirement, but where access is denied a summary describing the items which were discussed (without revealing the information in question) must be placed in copies of the minutes which are made available to the public.

Information which is exempt from the public access rules set out above is as follows:

i) Confidential Information

The public and press *must* be excluded during the consideration of agenda items where "confidential information" is likely to be discussed. "Confidential" means information provided by the Government on a confidential basis or information which may not be disclosed because of statutory restrictions or a court order [s100A(2)]. The local authority *must not* disclose this information to the public at any time.

ii) Exempt information

The authority *may* decide to exclude members of the public and press where "exempt information" is to be discussed [s100A(4)]. "Exempt" is defined in Schedule 12A and includes information concerning particular employees or tenants of the authority or particular service users; information relating to the education, adoption or care of particular children; certain details of pending contracts involving the authority; information relating to the prevention and investigation of crime; details of counsel's opinion obtained by the authority; and information which would reveal the authority's intention to serve a statutory notice. Information in this category *may* be withheld by the authority if it chooses, subject to certain qualifications.

The Local Authority Associations have issued a joint note on good practice on access to information.[119] It states:

> The Associations have always considered that local government derives its integrity and influence from the trust and confidence of the individuals and communities it serves. Access to information is a necessary prerequisite for generating that trust and confidence. Informed citizens and communities are better able to contribute to, and take part in, the work of local authorities. Access to information is central to this process, and requires local authorities to establish the appropriate balance between:
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> - making information readily and openly available to the public;

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[119] *Open Government: A good practice note on access to information.* ACC, ADC, AMA, undated

- ensuring that certain areas of personal/public life remain the legitimate object of confidentiality.

The good practice note recommends that local authorities adopt a policy statement on access to information, declaring their commitment to open access. The following principles are recommended as a minimum basis for such a policy:

- the public should be aware of their statutory rights to information;
- information should be made available in response to all reasonable requests from the public unless it falls within an exempted category;
- procedures for handling requests for information and reviewing decisions about disclosure are essential;
- the public should be given reasons if it is decided to withhold access to information;
- personal privacy and confidence should be respected fully, in accordance with the law.

The Associations suggest that Councils' policy statements should describe the categories of information to which the public are entitled by statute, and specify the categories of information which they will release on a voluntary basis. These should include:

- a statement that individuals will be allowed to see and correct all personal information held on them by the local authority, as well as that provided for by statute;
- a commitment that data protection principles, as set out in the *Data Protection Act 1984*, will also apply to manually held personal files.

Other features of the good practice note include the following:

- councils should introduce written procedures for staff handling requests for information;
- requests for information should, where possible, be dealt with in line with separate performance targets for answering queries from the public;
- reasonable facilities should be made available for members of the public who wish to inspect documents;
- non-commercial requests for documents should not be subject to a charge where this is reasonable;

- reasonable guidance should be provided to enquirers who are unsure of the precise nature of the information they need;

- reasonable guidance should be provided to help enquirers understand the information supplied to them;

- provision should be made for enquirers whose first language is not English or who have a hearing, visual or other disability;

- reasons should be provided in those cases where a request for information is refused;

- a review system should be established for cases where the enquirer is not satisfied with the council's response. The review should be conducted by someone senior to the person who took the original decision. Provision should be made for appropriate redress where an enquirer has suffered injustice due to information being wrongfully withheld, unreasonably delayed, or supplied in an inaccurate or incomplete form.

The good practice note also commends additional initiatives which some local authorities have taken, including neighbourhood forums; decentralised decision-making; "question time" for members of the public during council meetings; information about the council on the internet; and requiring officers to give their name, designation and extension number to all members of the public with whom they are dealing.

The Department of the Environment commissioned the Policy Studies Institute to evaluate the effectiveness of the *Local Government (Access to Information) Act 1985*. The PSI's report, **Public Access to Information**, was published in 1995. The key findings, as set out in the summary to the report, were as follows:

PSI Research Report on Access to Information in Local Government: Key Findings

- The Act was found to be effective in establishing minimum standards for openness and accountability, with which all local authorities appear to be complying.

- While some authorities stated that they were already meeting the Act's requirements prior to 1985, in others the Act facilitated a transition to more open attitudes and working practices.

- Four fifths of local authorities were found to be exceeding the minimum requirements, by taking steps to ensure that information about meetings and rights under the Act was made more widely available. More could be done to facilitate access to information.

- Members of the public and the press use their rights under the Act, although local authorities perceive the take-up to be low. Efforts made to encourage public participation appear to be linked with higher levels of attendance at meetings. This supports the argument that local authorities should review their approach to information provision.

- Steps taken by local authorities to meet the requirements of the Act, and even to exceed them, had generally been achieved without incurring significant additional costs.

These findings led the PSI to recommend that, apart from one or two secondary issues, "there are no requirements related to the Act which are in need of revision or clarification" [p65].

The Campaign for Freedom of Information, which is concerned about the narrow scope of the *Local Government (Access to Information) Act*, has rejected this conclusion. Its letter to the Nolan Committee[120] is critical of the way that the Act,

> contrary to its title, primarily provides a right of access to *meetings* rather than to *information.* Insofar as the Act provides access to documents, it is only those documents which relate to matters which have been, or in the next three days are about to be, discussed in public at a meeting of the authority. The bulk of information held by local authorities falls outside the Act's scope.

The Campaign lists a number of situations in which information falls outside the scope of the Act:

- information relating to a matter which has not reached a formal decision stage or which has been received after a decision has been taken
- information relating to a decision which has been or is about to be taken by an officer under delegated powers without reference to a committee
- information relating to a decision taken at a meeting which was closed to the public
- information relating to a matter which was properly confidential at the time of the meeting but which is no longer confidential
- information relating to a decision taken in public, but which the relevant council officer considers not to be relevant

The Campaign for Freedom of Information notes that individual authorities are free to ignore the good practice note issued by the local government associations. The group calls for a Freedom of Information Act providing a statutory right of access to information across the public sector, subject to appropriate exemptions, which would provide "more effective accountability, and greater opportunities for the public to learn about and influence the decisions of local authorities and other public bodies".

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[120] Inquiry into Aspects of Conduct in Local Government, 28.10.96

Appendix 2: Environmental Information Regulations[121]

The *1992 Environmental Information Regulations*[122] implemented Directive 90/313/EEC on the freedom of access to information on the environment. This required public authorities holding information relating to the environment to make it available.

There are exemptions. Judicial and legislative bodies are specifically excluded, and although public authorities must respond to a request for information within two months, they may refuse to provide it on the following grounds[123]:

- confidentiality of proceedings of public authorities, international relations and national defence
- public security
- matters *sub judice*, under enquiry, or the subject of preliminary investigation requirements
- commercial and industrial confidentiality, including intellectual property
- confidentiality of personal data and/or files
- material supplied by a third party without that party being under a legal obligation to do so
- if disclosed, the material would increase the likelihood of damage to the environment it relates to

As well as this, internal communications of unfinished data may be withheld, as may information when the request is 'manifestly unreasonable or formulated in too general a manner'. A 'reasonable cost' may be charged for providing the information.

The Lords Select Committee on the European Communities recently investigated the UK's implementation of the Directive[124]. There was a clear divide among witnesses, with Government Departments and industry asserting that the Directive was fully transposed into UK law and working well, but NGOs, academics and environmentalists considering that the Directive had been weakened in transposition, and that the Regulations lacked guidance and clarity, and were not advertised sufficiently to the public.

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[121] provided by Patsy Hughes, Science and Environment Section

[122] *SI 1992/3240*

[123] *Manual of Environmental Policy: The EC and Britain* Nigel Haigh Chapter 11 p.11.5-1

[124] First Report Session 1996-7 *Freedom of access to information on the environment.* HL Paper 9 12 November 1996

One of the Committee's main criticisms was that although 'bodies with public responsibilities for the environment and under the control of public authorities' are covered by the Directive, it is not clear whether privatised bodies, particularly the water companies, come under this definition of 'relevant persons'. The Committee pointed out that the Department of the Environment had initially drafted a list of persons to whom the Regulations would apply, before abandoning the list and leaving individual bodies to themselves decide whether they were covered[125]. It recommended that the Directive be redrafted to clarify the status of privatised public utilities[126].

The meaning of the term 'information relating to the environment' was also, the Committee felt, subject to varying interpretations, some of which were too narrow. This had led, for example, to British Nuclear Fuels withholding information on the environmental implications of its THORP plant to the Campaign for the Freedom of Information.

The exemptions from disclosure were also felt by the Committee to be too broad, and open to abuse. In some cases the internal communications exemption had, for instance, been wrongly applied to advice given by independent statutory bodies, such as English Nature, to Government Departments[127]. The Campaign for a Cleaner Cardigan Bay has alleged that the DTI has withheld reports on the environmental effects of oil drilling submitted to it by the Joint Nature Conservation Committee on such grounds[128].

Loose criteria concerning 'commercially confidential' and 'incomplete' information (documents might simply be labelled 'draft' to avoid disclosure) were also criticised by the Committee. Other perceived shortcomings included the charging arrangements and lack of guidance as to what constituted a reasonable charge, the lack of an appeals procedure, the length of time allowed for reply (two months was felt to be too long), and a lack of public awareness concerning available information. (This despite the publication by the DoE of *Environmental Facts: A guide to using public registers of environmental information*[129].) All of the above points were raised by the Opposition Parties when the Regulations were debated on their introduction[130].

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[125] op cit p.11
[126] p.27
[127] p.12
[128] Letter to *The Guardian* 21 December 1993 'Regulations on information' p.19
[129] March 1995
[130] HC Deb 16 December 1992 cc.504-532

The Committee restated its support[131] for the Royal Commission for Environmental Pollution's 1984 recommendation that[132]:

> 'a guiding principle behind all legislative and administrative controls relating to environmental pollution should be a presumption in favour of unrestricted access for the public to information which the pollution control authorities obtain or receive by virtue of their statutory powers, with provision for secrecy only in those circumstances where a genuine case for it can be substantiated'.

In its response to the Committee[133] the previous Government continued to oppose making a list of 'relevant persons', but did agree that a number of ambiguities, such as those concerning the privatised utilities and the definition of 'environmental information', needed to be addressed by the European Commission and clarified by altering the Directive. The then Secretary of State for the Environment, John Gummer, agreed with the Committee on the need for an independent appeals procedure[134]:

> 'I accept that access would be significantly extended if were to be a more satisfactory machinery for appeals and enforcement. I propose therefore, to seek ways to establish an independent appeals procedure as a matter of urgency and will give serious consideration to the Select Committee's preference for an Information Commissioner. I will also ensure that the Guidance is revised to cover this change and to improve clarity elsewhere.'

Article 8 of the Directive required Member States to submit progress reports on implementation by 31 December 1996. Having received these the Commission is currently reviewing the Directive. The outcome of the review is likely to be influenced by a UN/ECE Convention on Access to Environmental Information which is currently the subject of negotiation[135].

When the Regulations were laid the Director of the Campaign for Freedom of Information commented[136];

> 'Last month the Environmental Information Regulations 1992 came into force, implementing an EC directive and providing a general right to environmental information. The exemptions are sweeping and enforcement weak. Nevertheless, we now have an Environmental Freedom of Information act, introduced and supported by ministers. Why should we not have the same right to other, equally important, information?'

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131 op cit p.19

132 Royal Commission on Environmental Pollution Tenth Report *Tackling Pollution- Experience and Prospects* Cmnd 9149 February 1984, para 2.77

133 Government Response to the House of Lords Select Committee report on freedom of access to information on the environment February 1997

134 *DoE Press Release* 54 4 February 1997 'Freedom of access to information on the environment - the Government response to House of Lords Select Committee'

135 *Environment Information Bulletin* **65** in *Health, Safety and Environment Bulletin* March 1997 p.2

136 *The Guardian* 26 January 1993 'Law: Britain's secret society - A new private member's bill could finally give us the right to know' p.18

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