RESEARCH PAPER 99/61
16 JUNE 1999

Freedom of Information - The Continuing Debate

This Paper describes briefly the Code of Practice on Access to Government Information (this is considered more extensively in Research Paper 97/69). It examines the proposals in the white paper *Your Right to Know* published in December 1997 and the subsequent report from the Public Administration Select Committee. A draft Freedom of Information Bill was published on 24 May 1999 in a consultation paper (Cm 4355) and this Paper briefly compares its provisions with the white paper proposals. Responses to the consultation paper are due by 20 July. The Public Administration Select Committee has commenced an inquiry which will be a 'pre-legislative scrutiny' of the Bill.

Oonagh Gay

HOME AFFAIRS SECTION

HOUSE OF COMMONS LIBRARY

Recent Library Research Papers include:

99/46	Local Elections - Proposals for Reform	28.04.99
99/47	Economic Indicators	04.05.99
99/48	Kosovo: Operation "Allied Force"	29.04.99
99/49	The *Northern Ireland (Location of Victims' Remains) Bill* [Bill 92 of 1998-99]	07.05.99
99/50	Scottish Parliament Elections: 6 May 1999	11.05.99
99/51	Welsh Assembly Elections: 6 May 1999	12.05.99
99/52	The local elections of 6 May 1999	17.05.99
99/53	Unemployment by Constituency - April 1999	19.05.99
99/54	Institutional Reform in the European Union	20.05.99
99/55	Wind Power	26.05.99
99/56	Homicide Statistics	27.05.99
99/57	European Parliament Elections - 1979 to 1994	02.06.99
99/58	The *Pollution Prevention and Control Bill* [HL] [Bill 107 of 1998-99]	03.06.99
99/59	Buses	08.06.99
99/60	Waiting lists and waiting times	14.06.99

Research Papers are available as PDF files:

- *to members of the general public on the Parliamentary web site, URL:* ***http://www.parliament.uk***
- *within Parliament to users of the Parliamentary Intranet, URL:* ***http://hcl1.hclibrary.parliament.u****k*

Library Research Papers are compiled for the benefit of Members of Parliament and their personal staff. Authors are available to discuss the contents of these papers with Members and their staff but cannot advise members of the general public.

Users of the printed version of these papers will find a pre-addressed response form at the end of the text.

ISSN 1368-8456

Summary of main points

The *Code of Practice on Access to Government Information* currently regulates access to information produced by government and other public bodies. The Code was introduced in April 1994 and appeals against refusal of information lie to the Parliamentary Ombudsman. Full background to the Code is given in Research Paper 97/69, which also looks at the general debate in the 1980s and 1990s on the value or otherwise of a Freedom of Information Act.

The Labour Government promised a Freedom of Information (FOI) Bill as part of its manifesto in May 1997 and Dr David Clark, then Chancellor of the Duchy of Lancaster, published a white paper, *Your Right to Know* in December 1997. The white paper proposed that exemptions would be subject to a public interest and a harm test, and decisions on disclosure of individual documents would be made on a contents, rather than class or category basis. A new Information Commissioner would be able to examine disputed documents and order disclosure. The proposals were favourably received by the main pressure group, the Campaign for Freedom of Information, but there was some criticism of the potential overlap with data protection legislation. The Select Committee on Public Administration expressed some concerns in its report published in May 1998.

In July 1998 there was a government reshuffle, and responsibility for FOI passed to Jack Straw, the Home Secretary, who had had responsibility for the *Data Protection Act 1998.* This Act implemented an EC directive and will give individuals rights to gain access information held about them and to have that information corrected or deleted. The Act extended the data protection regime beyond information recorded on computer to certain manual records, referred to in the Act as 'relevant filing systems'.

A draft FOI Bill was published on 24 May 1999, which received a mainly critical reception because it was seen as retreating from a number of principles in the white paper. In particular, there are a number of class (or category) exemptions, including for decision making and policy formulation where no harm test applies; and it is intended that the Information Commissioner should only be able to require public authorities to consider the public interest in deciding on disclosure rather than allowing release of information on that ground herself. The Data Protection Registrar and the Information Commissioner posts will be merged and amendments made to the 1998 Act. The Public Administration Select Committee has begun pre-legislative scrutiny of the draft bill.

The draft bill provides that requests for access to personal information will be handled under data protection legislation rather than FOI (Clause 31). However there will be a single route for accessing information under both FOI and data protection and a single commissioner to oversee the legislation. At present there are separate statutory regimes covering access to personal files in the fields of health, education, social work and housing. These will be brought within the data protection regime when the 1998 Act is implemented.

CONTENTS

I The Code of Practice on Access to Government Information

Full background on the Code can be found in Research Paper 97/69. This non-statutory code was introduced in 1994 and is enforced by the Parliamentary Ombudsman. Research Paper 97/69 also discusses the general debate in the 1980s and 1990s on the value or otherwise of a Freedom of Information Act.

Under the non-statutory code, there is no right to documents but to 'information' which is sifted by civil servants before being disclosed. However, the Ombudsman has made clear that Under the non-statutory code, there is no right to documents requests for all in the information in a particular document can usually only be met by the provision of the document.[1] Although the decisions of the Ombudsman have generally been complied with to date, critics argue that an independent judicial body should have power to enforce decisions against the executive. The Ombudsman does have power to balance the public interests involved in deciding whether the public interest is better served by disclosure or non-disclosure. Only bodies covered by the Ombudsman under the terms of the *Parliamentary Commissioner Act 1967* come within the Code. This has left a number of bodies, such as local authorities and the Cabinet outside his jurisdiction. There appears to have been little use of the Code, with 3,772 Code requests in 1997.[2]

After the Scott Inquiry into arms for Iraq, the then Government announced that ministers would only claim public interest immunity when it was believed that disclosure of a document would cause real harm or damage to the public interest. The former division into class and contents exemption would no longer be applied.[3] Critics have argued that it is essential that the need to exempt information is considered on an individual contents basis. There are 15 categories, or classes, of information which are exemptions under the Code. However the *Guidance on Interpretation*[4] notes that disclosure of information in the internal discussion and advice category would be considered on a case by case basis. The categories set out in the Code[5] are as follows:

---

1 See comments in Parliamentary Commissioner for Administration Select Committee report HC 84 1995-6, para 78

2 for definition of a Code request see *Open Government: Code of Practice on Access to Government Information 1997 Report* Cabinet Office, para 13. Discounting a particular type of Code request to the Health and Safety Executive, the figure for 1997 was 2,037. This represents only a 0.2 per cent increase in requests over 1996. The report for 1998 will be available later in the summer, and will be published by the Home Office, which has taken over the monitoring of the Code

3 HC Deb 18 December 1996 vol 576 c1507

4 *Open Government Code of Practice on Access to Government Information Guidance on Interpretation* second ed 1997

5 *Code of Practice on Access to Government Information,* revised November 1998. The whole Code is available on the Home Office website www.open.gov

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.

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.

1. Defence, security and international relations

Information whose disclosure would harm national security or defence.
Information whose disclosure would harm the conduct of international relations or affairs.

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

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.

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.

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.
Information covered by legal professional privilege.

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

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.

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

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.

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

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.

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

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

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.

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

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

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

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.

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

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

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

Information whose release would constitute a breach of Parliamentary Privilege.

The Appendix attempts to summarise exemptions in the Code, the white paper and the draft bill.

The Advisory Group on Openness in the Public Service was set up by the Home Office in February 1999 with a brief to report by October on achieving cultural change across the public sector. A further 158 NDPBs were also brought within the jurisdiction of the Ombudsman and the Code of Access.[6] However the Campaign for Freedom of Information declined to take part until the draft bill was published.[7]

---

6 *Home Office Press Notice* 12 March 1999 'Government takes action to create a culture of openness'

7 'Government sets up taskforce on 'openness' *Financial Times* 22 February 1999 HC Deb 12 March 1999 vol 327 c 378-9W

II The White Paper *Your Right to Know*

Both the Liberal Democrats and the Labour Parties had been committed to the introduction of an Act for several years and it featured in the Joint Consultative Committee report issued by both parties on 5 March 1997. There was some initial concern from FOI supporters when it was announced that a bill would not feature in the first session of the new Parliament. On 14 May David Clark, Chancellor of the Duchy of Lancaster issued a press notice adding that he hoped to publish a white paper by the summer recess[8], noting that he wanted to ensure full public consultation before a bill was introduced. On 22 May Ann Taylor announced that a FOI Bill would be one of the draft bills to be issued to allow more time for public scrutiny.[9].

In the event the white paper did not appear until December 1997, and even then the contents were leaked on 9 December.[10] Dr Clark apologised to the House on that day. On 11 December Dr Clark published the white paper *Your Right to Know*[11]

A. The White Paper - Proposals

The non-statutory code was briefly discussed as a model, but it was argued that it contained too many exemptions and that it encouraged 'class-based' exemptions of information, with a imprecise definition of public interest (para 3.3).

B. Scope

The scope of the proposed legislation was wide, to include not only government departments, but also a range of public bodies and even privatised utilities:

> 2.2 The Act will have a far broader scope than the existing central government Code of Practice on Access to Government Information, or other openness measures in government. It will cover:
>
> Government Departments, including non-Ministerial Departments, and their Executive Agencies;
> Nationalised industries, public corporations, and all the 1,200 Non-Departmental Public Bodies ("Quangos"). Examples range from the Equal Opportunities

---

8 Cabinet Office PN 14 May 1998 'Commitment to Freedom of Information Bill and More Open Government Reaffirmed'

9 Cabinet Office PN 22 May 1997 'Record Number of Draft Bills to be Published- Ann Taylor'

10 'Act to lift veil of secrecy "*Guardian* 10 December 1997

11 Cm 3818

Commission and the UK Atomic Energy Authority to the Royal Botanic Gardens and the Northern Lighthouse Board;
National Health Service;
administrative functions of the Courts and tribunals;
administrative functions of the Police and Police Authorities;
the Armed Forces;
Local Authorities;
Local Public Bodies, for example Registered Social Landlords and Training and Enterprise Councils;
Schools, Further Education Colleges and Universities;
the Public Service Broadcasters (for example the BBC, Channel Four, the Radio Authority);
private organisations insofar as they carry out statutory functions;
the privatised utilities.

Individuals or companies or other bodies could apply for either records or information of any date even if produced before the Act came into effect, held by the public authority concerned. The authority would not need to be the originator of the record. However the information or record would need to be held in connection with a public function, not private or personal records.

C. Exclusions

The bodies to be completely excluded under the white paper were the Security Service, the Secret Intelligence Service, GCHQ and the Special Forces. The white paper also proposed the exclusion of personnel records of public sector employees, including records held for recruitment and appointment.

The Act would also exclude 'information relating to the investigation and prosecution functions of the police, prosecutors and other bodies carrying out law enforcement work such as the Department of Social Security or Immigration Service. The Act will also exclude information relating to the commencement of civil proceedings' (para 2.20). Finally, it would not cover legal advice obtained by the government or any other advice within government normally protected by legal professional privilege.

D. Gateways

This term denoted various tests to be passed before an application would be processed It was not subsequently used in the draft bill. The gateways included applications for information which had already been published, or would be published as a future date, unspecific applications, or large scale fishing expeditions involving disproportionate costs, and multiple applications of specified types.

E. Charges

A charge not exceeding £10 was proposed per request, with public authorities able to set their own charging schemes within this parameter.

F. Exemptions

The white paper proposed that exemptions should solely apply on the basis of the contents of individual documents, rather then class based rules. Seven specified interests were set out as grounds for exemption:[12]

1. National security, defence and international relations

Protection of information whose disclosure could damage the national and international interests of the State is a key requirement of an FOI Act. The integrity of communications received in confidence from foreign governments, foreign courts or international organisations should be protected.

2. Law Enforcement

Again, protection in this area is common to all FOI legislation. Paragraph 2.21 notes that the Act should not undermine the investigation, prosecution or prevention of crime, or the conduct of civil proceedings, and these functions of public authorities will be excluded from the Act. Beyond this however, there can clearly be no obligation to disclose other information which could substantially harm the effectiveness of law enforcement or encourage the avoidance or evasion of tax and other financial obligations owed to the State.

3. Personal Privacy

The right of the individual to personal privacy is a fundamental human right. To some extent, this right is already protected through the law relating to confidentiality; moreover it is enshrined in Article 8 of the European Convention on Human Rights, which we propose to incorporate into UK law as a key element of our policy of bringing rights home. Protection against disclosures which could substantially harm this right is an essential element of an FOI regime.

At the same time, the right to personal privacy cannot be absolute - there may be circumstances where disclosure of personal information may be in the public interest. Such cases could well raise difficult choices between the potentially conflicting interests of the individual, the applicant and the public authority holding the information. This is an issue which an FOI Act may need to

[12] para 3.11

acknowledge through a mechanism to allow third party appeals against impending disclosure (see paragraph 5.19). The Government is introducing legislation into Parliament to implement the 1995 European Community Data Protection Directive. Data protection is integral to personal privacy, so there will be clear and important links between this legislation and FOI. These are examined in Chapter 4.

4. Commercial Confidentiality

Relations between public authorities and the private sector need to rest on two-way openness and trust. There will of course be information - like trade secrets, sensitive intellectual property or data which could affect share prices where disclosure would substantially harm the commercial interests of suppliers and contractors. This might, in certain circumstances, apply to the commercial interests of the disclosing authority itself - we are mindful that the Act's proposed coverage will include the nationalised industries, executive public bodies with significant commercial interests, and some private bodies in relation to any statutory or other public functions which they carry out. But we believe that openness should be the guiding principle where statutory or other public functions are being performed, and in the contractual arrangements of public authorities. For example unsuccessful bidders need to know why they were unsuccessful and how they could succeed next time. For the public, it is important to know how much central government services cost, no matter who provides them. Commercial confidentiality must not be used as a cloak to deny the public's right to know.

5. The Safety of the Individual, the Public and the Environment

Protection should exist for information whose disclosure could pose a significant threat to the health and/or safety of an individual person, the public more generally, or the environment.

6. Information Supplied in Confidence.

Many public authorities hold information supplied to them by private individuals, companies or other organisations in the expectation that it will be kept confidential. Much of this will be personal information or commercially sensitive material, in which case the relevant specified interests will apply. But there may be other circumstances where an obligation of confidentiality exists: for example the views of experts given freely on the understanding of confidentiality, or opinions expressed about an individual in references for appointments or citations for honours. In taking forward proposals in this area, we will have regard to the law of confidentiality. As noted in paragraph 2.13, the Act will cover information and records of any date before it comes into force. This will make it particularly important to ensure adequate protection for people or organisations whose communications with public authorities were covered by explicit undertakings of confidentiality, or at least a reasonable expectation that the law of confidentiality applied to them.

Decision-Making and Policy Advice

3.12 There is one specified interest where, because of particular factors set out below, we propose that decisions on disclosure be made against a test of "simple" harm (ie, **"would disclosure of this information cause harm?").** This is:

7. The Integrity of the Decision-making and Policy Advice Processes in Government

Now more than ever, government needs space and time in which to assess arguments and conduct its own debates with a degree of privacy. Experience from overseas suggests that the essential governmental functions of planning ahead, delivering solutions to issues of national importance and determining options on which to base policy decisions while still maintaining collective responsibility, can be damaged by random and premature disclosure of its deliberations under Freedom of Information legislation. As a result, high-level decision-making and policy advice are subject to clear protection in all countries, sometimes taking it outside the scope of the legislation altogether - for example in Canada, where "Cabinet Confidences" and related information are excluded from that country's Access to Information Act.

We do not propose a restrictive approach on these lines. Indeed, unlike previous UK Administrations, we are prepared to expose government information at all levels to FOI legislation. But we believe the relevant harm test needs to reflect the points set out above, and in particular the extent and nature of the damage which can be caused in this area. This leads us to propose a modified, straightforward harm test in this area. Factors which would need to be taken into account in determining whether this test would prevent disclosure of information are likely to include:

the maintenance of collective responsibility in government; the political impartiality of public officials;

the importance of internal discussion and advice being able to take place on a free and frank basis;

the extent to which the relevant records or information relate to decisions still under consideration, or publicly announced.

As noted above, we see the use of harm tests as being based on the contents, not the nature, of the records or information requested. In framing our proposals on decision-making and policy advice, we see the factors determining the harm test here as likely to apply particularly to high-level government records (Cabinet and Cabinet Committee papers, Ministerial correspondence and policy advice intended for Ministers, whether from government departments or other public bodies). Protection of this interest may well also be necessary for other records such as confidential communications between departments and other public bodies. But ail potential disclosures will be decided on the basis of the information in question, against the requirements of the Act.

The Appendix attempts to summarise exemptions under the Code, the white paper and the draft bill.

1. Substantial harm and public interest tests

A substantial harm test would be applied to assess the case for disclosure in these areas, with a simple harm test for decision-making and policy advice. The white paper emphasised that disclosure would be assessed on a 'contents' rather than a 'class' basis, so that each piece of information was examined individually to assess if the harm test applied. It stated: 'We do not propose that the Act should contain exempt categories at all, but rather that disclosure should be assessed on a 'contents' basis, records being disclosed in a partial form, with any necessary deletions, rather than being completely withheld' (para 3.8). Further definition of these terms was not made.

A public interest test would also apply to decisions on disclosure, as a separate identifiable step, with the term to be defined in the Bill (para 3.18). This was intended as a balancing operation:

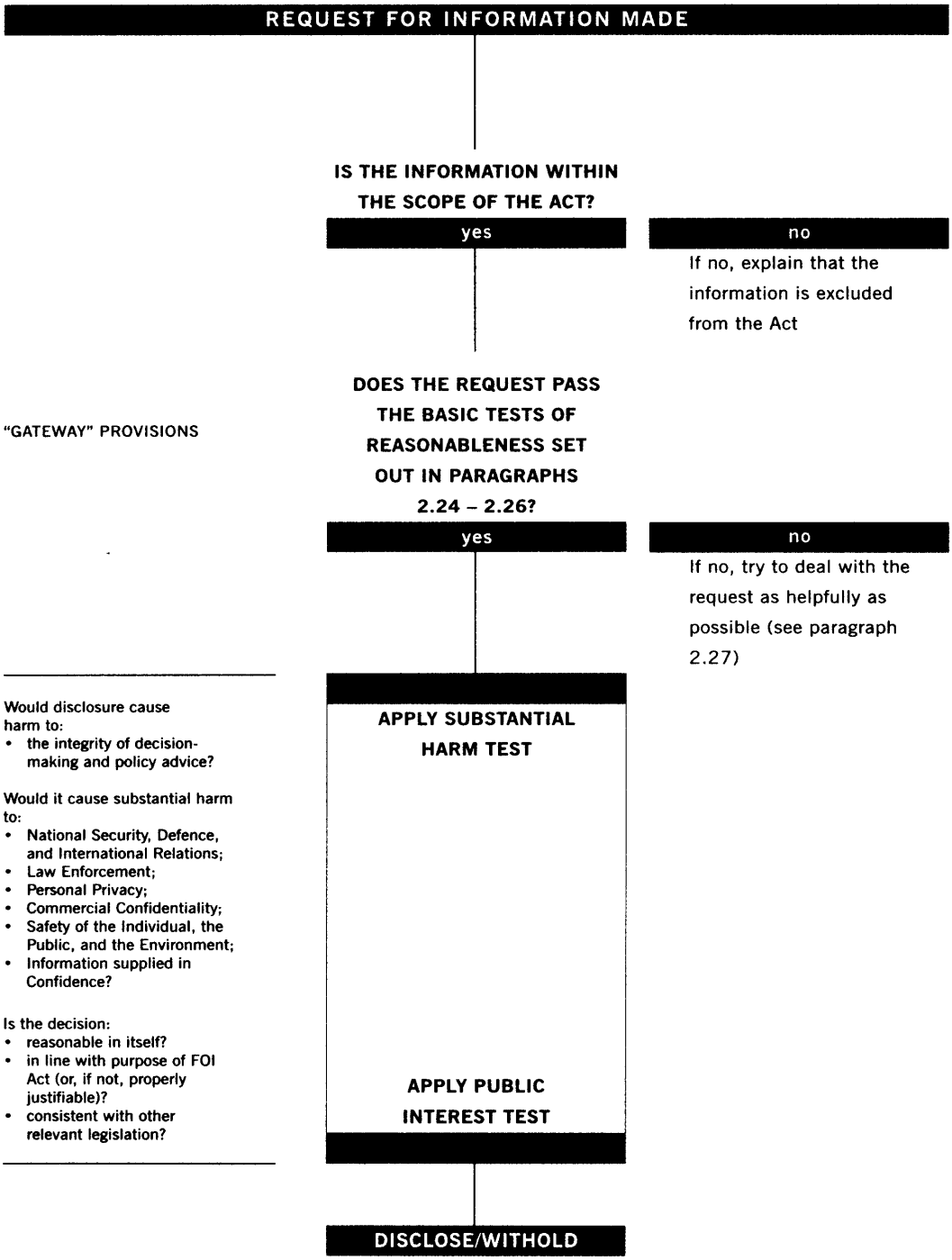
> 3.15 Applying the harm test is an essential element of any decision on disclosure. But there is a risk that the results of applying that test may not necessarily be consistent with the public interest (whether the outcome is to disclose or to withhold information). 3.16 Consideration of the "public interest" has become an increasingly important aspect in decisions - in both legal and non-legal contexts - on disclosure of information. It can, in certain circumstances, be critical in deciding whether information should be disclosed or withheld. We believe it to be an essential element in determining the right to know. 3.17 In addition, we have noted (paragraph 3.3 above) that the way that the public interest is meant to be applied under the Code of Practice is unclear, and can be difficult for both the disclosing authority and the applicant to understand. 3.18 We make two proposals to deal with this. First, ensuring that any decision on disclosure safeguards the public interest should be a separate, identifiable step in the FOI process. Second, an attempt will be made in the Bill to increase the clarity and certainty of individual decisions by defining what constitutes the public interest. The public interest 3.19 No single factor can be said to constitute the "public interest", nor can the outcome of conducting a public interest test be predicted in advance: a case-by-case approach will be necessary. We believe, however, that public authorities can seek to ensure that decisions under FOI safeguard the public interest first by checking:
>
> that the preliminary decision on whether or not to disclose, resulting from the substantial harm test, is not itself perverse. For example, would a decision not to disclose particular information itself result in substantial harm to public safety, or the environment, or the commercial interests of a third party?

and then by ensuring:

that the decision is in line with the overall purpose of the Act, to encourage government to be more open and accountable (see paragraph 1.2); or if not, that there is a clear and justifiable reason for this; and that the decision is consistent with other relevant legislation including European Community Law which requires either the disclosure or the withholding of information. In particular, we are concerned to preserve the effectiveness of the Official Secrets Act, and there may in some cases be a need to ensure that a decision taken under the FOI Act would not force a disclosure resulting in a breach of the harm tests that prohibit disclosure under the Official Secrets Act.

The process would therefore be as set out in Annex C:

Processing an FOI application



G. Data Protection

The white paper noted that FOI would cover all personal data held by public authorities, whether on computer or on paper files, which would therefore be broader than in the proposed Data Protection legislation; the two regimes would run in parallel but 'we intend to ensure that the regimes for freedom of information and the protection of personal privacy accommodate each other. The two regimes have to perform differing functions as effectively as possible, with the potential for conflict kept to a minimum (para 4.6). The white paper promised that 'as far as practicable we will align the systems for access to personal information under Data Protection and Freedom of Information. This is likely to include the means of access, time limits for reply, charges and appeals' (para 4.11). The new independent Information Commissioner and the Data Protection Registrar would be 'required, under the Freedom of Information Act, to consult each other and to exchange information on those cases where both jurisdictions come into play. In the unlikely event of a dispute arising between the Commissioner and Registrar, on which they are unable to reach agreement, this would ultimately be resolved by the Courts' (para 4.13).

H. Independent Commissioner

The white paper proposed a two stage system of appeal, with a formalised internal review stage and an Information Commissioner who would have the power to order disclosure and who would be answerable to the courts for his decisions (para 5.7).

The proposed powers were set out as follows:

> 5.10 The new Information Commissioner will have a key part to play in promoting, interpreting and enforcing the Freedom of Information Act. The Commissioner will not have any locus where the information concerned is not covered by the Act. The Commissioner's primary role will be to investigate complaints that a public authority has failed to comply with the requirements of the Act either by refusing to disclose information, or by taking an unreasonable time to respond to requests, or by imposing excessive charges for information. He or she will be expected to resolve such cases as quickly and informally as possible. In a similar vein, the Commissioner will also hear appeals relating to access to historic records.
>
> 5.11 In addition, we will require the Information Commissioner to:
>
> publish an annual report, and special reports where necessary, to Parliament on the operation of his or her function and the operation of the Act more generally;
> publish reports on the outcomes of investigations and issue best practice guidance on the interpretation of the Act; and promote greater general public awareness and understanding of the Act.

5.12 We are prepared to give the Information Commissioner wide-ranging powers to carry out these important functions effectively:

the power to order disclosure of records and information which are subject to the Act. This is an essential guarantee of the Commissioner's role in ensuring that public authorities fulfil their duties under the Act. The Commissioner could require disclosure of whole records, or of part of them with sensitive material deleted, or of extracted information as appropriate;

the right of access to any records within the scope of the Act and relevant to an investigation;

the power to review and adjust individual charges or charging systems, or to waive a charge it disclosure is considered to be in the wider public interest. For example, the Commissioner might consider that there is a compelling public interest in disclosure which could go by default if the applicant could not afford to meet the charge being levied;

the right to resolve disputes via mediation. Mediation should enable less complicated appeals to be resolved quickly, at minimum cost, without the need for a formal enquiry.

5.13 In line with the Parliamentary Ombudsman's enforcement powers, the Information Commissioner will also be allowed to report any failure by a public authority to comply with a disclosure order, or to supply records relevant to an investigation, to the court. Such cases would be treated by the court in the same way as a contempt of court.

5.14 There have been a number of cases overseas where public officials have deliberately altered, destroyed or withheld records from review. Although such cases are rare, and while there is no evidence of similar abuses having occurred under the *Code*, we believe that the public's right to know established under the Act should be properly safeguarded. We will therefore allow the Information Commissioner to apply for a warrant to enter and search premises and examine and remove records where he or she suspects that records that are relevant to an investigation are being withheld. We also intend to create a new criminal offence for the wilful or reckless destruction, alteration or withholding of records relevant to an investigation of the Information Commissioner.

5.15 There will be occasions, involving requests for personal information in particular, when FOI appeals overlap with the jurisdiction of the Data Protection Registrar. In such cases the Information Commissioner will need to consult the Data Protection Registrar (see paragraphs 4.12 and 4.13). Experience under the *Code* also shows that complaints about access to information and about maladministration can often be linked - for example, a complainant's case may be that he or she has been denied access to information which would be relevant in determining the degree of fault of the public authority concerned. We will therefore encourage the Information Commissioner to develop close working relationships with the various public sector Ombudsmen.

A disclosure order or a decision not to order disclosure would be subject to judicial review, with no provision for ministerial certificates and vetoes overriding decisions.(para 5.18) The white paper expressed concern that allowing appeals to the courts would enable public authorities reluctant to disclose information to appeal simply to delay the implementation of a disclosure decision. The cost of an appeal would also favour public authorities over private individuals. The white paper welcomed views on whether a mechanism should be established which would allow third parties to appeal against decisions to release information which they believe would substantial harm to their interests (para 5.19).

I. Public Records

The white paper proposed that the FOI Act would cover access to both current and historical material; current rules relating to access right to historical documents would be incorporated into the FOI Act, but the same access rights as for current records would not apply, as the 30 year rule would be retained. The criteria for withholding documents set out in the 1993 white paper *Open Government*[13] would be reformulated in the Act and an upper limit of 100 years introduced, with appeals lying to the Information Commissioner.

J. Open Government Initiatives

The white paper promised a culture change within government, with a FOI unit in the Cabinet Office championing open government. The FOI Act might need to be phased in and a good deal of training would be required. Proactive initiatives will be required and the Act would impose duties on public authorities to make certain information publicly available as a matter of course (para 2.18).

K. Reactions to the White Paper

The white paper received a general welcome for the broad scope of its coverage and the powers of disclosure given to the Information Commissioner, but the Campaign for Freedom of Information expressed some concern that the security and intelligence services would not be covered at all nor would non- administrative functions of the police or law enforcement bodies. The Campaign issued a booklet containing its general comments. There were also concerns about the interaction with data protection. The independent Constitution Unit commentary however considered that the white paper was 'aspirational' and expressed concerns that it had been brought out without full

[13] Cm 2290

understanding or commitment by departments and ministers.[14] These issues were explored by a number of witnesses to the Select Committee inquiry.

L. Data Protection Act 1998[15]

1. Introduction

Under the *Data Protection Act 1998* individuals about whom information is recorded on computer will have various rights, including the right to have access to such information ("subject access") and, where appropriate, to have the data corrected or deleted. The 1998 Act extends the data protection regime to cover certain manual records, referred to in the Act as "relevant filing systems", in addition to information held on computer. The definition of such systems given in section 1 of the Act is only intended to cover highly-structured manual filing systems.

Clause 60 of the draft *Freedom of Information Bill* amends the 1998 Act so that any information held in manual form by public authorities which is excluded from the definition of "relevant filing systems" will nevertheless be covered by the data protection regime, subject to various exemptions which already exist under the 1998 Act and a number of new exemptions which are set out below in part 4 of this section. In particular, only those parts of the data protection regime which relate to subject access and the accuracy of data held will apply to such data. In addition, this new category of manual data is sub-divided as follows. Only data within the new category which consists of relatively structured manual information (for example, a case file about an individual containing correspondence, held in chronological order, about that individual) will be covered by the full subject access provisions of the 1998 Act. For "unstructured personal data" (for example, incidental personal information on individuals which is held in policy files) there will be a modified right of subject access, under which an individual will have to give a description of the data in question in order to make a subject access request.

2. The *Data Protection Act 1998*

The Data Protection Act received the Royal Assent in July 1998 and the majority of its provisions are due to come into force in 1999. It will replace the *Data Protection Act 1984*, but "processing already underway" will not be subject to the new Act until October 2001. Manual records will have partial exemption until October 2007.

---

[14] *Commentary on Freedom of Information White Paper* Constitution Unit January 1998. The commentary was by Robert Hazell, a specialist advisor to the Public Administration Select Committee

[15] contributed by Edward Wood, Home Affairs section

Both statutes give rights to individuals about whom information is recorded on computer (known as data subjects), including the right to have access to such information and, where appropriate, to have the data corrected or deleted. The 1998 Act goes further, in requiring the *data controller* (ie. the person who holds the data) to notify the data subject that personal information on him or her is being held, subject to certain exceptions, regardless of whether a request for access is made.

Schedule 1 of the Act contains eight data protection principles which must be followed by data controllers:

1) Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless
    a) at least one of the conditions in Schedule 2 is met, and
    b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

2) Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

3) Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

4) Personal data shall be accurate and, where necessary, kept up to date.

5) Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

6) Personal data shall be processed in accordance with the rights of data subjects under this Act.

7) Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

8) Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

As under the 1984 Act, individuals will be able to complain to the Data Protection Registrar (to be renamed the Data Protection Commissioner) if their rights are infringed or the data protection principles are not complied with. They will be able to seek compensation in the courts if they have suffered damage resulting from the disclosure of inaccurate data.

The 1998 Act extends the data protection regime to cover certain manual records, referred to in the Act as "relevant filing systems". The definition of manual records contained in section 1 is somewhat opaque:

> "relevant filing system" means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

While this will include card index systems, etc, the Act is not intended to cover

> miscellaneous collections of paper about individuals, even if the collections are assembled in a file with the individual's name or other unique identifier on the front, if specific data about the individual cannot be readily extracted from that collection… except by looking at every document

[HL Deb Vol 587, 16.3.98, cc 467-8].

In addition there are separate rules covering personal files in the fields of health, education, social work and housing, referred to in the Act as "accessible records".

Part IV of the 1998 Act contains a number of exemptions from various provisions of the Act which are relevant to the activities of Government departments and official bodies, including:

- National security (section 28)
- Crime and taxation (section 29)
- Regulatory activity (section 31)
- Research, history and statistics (section 33)
- Information made available to the public by or under enactment (section 34)
- Disclosures required by law (section 35)
- Armed forces (Schedule 7)
- Judicial appointments and honours (Schedule 7)
- Crown employment and Crown or Ministerial appointments (Schedule 7)
- Management forecasts and planning (Schedule 7)
- Negotiations with the data subject (Schedule 7)
- Legal professional privilege (Schedule 7)
- Self incrimination (Schedule 7)

As the introduction to the *Data Protection Act 1998* produced by the Data Protection Registrar suggests, the exemptions which are available cannot easily be categorised into

classes which enjoy the same type of exemption.[16] To give an example of a specific exemption from the above list, personal data are exempt from the Data Protection Principles and most of the rest of the Act[17] if exemption is required for the purpose of safeguarding national security. A certificate of exemption, signed by a Minister of the Crown, is conclusive evidence of the requirements of the exemption having been met. Such a certificate may identify the personal data by describing it in general terms and may have effect at a time in the future.[18]

3. Data Protection and Individuals' Rights

Part II of the *Data Protection Act 1998* gives individuals various rights in respect of personal data held about them by others, including:

- The right of access to that data, known as "subject access" (Sections 7 to 9)
- The right to prevent processing likely to cause damage or distress (Section 10)
- The right to take action for compensation if the individual suffers damage by any contravention of the Act by the data controller (Section 13)
- The right to take action to rectify, block, erase or destroy inaccurate data (Section 14)

The following rights are relevant to the new data protection provisions of the draft *Freedom of Information Bill*:

The basic subject access rules: section 7

An individual has the right to be told by any data controller (subject to certain exemptions set out in Part IV of the Act) whether they or someone else on their behalf is processing personal data about him or her.

If this is so, that individual has the right to be given a description of:
- the personal data;
- the purposes for which they are being processed; and
- those to whom they are or may be disclosed.

The individual has the right to be told, in an intelligible manner, of all the information which forms any such personal data. This information must be supplied in permanent form by way of a copy, except where the supply of such a copy is not possible or would

---

16 1998, chapter 5, para 1.2

17 ie. Part II (individuals' rights), Part III (notification), Part IV (enforcement), and section 55 (which prohibits the unlawful obtaining of personal data)

18 all of the exemptions available under the Act are described in *The Data Protection Act 1998: An Introduction*, Data Protection Registrar, 1998, chapter 5 (available at http://www.open.gov.uk/dpr/dprhome.htm)

involve disproportionate effort or where the data subject agrees otherwise. If any of the information in the copy is not intelligible without explanation, the data subject should be given an explanation of that information, e.g. where the data controller holds the information in coded form which cannot be understood without the key to the code.

The individual also has the right to be told, in an intelligible manner, of any information as to the source of those data. Special rules apply where it is necessary to protect the identity of another individual who has provided information.

Subject access requests must be made in writing. The data controller has the right to demand a fee, subject to any maximum set by the Secretary of State. The normal deadline for complying with a subject assess request is forty days, provided all of the information necessary to locate the data has been supplied to the data controller. If a data subject believes that a data controller has failed to comply with a subject access request in contravention of the Act they may apply to Court for an order forcing the data controller to comply.

The right to compensation if the individual suffers damage by any contravention of the Act by the data controller: section 13

An individual who suffers damage or damage and distress as the result of any contravention of the Act by a data controller is entitled to compensation where the data controller is unable to prove that they had taken such care as was reasonable in all the circumstances to comply with the relevant requirement.

The right to have inaccurate data rectified, blocked, erased or destroyed: section 14

An individual may apply to the Court for an order requiring the data controller to rectify, block, erase or destroy any inaccurate data relating to him or her.

4. Data Protection and FOI

This legislation overlaps to some extent with the FOI proposals. A number of states operate Freedom of Information (FOI) legislation alongside data protection legislation but a variety of mechanisms are used to integrate the two legal regimes. In Australia for example the usual route for access to personal information is the FOI Act which predated the Privacy Act 1988. In Canada the Privacy Act 1993 removed the right of access to personal information from the FOI Act and re-enacted it in the 1993 Act with privacy protection principles. Ireland enacted FOI legislation in 1997 but has not yet enacted the EC Data Protection Directive. The order in which a state enacts FOI and data protection legislation can inevitably affect the outcome of the overall legal process. It is also important to note that FOI generally applies only to public sector information whereas data protection generally covers public and private information.
There can be difficulties where citizens are unclear which is the most appropriate piece of legislation for their needs and where rulings by different enforcement bodies conflict .In a number of Canadian provinces (Ontario, Quebec) a single commissioner combines the

role of privacy and FOI enforcer so that one person can balance the conflicting considerations of access and privacy. There is a degree of overlap because FOI legislation often covers personal information and individuals may use the legislation to gain access to their personal files and to files containing personal information on other individuals (third party access).

Third party personal information is one of the most widely used exemptions in FOI legislation to prevent access to information. A public interest override may however allow disclosure. Data Protection legislation is designed both to assist individuals to obtain details of information held on them and to protect individuals from the unauthorised disclosure of that information. Finally, Article 8 of the European Convention on Human Rights (right to privacy) and Article 10 (freedom of expression) are relevant. The *Human Rights Act 1998* seeks to give effect in domestic UK law the rights contained in the European Convention of Human Rights. The *Data Protection Act 1998* has not yet come into force, and there will be a transitional period before full implementation.[19]

The Data Protection Registrar expressed some concerns over the overlap between FOI and privacy protection in her evidence to the Select Committee on Public Administration, arguing for a single authority to enforce both regimes.[20]

M. The Public Administration Select Committee Report

The Public Administration Committee issued its report on the white paper proposals in May 1998.[21] While welcoming the proposals for a FOI Act as a 'radical advance in open and accountable government'[22] the Committee was concerned about the interaction with both **data protection** and the human rights bill, now the *Human Rights Act 1998*:

> ACCESS TO INFORMATION AND THE RIGHT OF PRIVACY
>
> 10. One of the most difficult and crucial issues that the Freedom of Information Act needs to address is the extent to which the public's right of access to information may override the individual citizen's right of privacy. Some of the issues of confidentiality involved are illustrated in the box below. This is the least satisfactory aspect of the proposed Act. It has been seriously complicated by the fact that there are three pieces of legislation which deal with these matters which have been, or are to be introduced separately: the Human Rights Bill; the Data Protection Bill; and the Freedom of Information Bill. We have serious

---

19 for further details see Research Paper 98/48, Part III

20 HC 398-iv 1997-98

21 *Your Right to Know: the Government's Proposals for a Freedom of Information Act* HC 398 1997-8

22 *Recommendation 1*

doubts that the regime **proposed strikes the right balance between privacy and openness, or indeed whether it will be workable….**

12 The UK does not have a single law defending individuals' privacy; but two Bills currently under consideration deal with privacy rights. The first of these is the Human Rights Bill, which will make provision in order to give fuller effect in UK domestic law to the European Convention on Human Rights. Article 8 of the Convention says that:

(a) "Everyone has the right to respect for his private and family life, his home and his correspondence

(b) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

The freedoms in Article 8 are balanced by the freedom of expression in Article 10 of the Convention which includes the right to receive and impart information.
13. One of the purposes of the new Data Protection Bill is to protect the confidentiality of personal information held by private and public sector bodies; it also provides a right of access to enable individuals to check whether information held by authorities about them is accurate. The Bill supersedes the 1984 Data Protection Act, and is based on the EC Data Protection Directive. The Bill is expected to be enacted by the end of the current session of Parliament (as required under the Directive). The Directive stresses its origin in a concern for the right to privacy: "in accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to processing of personal data". The White Paper says that the Data Protection Act will provide the basis for the protection of the individual's right to privacy against the right of access to information held by the Government.

14. Freedom of Information and these two pieces of legislation inevitably pull in different directions. On the one hand, there is a risk that by taking a liberal approach to Freedom of Information the UK may find itself in breach of Article 8 of the European Convention on Human Rights. On the other, there is a risk that over-scrupulous concern for privacy may prevent the disclosure of information of legitimate concern to the public. The Lord Chancellor sought to reassure us about the conflict between the Convention and the Freedom of Information Act: "the important thing, I think, is that the Human Rights Bill represents a floor of rights; it does not represent a maximum of rights, it is a floor of rights beneath which people should not fall. These are minimum rights. However, there is nothing in the Human Rights Bill which prevents the freedoms and rights of individuals being enhanced above that floor. This is exactly what the Freedom of Information Bill does". We agree with him on the Article 10 side, but whether that solved the Article 8 infringement problem is another matter. It might be added that the Council of Europe, which is responsible for the Convention, in

> 1981 recommended to Member States that they implement Freedom of Information laws.

The Committee noted that in evidence given by the Cabinet Office in April that the Cabinet Office had received legal advice to the effect that overlapping FOI and data protection regimes would be legally undesirable…concluding: 'this will mean that all requests by a person for information about him or herself will be dealt with under the Data Protection Act; requests for access to information about others will be dealt with under the Freedom of Information Act' (para 19). There were major concerns about this development:

> 20. This is a fundamental change in the scope of the Data Protection Bill, and its relationship with Freedom of Information to be putting forward at such a very late stage. It will greatly extend the scope of the Data Protection Bill, and reduce the scope of the proposed Freedom of Information Bill, if Freedom of Information is no longer to cover access to personal files. It will also greatly increase the responsibilities of the new Data Protection Commissioner, and correspondingly reduce those of the Information Commissioner. In future the champion of individuals' access to their personal files will be the Data Protection Commissioner and not the Information Commissioner. This gives us cause for concern because in the past the Data Protection Registrar has proposed that she should concentrate her limited resources on major data systems and high risk data processing, leaving individuals to pursue their claims for subject access through the courts." The DPR's operations have not been previously oriented towards assisting individuals to gain access to their own files. Such requests form only ten per cent of her complaints caseload, and she lacks the resources to help individuals to enforce access when it is denied." The Data Protection Act itself is not oriented towards subject access. That is apparent from its title, which is about the denial of access, and from the convoluted language of its access provisions (see the box on page xxi). If the Government wants a simple, accessible regime for individuals to see their own personal files, the Data Protection Act does not readily provide it. Furthermore, under the Data Protection Bill, although the Registrar can issue an enforcement notice to order a data controller to permit access to the information requested, the data controller may appeal on very wide grounds to a Data Protection Tribunal to try to prevent access [see clause 47]. Under the Freedom of Information proposals, there will not be a similar right of appeal against the Information Commissioner's determination, and this should make access more likely. **We recommend that if the Data Protection Registrar is really going to provide the only means of enforcing access to information held by a public authority about oneself then she should be enabled to fulfill this role at least as effectively as the Information Commissioner could do under the Freedom of Information legislation. This means that the provisions in the Data Protection Bill relating to access to personal information should give rights of access by individuals at least as great as those proposed in the Freedom of Information White Paper, and should avoid placing obstructions in the way of that access (for example by allowing appeals against the Registrar's decision to force disclosure) greater than those presented in the Freedom of Information Bill.**

It regretted that an opportunity was not taken to consider integrating the two regimes, since there had to be a simple and comprehensible method for individuals to gain access to their own information (para 21).

The report agreed that a system of **appeals for third parties** was essential but the practical problems were great (para 22). It expressed concerns about the decision to exclude **law enforcement information**, with the distinction between administrative functions and enforcement functions difficult to draw. The Home Secretary argued for the exclusion because of the substantial harm test, and so the Committee recommended that such information be included in the Act, but subject to the simple harm test only (para 30).

The Committee also queried the complete exclusion of **legal advice given to government**, rather than as an exemption (paras 31 and 32). It noted that overseas FOI regimes were often heavily used for gaining access to personnel records and it recommended that **personnel information for public servants** be included, and the implications of the *Data Protection Bill* provisions considered (para 35). In general terms, there should be a right of appeal to the Information Commissioner concerning the boundaries of exclusions (para 36).
There was surprise at the exclusion of **Parliament** from the FOI Act, but the committee referred to the Joint Committee on Parliamentary Privilege inquiry into parliamentary privilege as the avenue for exploration of the topic (para 36). The Committee recommended that the **Security and Intelligence Services** should not be excluded, but subject to exemption, since they should be subject to the test of public interest (para 39).

Privatised utilities should only be subject to the Act if they were companies which were monopoly, dominant, or franchised suppliers in one of the regulated utility markets (para 45). The committee was concerned that an FOI regime should be brought into force for devolved subject areas in **Scotland** as soon as it came into effect for the rest of the UK (para 46).

On **charges**, the committee recommended that all charges for personal information be capped at a low level, less than £10, with no discrimination between commercial organisations and others.

The exemption relating to **decision making and policy advice** was examined in some detail, with clarification requested as to whether it would apply also to public authorities other than central government (para 73). It concluded that public interest should include not only openness and accountability, but should also cover possible dangers to the public or the environment (para 76). Although the white paper suggested that a decision taken under the FOI Act should not force a disclosure resulting in a breach of the harm tests that prohibit disclosure under the **Official Secrets Act 1989**, the committee thought that the FOI harm and public interest tests should take precedence (para 82).
The Committee were concerned about the creation of another public sector complaints body - the **Information Commissioner -**

> 87. We are concerned by a problem put to us by both the Ombudsman and the Data Protection Registrar. An Information Commissioner will add another to the list of public sector complaints authorities in the UK. As the Ombudsman wrote in his evidence to us, "creating another authority in the form of an Information Commissioner is bound to further complicate the task of the ordinary citizen in seeking redress". "It does not sit as comfortably as it might with concepts of better government and one-stop shops for citizens", the Data Protection Registrar told us. Furthermore, appeals to the Information Commissioner about refusals to disclose information may also involve complaints about maladministration; some may involve complaints about a number of different authorities-for example a National Health Service Trust and a local authority. The Ombudsman points out that "there is provision for co-operation between the Ombudsmen in these circumstances; but it does not make the matter any simpler for the complainant or the Ombudsmen. To add yet a third complaints authority and to require the complainant to deal with both the Ombudsman and the new authority on what may be, for the complainant, one grievance with several causes would put him or her to unnecessary trouble, risk confusion, and be wasteful of public funds". The relationship between the Data Protection Registrar and the Information Commissioner is another source of confusion for the complainant which, the White Paper acknowledges, will need to be carefully handled.

It recommended that a Select Committee monitor the work of the Commissioner (para 90).

The Committee supported the suggestion in the white paper that there should be an order making power in the FOI Act to enable **repeal or amendment of statutes** restricting public access to information (para 93) and recommended that a Committee of the House review all such provisions. The government should publish its own review, indicating where EU requirements apply which might be overridden by the FOI Act.

The question was raised as to whether the preservation of **public records** by authorities outside central government ought to be assisted by the expertise of the Public Record Office (para 104), but in general the Committee had no specific criticisms in this area.

The report supported the **phased introduction of FOI**, with continuous pressure being exerted by the Cabinet Office to promote pro-active disclosure of information (para 111). It proposed that the Committee be consulted on the appointment of the Information Commissioner (para 112).

N. Select Committee Report on Ministerial Accountability and Parliamentary Questions

The Public Administration Committee issued this report in June 1998[23] as a follow up to work done by the Public Service Committee before the 1997 election on ensuring ministerial accountability.[24] The non-statutory *Code of Practice on Access to Government Information* is referred to in the new resolution of ministerial accountability passed just before the election. The report reviewed the previous years' experience of the blocking of PQs because of the refusal of ministers to answer them, concluding that further review was required by Parliament. It also expressed concern about the interaction of FOI and Parliamentary Questions, as suggested by the Chancellor of the Duchy of Lancaster:

> *Parliamentary Questions and Freedom of Information*
>
> 14. The Freedom of Information White Paper has considerable implications for the system of Parliamentary Questions. Dr Clark, in his evidence to the Committee on the White Paper, pointed out "we may well find that Members of Parliament themselves make use of [the Freedom of Information Act] because it may be a better way to get more detailed information than just asking Parliamentary Questions"." There are some countries with Freedom of Information regimes in which this has indeed happened; although Members of Parliament have continued to seek information in the traditional way."
>
> 15. We regard the implications of Dr Clark's remark as very troubling. The Parliamentary Question should be no less effective a way of obtaining information from the Government than the Freedom of Information request. We have welcomed the Freedom of Information proposals as a radical advance in open and accountable government. " But we believe that there are good reasons for continuing to ask Parliamentary Questions, rather than to seek information via the future Freedom of Information Act. The answers to Parliamentary Questions are published, and are therefore more generally available than information likely to be disclosed under the Act. It may be that there are means of making Parliamentary Questions and Freedom of Information requests complementary systems of obtaining information. **It would be absurd if the private request should be in some way a better method of obtaining an answer from the Government than the public request in Parliament. Ministers should continue to be held to account in Parliament. It would be inappropriate to apply some of the provisions of the proposed Act to Members' Questions: there should naturally be no charges for information just as there is no charge made under the present Code for answering Parliamentary**

---

[23] HC 820 1997-98

[24] for background see Research Paper 97/5 *The Accountability Debate: Codes of Guidance and Questions of Procedure for Ministers*

Questions (subject, of course, to the maintenance of a "disproportionate cost" threshold).

The Committee acknowledged that it would be inappropriate for the Information Commissioner to adjudicate on a proceeding in Parliament in view of Article 9 of the Bill of Rights, but were concerned that Members might be in a worse position than members of the public in obtaining information. It recommended that the Joint Committee on Parliamentary Privilege investigate the problem (para 17).[25]

The Government's white paper proposals were debated on 6 July 1998[26] on a motion to debate the select committee reports described above. For the Opposition, Patrick Cormack complained that the government had not offered consultation with the Opposition. David Clark acknowledged that the government had 'shifted the relationship between freedom of information and data protection and have looked afresh at some of the concepts' (c 830). He reassured the House however that the planned publication of a draft bill by the end of September 1998 would not affect the Bill's candidature for inclusion in the Queen's Speech.

On 27 July 1998, in the government reshuffle, David Clark was replaced by Dr Jack Cunningham. In a response to a PQ it was announced that FOI would become the responsibility of the Home Office, which would coordinate preparation and implementation alongside related legislation on data protection and human rights.[27] The *Financial Times*[28] reported that the Bill would not be in the Queen's Speech for the session 1998-9, although the draft bill would be published in September. *Financial Times* also reported that the new national appeals tribunal of judges and former civil servants would now arbitrate between the Information Commissioner and government departments over the release of information. This development did not appear in the official government response to the Select Committee report.

O. The Government Response

The Government's response to the Select Committee's report on FOI was published on 29 July 1998.[29] It acknowledged the difficulties in combining the FOI and Data Protection regimes and announced that it was examining ways for personal information to be made under FOI, but treated as subject access requests made under the new *Data Protection Act 1998*:

---

25 see also *Public Law* Summer 1998 'Analysis' by Patrick Birkinshaw, a special adviser to the Public Administration Committee

26 HC Deb 6 July 1998 vol 317 cc 797-832

27 HC Deb 31 July 1998 vol 317 cc 603-4W

28 'Freedom Legislation set to be delayed' 1 August 1998

29 HC 1020 Session 97-98 Fourth Special Report

> The Government is examining an approach which would permit applications for personal information to be made under the Freedom of Information (FOI) Act but for all such applications which are for the applicant's own personal information to be treated as subject access requests made under the new Data Protection Act. This avoids the need for a second, bespoke FOI regime for the release of personal information (which would perhaps cause confusion or discrepancies) while not penalising the user for applying under the "wrong" Act. At the same time this approach would enable the FOI Act to extend the access rights of the Data Protection Act in the public sector to ensure full coverage of retrievable personal information, in effect removing the restriction that manual files must be constructed in a particular way to allow access. This fulfils the Government's commitment in the White Paper to apply the FOI Act to "all personal data held by public authorities" (Your Right to Know, paragraph 4.5).
>
> The Government believes that this means of permitting access to one's own personal data would be both comprehensive in scope (because of the extension described above) and strong in enforcement, allowing the applicant recourse to the Data Protection Commissioner and the Courts in the exercise of his (or her) rights. The Government believes that the Data Protection Commissioner should be able to fulfil this role effectively but it will examine the position in detail to ensure that individuals are not disadvantaged in subject access terms by the lack of recourse to the Information Commissioner.
>
> The Government agrees with the Committee's view that "preserving the privacy and confidentiality of individuals is a vital interest, which should be overridden only on careful consideration and for good reasons". It believes that this can be provided for, in respect of both subject access requests which might incidentally reveal third party information and of any direct requests for information about third parties. The release of personal information to a third party under the FOI Act would only be allowed if it was also permitted under the Data Protection Directive (where the data falls within its scope) and the ECHR (in all cases).

1. Exclusions

The response noted that straightforward comparisons with the *Code of Practice* were misleading, given that it had class-based harm tests, and concluded that its decisions on excluded categories would not create a more restrictive regime. The response rejected recommendations from the Committee that information relating to **law enforcement** should not be excluded (Response to Recommendation 12) but promised to consider further where the balance should lie between exclusion and a specified interest subject to a harm test. It also rejected recommendations to include **legal advice** obtained by a public authority and to include **public personnel** information (Recommendations 13-14) The Government had no objection in principle however to the Committee's recommendation that the administrative functions of **Parliament** be brought within the scope of FOI and was willing to be guided by the Act. (Recommendation 16) It also considered the possibility of covering the Parliamentary Ombudsman and the National Audit Office, but rejected recommendations that **the Security and Intelligence Services** should be

included (Recommendation 17). The Committee had recommended a more precise definition of the term **'privatised utilities'** and in response the Government announced that its objectives might be achieved through coverage of those utility companies which 'carry out statutory functions' (Recommendation 18).

2. Fees

The response rejected recommendations that no access fees should apply, noting that the Government saw the £10 maximum fee as an encouragement to think clearly about the request they wish to make (Response to Recommendation 23). It agreed that there should only be a single set of charges, with no discrimination between commercial organisations and others.

3. Exemptions

The Committee recommended clearer definitions in a number of areas, and in response the Government stated that the policy advice exemption would apply to all bodies within the scope of the FOI Bill.

4. Official Secrets

The Government response indicated no desire to modify the operation of the *Official Secrets Act 1989* noting 'we will ensure that no decision under the FOI Act would force a disclosure which would be in breach of the Official Secrets Act' (Response to Recommendation 33).

5. Complaints Authorities

The Government emphasised that there was no doubt of the independence of the Parliamentary Ombudsman, but maintained its Information Commissioner model. The response noted that the government was considering a proposal from the British and Irish Ombudsman Association for a focal point in central government on ombudsman issues to look at general guidance. It welcomed the proposed continued involvement of the Select Committee in the workings of FOI.

6. Repeals

The response agreed that there should be an order making power to enable the repeal or amendment of provisions not repealed in the FOI Act itself and that existing access rights should be subsumed into the Act, but rejected recommendations for a committee of the House to examine the whole range of access rights. The Government would publish the

results of its review of statutory provisions inhibiting disclosure, and the extent to which it would be possible to override them in the FOI Act.

7. Proactive Measures

The response did not agree that all public authorities should be required to publish all file and record indexes although it instanced a number of other proactive initiatives, such as HMSO proposals for an Information Asset Register (Response to Recommendation 22). There would be duties on public authorities to disclose factual and analytical material as set out in para 2.18 of the white paper (Response to Recommendation 43). It did not agree that there should be a statutory requirement on the Government to produce an annual report.

P. Recent Developments

In a letter to the Public Administration Select Committee, the Home Secretary promised to reexamine the proposals in the light of the data protection legislation and to devote more resources to the issue now that freedom of information was being handled by the Home Office.[30] The Government stated that a draft bill would be published early in 1999 and that legislation was to be expected in this Parliament which would be based on the 'principles of the white paper'.[31] There was speculation that the post of Information Commissioner would be supplemented by an appeals tribunal which would enable government departments to appeal against disclosure[32] and that the substantial harm test would be redrafted.[33]

A private member's bill, the *Freedom of Information Bill* was introduced by Lord Lucas into the House of Lords and received a second reading on 10 February 1999.[34] It was largely based on the white paper proposals but its scope was more widely drawn, to take in for example the law enforcement functions of the police and government departments. A Campaign briefing provides a detailed guide.[35] The Bill has made no further progress.

The Lawrence Inquiry report (the Macpherson report) was published in February 1999. It recommended that 'a Freedom of Information Act should apply to all areas of policing,

---

30 *Home Office PN* 29 September 1998 'Government sets out plans for draft bill on Freedom of Information

31 HL Deb 9 November 1998 vol 594 c 502

32 'Secrets and Lies' *Guardian* 18 August 1998 'Freedom of Information Setback' *Free Press* Sept/Oct 1998

33 'Straw to weaken code on freedom' *Times* 12 January 1999

34 HL Deb vol 597 cc 291-318

35 *Notes on the Freedom of Information Bill introduced by Lord Lucas* 10 February 1999 Campaign for Freedom of Information

both operational and administrative, subject only to the 'substantial harm' test for withholding disclosure'.[36] It also stated that 'we see no logical grounds for a class exemption for the police in any area' (para 46.32). The Government Action Plan[37] accepted this recommendation in part stating that the draft bill would be published 'on the basis that all aspects of policing (administrative and operational) will be covered by the Freedom of Information legislation, subject to an appropriate harm test' (p 9). However information relating to informers and to an investigation or prosecution would be exempt on a class basis. 'Information about the *conduct* of an investigation will be disclosable subject to the appropriate harm test'. The Macpherson report was debated on 29 March in the Commons.[38] A Campaign briefing document produced for the debate argued class exemptions were inappropriate, and that the scope of an 'appropriate' harm test needed to reflect the white paper's substantial harm test, itself intended to approximate to the 'real damage' test now applied for Public Interest Immunity claims It pointed out that although information about the conduct of the police investigations could be sought, information obtained by the police during their inquiry would fall into the excluded class.[39]

III The Draft *Freedom of Information Bill*

The draft bill was published on 24 May. In his Commons statement, Jack Straw said:

> In drafting the Bill, we had to strike a careful balance three ways, between extending the public's access to information, protecting citizens' own privacy, and preserving confidentiality where disclosure itself would be against the public interest. That has been a difficult balancing act, but I think that we have got it right. The scales are weighted decisively in favour of openness, and the proposals will radically change the relationship between Government and citizens.
>
> The proposals are not merely about abstract rights, to the benefit of academics, historians or constitutional theorists alone, important though all those are. The proposals will benefit everyone and provide access to the sort of information that people really want to know: parents will be better able to find out how schools apply their admissions policies; patients will be able to understand how hospitals allocate resources between different treatments and how they prioritise waiting lists; and citizens will be able to find out more about the actions of their local police force.

---

36 *The Stephen Lawrence Inquiry* Cm 4262 February 1999. No specific reasoning was attached to the recommendations, but the conclusion followed from the inquiry's findings about the conduct of the murder investigations

37 *Stephen Lawrence Inquiry: Home Secretary's Action Plan* March 1999 Home Office

38 HC Deb vol 328 cc 760-831

39 *The Macpherson Report and Freedom of Information House of Commons debate* 29 March 1999 Campaign for Freedom of Information

> Under the Bill, for the first time, everyone will have the right of access to information held by bodies across the public sector. There will be a duty on public authorities to adopt a scheme for the publication of information about their work; a positive duty on authorities, even where they are not obliged to provide such information, to consider disclosure on public interest grounds; and a new Information Commissioner, together with a new information tribunal, to enforce the rights which are created. [40]

In response, Sir Norman Fowler, for the Opposition, argued that the proposals marked a retreat from the white paper, but stated that 'our aim is to make this legislation effective' (c 25). David Clark asked that the definition of prejudice as 'of substance' be written into the Bill (c 26). Alan Beith, for the Liberal Democrats asked whether the consultation would allow key points in the white paper to be reinserted in the Bill. Richard Shepherd, a member of the Public Administration Committee, deplored a public interest test which he considered weaker than that in the Code (c 30).

The Campaign for FOI expressed deep disappointment with the Bill, stating that in key areas it was weaker than the Code. In a Press Release, the Campaign's director Maurice Frankel said:[41]

> "The bill allows authorities to classify safety information as top secret. It replaces the code's public interest test by a voluntary test, making it easier for authorities to conceal misconduct. It abandons the white paper promise of access to internal discussion where disclosure would not be harmful, and instead creates a blanket exclusion for all information about the development of policy; even factual information and scientific analysis on matters like BSE and genetically modified food could be withheld under this provision. It replaces the white paper's "substantial harm" test by a lower "prejudice" test. It contains "catch all" exemptions allowing information to be refused without real evidence of any harm. It rejects the Macpherson report's recommendations that all police information should be covered by the bill. It allows new exemptions to be created at short notice to block requests already received. And it doubles the time authorities are given to provide information, from the code's 20 days to 40 days, which would make Britain's FoI law the slowest and most unresponsive in the world. "
>
> "It achieves the remarkable feat of making the code, introduced by a government opposed in principle to FoI, appear a more positive measure than legislation drawn up by a government committed to the issue for 25 years," he added. [2]

---

[40] HC Deb 24 May 1999 vol 332 c 21

[41] Campaign Press Release 24 May 1999 'Deeply disappointing information bill, weaker than Conservatives' openness code'

It was welcomed by the Data Protection Registrar who confirmed her support for one office with oversight of data protection and freedom of information.[42]

Press coverage has been generally critical, with disappointment at the number and extent of exemptions.[43] The Local Government Association have complained that the Bill does not assess existing legislation on local government access to information.

A. The Bill - Detailed Proposals

There are some significant differences with the scheme outlined in the white paper.

- There are several more exemptions in the Bill, but this is partly explained by the fact that some of the exclusions set out in the white paper have been transformed into exemptions, such as criminal investigations and public sector employee records. The exclusions in the Bill include the security services, the special forces and GCHQ.
- The 'substantial harm' test has been replaced with a test which exempts information where disclosure would 'prejudice' or would be likely to prejudice particular interests.
- The public interest test remains but becomes a test to be applied by public authorities, when deciding whether exempt information should be disclosed on a discretionary basis, It is the authority which is required to make the decision but it may refuse to make a decision unless told what use the applicant intends to make of the information, and it may place restrictions on the use of any information disclosed.
- Some exemptions are 'class' based, such as information relating to the formulation of government policy.
- Decision making and advice would be exempt if disclosure would undermine the conventions of collective responsibility in the 'reasonable opinion' of a minister.
- Ministerial certificates may be issued to exempt information relating to national security, the security services and special forces, and GCHQ. It will be possible to appeal to a new tribunal against the certificates
- Appeals will be possible from the decisions of the Commissioner to a new tribunal and then on a point of law to the High Court and ultimately to the Lords.
- The Information Commissioner and the Data Protection Commissioner will be combined into a single office and the Data Protection Tribunal will be merged with the new information tribunal.
- The possibility of extending the Bill's provisions to the administrative function of Parliament has been raised-as recommended by the Public Administration Select Committee.

---

[42] Office of the Data Protection Registrar 24.5.99 'Data Protection Registrar welcomes proposal for Information Commissioner'

[43] 'Sorry, limited information is available' *Guardian Editor* 28 May 1998, 'Salute to Secrecy' *Financial Times* 28 May 1999, 'The right to say nothing' *Times* 1 June 1999

There are many areas where the Bill is broadly in line with the white paper proposals:

- The term 'information' is broadly defined to include not only documents but information held in electronic form. However information not 'recorded' is not covered. Information held by a public authority is covered by the Bill, whether or not the authority was the original author of the information is included, as long as it is not held on behalf of another person. In New Zealand 'information' is not defined and commentators consider as a result that its scope is considerably broadened.[44]
- The legislation will be retrospective in effect, so that records already in existence will be covered. Further work is being carried out on how to dovetail the FOI scheme with historical records, but a number of exemptions will be disapplied for such records.
- A wide range of public bodies will be included, and there is power for the Secretary of State to apply FOI to other bodies with functions of a public nature. However privatised utilities will only be subject where they hold information relating to a public function. The possibility of extending FOI to Parliament itself and bodies accountable to it has been raised.[45]
- Fee levels will be specified in regulations (with the amounts likely to be lower than proposed in the white paper) and an authority will be allowed 40 days for a response, to align the time period with that for Data Protection (it is 20 days under the Code of Access).
- Authorities will have a duty to adopt and maintain 'publication schemes' for the proactive disclosure of information. However the white paper envisaged a more extensive duty to make information available.
- Personal information is exempt if it is personal information about the applicant or disclosure would contravene the data protection principles.
- There will be a power for the Secretary of State to amend or repeal enactments prohibiting disclosure of information.
- A new offence of altering records with intent to prevent disclosure, will be created, going beyond white paper proposals.
- Each public authority will have a duty to adopt publication schemes, as a guide to its publications and policy.

---

[44] 'Open Government in New Zealand' in *Open Government: Freedom of Information and Privacy* ed Andrew McDonald and Greg Terrill The Danks Committee, which preceded the introduction of legislation in New Zealand, considered that information should not only include 'recorded data, but knowledge of a state of fact of affairs by officers of the agency in their official agency' (*Towards Open Government* p 62)

[45] The Public Administration Select Committee considered that the administrative functions of Parliament should be subject to FOI and hoped that the Joint Committee on Parliamentary Privilege would review the question. The Joint Committee's report on parliamentary privilege did not address the issue, but in correspondence with the Home Secretary, the chairman, Lord Nicholls, considered that FOI should not apply to Parliament itself. See HC 214 1998-9 volume III p 181

B. Substantial Harm v Prejudice

The Campaign for FOI and others have expressed concern at the new wording governing exemptions. The Campaign have emphasised the comments of David Clark, as Chancellor the Duchy of Lancaster, that the substantial harm test was intended to be a stringent test, analogous to the 'real damage' test of Public Interest Immunity.[46] There are concerns that a test of 'prejudice' would be much weaker in comparison.[47] Prejudice appears to be much closer to the 'damage' test in the *Official Secrets Act 1989.* See the drafting of Clauses 21-26, 30 and 34 as 'would or would be likely to prejudice'. In his statement Jack Straw said that 'a single omnibus substantial harm test would not work properly for the range of exemptions proposed' and that the test would produce a more open regime than the Code, since the prejudice test was a higher one of probability rather than possibility under the Code.. The Commissioner would have the power to substitute his judgement as to disclosure for that of the public authority and the prejudice 'has to be real, actual or of "substance" (c 22).

C. The Public Interest

The existing Code of Practice contains a public interest override . Under the Code and the white paper it appears to be the Ombudsman or Commissioner who has ultimate authority to consider the public interest in reaching a decision on disclosure; in the Bill the Commissioner can only consider whether the authority had failed to exercise its discretion and order it to reconsider, without the power to force disclosure of the information. The Code states 'in those categories [of exemptions] 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'. Public interest was not defined in the Code. The white paper considered that the public interest had become an increasingly important aspect in decision-making and that as part of any decision on disclosure a separate public interest test should apply. There should be an attempt to define the public interest in the Bill (paras 315-3.21). See above in Part II where this is reproduced[48].

The white paper did not state explicitly that the Commissioner would be able to force disclosure on public interest grounds alone, but in evidence to the Public Administration Select Committee enquiry on the white paper the Lord Chancellor laid emphasis on the' very strong powers we have given the Information Commissioner to go into departments,

---

46 *Notes on the Freedom of Information Bill introduced by Lord Lucas* 10 February 1999. Q102 evidence to the Public Administration Committee 16 December 1997

47 'The final triumph of all the butcherers and whisperers' *Guardian* 25 May 1999

48 The Select Committee on Public Administration recommended that the public interest be defined in the Act. Para 77 HC 398 1997-8

to look at documents, and to assess whether the claim of a particular public interest would cause substantial damage can be made out'.[49]

Clause 14 of the Bill requires a public authority to consider whether exempt information should still be released, as a discretionary disclosure. In making the decision the authority is required it to take the public interest into account both in disclosure and in non-disclosure. Critics have argued that this does not represent a public interest override. It is at the discretion of the authority to release information and a court or the Commissioner would have difficulties in establishing that the decision had been unreasonable. Moreover, the authority would be able to impose 'reasonable' conditions restricting the use or disclosure of the information.

There would presumably be considerable public pressure on an authority to reconsider its stance, should the Commissioner require a redetermination. The Commissioner would be likely to make comments or issue practice notes on factors to be considered in defining the public interest, although this will not have statutory force. The Commissioner would have power to examine the documents in question using information notices under clause 44, except communications with a legal professional adviser or where a public authority might expose itself to proceedings for an offence other than under the Bill. The consultation paper on the draft bill explains this as preserving the privilege against self-incrimination (para 145).[50] The paper also states that the requirement to consider the public interest discretion was wider than either the Code or the white paper (Table 3). The Campaign maintain that the Code offers greater protection, because of the Ombudsman's power to consider the public interest and to order the release of information.[51]

There is no general public interest exemption in data protection legislation, but journalists may benefit from exemptions where they 'reasonably believe' that they are acting in the public interest. Note that this protects journalists from revealing information, such as sources.

D. Exemptions

Although there is a longer list of exemptions in the white paper, the Home Office maintain that this is due to the categorisation of exclusions and gateway provisions as exemptions and the need to produce a legislative draft from the white paper proposals. The main points can be summarised as follows:

- The **Security Services** are in effect excluded as all information is exempt (Clause 18).

---

[49] Q344 398 HC 1997-8

[50] Cm 4355

[51] *Campaign for Freedom of Information* Press Release 24 May 1999

- Information relating to **national security** is exempt, and ministerial certificates will define what information is covered. Certificates can be challenged by the Commissioner, who can appeal to the Tribunal (Clause 19).
- **Criminal prosecutions** will be subject to a class exemption, with no need to demonstrate 'prejudice' (Clause 25). The Macpherson report recommended a substantial harm test on a contents basis.
- Information which would prejudice **law enforcement functions** is exempt (Clause 26). This has been seen as a class exemption although the draft Bill does not categorise it as such.
- Information held at any time by public authorities for certain categories of investigations, such as **regulatory or accident investigations** is exempt, with no harm test applicable (Clause 25). The Campaign and environmental groups have expressed concern that this will prevent disclosure of documents on a wide range of health, safety and environmental issues. [52]
- There is a **decision-making and policy formulation** class exemption with no harm test.[53] In addition, other information will be exempt if likely to prejudice collective responsibility or frank provision of advice, or the effective conduct of public affairs, on the 'reasonable opinion of a Minister of the Crown" which again may be difficult to challenge in the courts(Clause 28). The white paper proposed a contents rather than class exemption, with a harm test. The exemption will also apply to other public authorities, including local authorities and the Welsh Assembly, but the relevant officer of the authority will exercise this function. In his statement Jack Straw said that 'the Commissioner will be able to challenge the reasonableness of a Minister's decision against disclosure' (c 22). There is some uncertainty about the scope for releasing factual information and background material under this exemption.
- **Commercial interests** will be exempt if there is prejudice or likely prejudice to commercial interests (Clause 34).
- There is a class exemption for **information provided in confidence** (Clause 32).
- There is a new exemption for information likely to prejudice **relations between any two administrations in the UK** (Clause 23). This is a common provision in federal states.
- The Secretary of State is given an order making power to create **additional exemptions** through the affirmative resolution procedure which may be used after a request has been made for which there is no appropriate exemption. There is a public interest test to be met before an order can be made. (Clause 36).

---

[52] In evidence to the Public Administration Select Committee Dr Clark had stressed that 'we do not want it to be the case that there is blanket protection against all the investigatory bodies' Q92 HC 398 1997 -8

[53] Robert Hazell's *Commentary on the Freedom of Information White* Paper considered that if Cabinet documents were not normally to be disclosed it might be simpler to make them subject to exemption as a category, since individual documents could still be disclosed and be the subject of investigation by the Commissioner (p 4). Constitution Unit January 1998

- Additionally, information is exempt if its disclosure, when combined with other information, would bring it within specified exemptions (Clause 37).

The Appendix attempts to summarise exemptions under the Code, white paper and draft bill.

E. Information Commissioner and Tribunal

The creation of a new Information Commissioner, to take in the work of the Data Protection Registrar, has been criticised on the ground that the data protection regime is weighted more towards to privacy than openness, but considerable difficulty was anticipated in allowing two separate regimes. The Home Office has argued that a Tribunal is necessary, to meet the EHCR Article 6 requirements on a fair hearing. There are concerns, however that a further appeal stage will slow down the FOI process. The white paper was concerned to avoid an automatic appeal to the courts, noting overseas experience of public authorities using this route simply to delay disclosure. The powers of the Commissioner appear to be built on those used by the Registrar in the data protection regime. The *Data Protection Act 1998* allows the Registrar to issue information notices and enforcement notices. In contrast to the Ombudsman's powers under the Code, there appears to be no bar on the Commissioner examining Cabinet and Cabinet committee papers.[54] The Commissioner's appointment will not depend on parliamentary approval, and there is no formal role in the bill for the Public Administration Committee.

F. Interaction with Data Protection[55]

The new data protection regime which will be introduced under the *Data Protection Act 1998* is explained in part II(L) of this paper. Briefly, the 1998 Act will give various rights to individuals about whom information is recorded on computer and, in certain circumstances, in manual filing systems. The data protection regime has much in common with the Government's proposals for FOI, and therefore a mechanism for co-ordinating the two systems is needed. **Clause 31** of the draft Bill achieves this by providing that requests for access to personal information will be handled under the rules for data protection rather than FOI. In addition, there will be a single route for accessing information held by public authorities under both FOI and data protection: individuals will not have to specify which set of rules they wish to make an application under. Under **Clause 5** there will be a single commissioner (the Information Commissioner) to oversee both systems. Finally, the 1998 Act will be amended so that all personal information held

---

[54] In evidence to the Public Administration Select Committee Dr Clark emphasised that in the white paper proposals the Commissioner would be able to examine Cabinet documents to examine whether departments had made an appropriate decision on disclosure. Q75 HC 398 1997-8

[55] contributed by Edward Wood, Home Affairs section

in manual files is covered by the Act, subject to various exemptions. The provisions extending the data protection rules are described below.

As mentioned above, the *Data Protection Act 1998* covers certain manual records in structured filing systems ("relevant filing systems") in addition to data held on computer. **Clause 60** of the draft Bill amends section 1 of the 1998 Act in order to extend still further the types of information held by public authorities which are covered by the data protection regime. Thus any information which is held by a public authority which does not fall within any of the four existing categories of data set out in section 1(1) of the 1998 Act will be covered. The definition of "data" in the 1998 Act, as amended, will be as follows:

> 1.- (1) In this Act, unless the context otherwise requires, “data” means information which-
> (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
> (b) is recorded with the intention that it should be processed by means of such equipment,
> (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,
> (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68,[56] or
> (e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d)

However, the data protection regime will only be extended to personal data falling within paragraph (e) subject to certain restrictions:

1. Under the definition of "held" by a public authority contained in **Clause 1(3)** of the draft Bill, paragraph (e) will apply to:

- information held by a public authority, or
- information held by another person or organisation on behalf of a public authority, **but not**
- information held by a public authority on behalf of another person or organisation.

2. The definition of "public authority" for the purposes of paragraph (e) is that given in **Schedule 1** of the draft Bill (or under an order made under **Clause 1**). Under **Clause 3**, some of a public authority's functions may be excluded from this aspect of the data protection regime.

---

[56] ie. health and social work records, etc

3. Under **Clause 62(1)** of the draft Bill, paragraph (e) data is only covered by those aspects of the data protection regime which relate to subject access[57] and accuracy. Thus, of the eight data protection principles contained in Schedule 1 of the 1998 Act (set out in full above), only principle 4 applies in full to paragraph (e) data:

> Personal data shall be accurate and, where necessary, kept up to date.

Sections 7-9 and 14 of the Act (subject access rights, and the right to have inaccurate data rectified, blocked, erased or destroyed) apply to paragraph (e) data. The right to compensation if the individual suffers damage by any contravention of the Act by the data controller (section 13) only applies to paragraph (e) data in relation to contraventions of the subject access rules.

Under **Clause 62(2)**, personnel records containing paragraph (e) data are excluded from the subject access and accuracy provisions of the 1998 Act in addition to the exclusions contained in Clause 62(1). This means, in effect, that the data protection regime does not apply at all in relation to such records.

5. **Clause 61** creates a new category of data, to be known as "unstructured personal data", which is narrower than "paragraph (e)" information as defined above. This category is intended to apply, for example, to incidental personal information on individuals which is held in policy files, but not to "relatively structured information", ie information which is "structured to a certain extent by reference to individuals"[58]. Thus "unstructured personal data" is not intended to apply to, for example, "a case file about an individual which contains correspondence about a number of matters relating to that individual and is indexed by reference only to the dates of the correspondence" [para 170].

The new category creates a two-tiered system for subject access requests in relation to paragraph (e) data:

- The normal rules contained in section 7 of the 1998 Act (as set out above) will apply to requests for access to "relatively structured information" within paragraph (e).

- The subject access rules will be modified for "unstructured personal data" within paragraph (e), by virtue of a new section 9A inserted into the 1998 Act by **Clause 61(2)** of the draft Bill.

The modified rules will work as follows. Ordinarily, an individual is not obliged to give a description of the personal data which he or she believes may be held in order to make a subject access request. On receipt of a request, it is up to the data controller to establish whether they have any data on that individual. Under **s9A(2)** of the 1998 Act (as

---

[57] on which, see para 5 below

[58] *Freedom of Information: Consultation on Draft Information,* Cm 4355, May 1999, para 170

inserted), however, an individual will have to give a description of the data in question in order to make a subject access request in relation to unstructured personal data held by a public authority. This might be seen as restricting the usefulness of the subject access rights in relation to this type of information: in order for an individual to establish whether a public authority was holding information of this kind on him or her, they would have to specify in some detail what kind of information they believed was being held. On the other hand, given that this kind of information is by definition unstructured, it might be virtually impossible for a public authority to be certain that it had no unstructured personal data on an individual if a catch-all subject access request under section 7 could be made.

In addition, a public authority will under **s9A(3)** of the 1998 Act be free to refuse to comply with a subject access request in respect of unstructured personal data if the cost of complying would exceed a limit set by the Secretary of State in regulations under **s9A(5)**. In estimating costs, a public authority will be bound by any regulations made under **Clause 12(5)** of the draft Bill, ie. the rules which apply to estimating costs under the FOI regime.

In a case where the cost of complying with the subject access provisions in full exceeds the specified limit, a public authority will nevertheless be required to comply with the first part of the subject access provisions, section 7(1)(a) (the duty to inform an individual on request whether personal data relating to him or her are being processed by or on behalf of the data controller), if the cost of complying with that part in isolation does not exceed the limit (**s9A(4)**).

G. Commencement and Territorial Extent

The Bill would extend to Northern Ireland and Wales, but apparently not Scotland, in respect of devolved matters. The Bill will not apply to the Scottish administration or Scottish Parliament. As part of the coalition agreement between Labour and Liberal Democrat[59] the parties stated: 'we are committed to the early introduction of an effective freedom of information regime'. A press notice from Jim Wallace, Minister of Justice, said that the draft bill would not extend to Scottish public authorities and the Scottish Executive and Parliament would take forward the commitment.[60] The Welsh Assembly has issued its own Code of Practice on Access. The political parties in Northern Ireland are to be consulted over whether FOI legislation should be extended to public bodies responsible to the Assembly there until the Assembly introduced its own legislation.[61] An unusual clause would bring the Act into effect at the end of five years if not already brought into force. This can be characterised as a 'sunrise' clause.

---

59 *Partnership for Scotland An Agreement for the First Scottish Parliament* May 1999

60 *Scottish Office* 24 May 1999 'Scotland to have its own freedom of information bill'

61 *Northern Ireland Office PN* 24 May 1999 'Public and Political Parties to be consulted on Freedom of Information legislation'

H. Pre-Legislative Scrutiny

The Public Administration Select Committee has begun an inquiry into the draft bill's provisions which will be a pre-legislative scrutiny. This is in line with proposals from the Modernisation Select Committee for more considered scrutiny of proposed legislation.[62] A number of committees have now completed these types of inquiries[63], which examine the detailed drafting of proposed legislation and hear the comments of informed witnesses. The Home Office have asked for responses to the draft bill by 20 July.

IV Overseas Comparisons

A. General Note

This section does not attempt a detailed overview of FOI legislation abroad. The *Background Material* published by the Cabinet Office in 1998 contains a summary of experience in Australia, Canada, New Zealand, the USA, Ireland and Europe generally. It noted the factors which tended to lead to a real increase in openness as: an accessible independent review mechanism, an incorporation of harm tests into exemptions which allow disclosure in the public interest, and the attitude of the government and bureaucracy to FOI. A recent study has assessed the background to the introduction of FOI in Australia, New Zealand and Canada[64] and concluded that there was no common identity between these forms of legislation, despite a common attempt to make FOI 'fit' a Westminster style model of government.

The New Zealand Law Commission reviewed the operation of the *Official Information Act 1982*[65] following a request from the Minister of Justice, partly prompted by an increase in the use of the Act to obtain large amounts of information concerning policy development. The advent of proportional representation and the proliferation of political parties had also increased the use of the Act by MPs and parliamentary research units. The Commission recommended that the present 20 day limit be reviewed, with the aim of reducing it to 15. It also considered that the 'Cabinet veto' should remain, which enables the Cabinet as a whole (rather than the relevant individual minister) to override a recommendation by the Ombudsman to disclose information. These vetos are subject to judicial review, but the Law Commission noted that none had been made since 1987,

---

62 see Research Paper 97/107 *Parliamentary Reform: The Commons 'Modernisation' Programme* for background

63 Social Security Committee (Pensions on Divorce) the Trade and Industry Committee (Limited Liability Partnership Bill) the Food Standards Committee (Food Standards Bill) Joint Committee on Financial Services and Markets (Financial Services Bill) Joint Committee on Local Government Functions and Standards (Local Government (Functions and Standards) Bill)

64 *Secrecy and Open Government: Why Governments want you to know* K G Robertson 1999

65 *Law Commission Report 40 Review of the Official Information Act 1982* October 1997

when the power to issue the veto was transferred to the Cabinet from the individual minister. One study has noted that a large number of briefing papers to ministers are now published, including most of the briefing papers from departments to an incoming government, concluding that the New Zealand experience has suggested that policy advice does not need to be automatically excluded.[66]

The joint review of the *Freedom of Information Act 1982* by the Australian Law Reform Commission and the Administrative Review Council [67] found weaknesses in the implementation of FOI and recommended the creation of an FOI Commissioner to monitor compliance and to promote the Act. It recommended that the time limit be reduced to 14 days after three years to prepare. Conclusive certificates (amounting to ministerial vetos) can be issued for certain areas, and the Commission considered that they could be justified for security and national defence reasons, and for Cabinet documents but not for other categories. These certificates can be reviewed, but not revoked, by the Administrative Appeals Tribunal. The review supported the role of the AAT in determining decisions on FOI, while calling for a more flexible and accessible interpretation of its role.

One commentator has found that the operation of FOI in Australia has been perceived as a disappointment and that it was essential that the object of the legislation include the underlying principle of the Act, to ensure open and accountable government. The public interest had proved to be an amorphous concept in Australia, but 'candour and frankness' arguments, derived from Public Interest Immunity cases, are widely relied upon by Australian agencies.[68] Another study has found that FOI in Australia has been weakened by the failure to fully develop the notion of the public interest, by increased charges, and diminution of the coverage of the Act.[69]

In Canada, there is a perception that FOI is resisted by ministers and civil servants, leading to an adversarial atmosphere and a commentator notes that a number of incidents involving attempts to thwart access to government information by tampering with records had compromised the credibility of government.[70]

---

66 'Open Government in New Zealand' in *Open Government: Freedom of Information and Privacy* ed Andrew McDonald and Greg Terrill 1998

67 *Australian Law Reform Commission Report no 77/Administrative Review Council Report no 40* Open Government: A Review of the federal Freedom of Information Act 1982 1995

68 'Freedom of Information - Principles and Problems: A Comparative Analysis of the Australian and the Proposed UK Systems' in C*onstitutional Reform in the United Kingdom: Practice and Principles* Cambridge University/Clifford Chance 1998

69 'the Rise and Decline of Freedom of Information in Australia' in *Open Government: Freedom of Information and Privacy* ed Andrew McDonald and Greg Terrill 1998

70 'Freedom of Information in Canada' in *Open Government: Freedom of Information and Privacy* ed Andrew McDonald and Greg Terrill 1998

The Irish FOI legislation, passed in 1997, has been criticised for the use of ministerial certificates in the areas of law enforcement, security and international relations. Decisions by an individual minister are subject to review by other members of the governments or the courts. However the Act does have a injury test and a public interest test. The Ombudsman was appointed as the Information Commissioner.[71]

B. Policy Advice

New Zealand has perhaps the most open access to policy advice and Cabinet documents. S9(2) allows information to be withheld if necessary to

> (f) Maintain the constitutional conventions for the time being which protect
> (i) The confidentiality of communications by or with the Sovereign or her representative;
> (ii) Collective and individual ministerial responsibility;
> (iii) The political neutrality of officials;
> (iv) The confidentiality of advice tendered by Ministers of the Crown and officials; or
> (g) Maintain the effective conduct of public affairs through
> (i) The free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any Department or organisation in the course of their duty; or
> (ii) The protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment.

The Law Commission *Review of the Official Information Act 1982*[72] commented that even if a reason is established, it might in terms of s 9(1) be outweighed by other considerations which make it desirable to make the information available in the public interest

> **217** Four features of s 9(2)(f) and (g) can be stressed at the outset.
>
> - The first is that even if one of the good reasons is established, it might, in terms of s 9(1), be outweighed by other considerations which make it desirable, in the public interest, to make the information available.
>
> - Second, the protection afforded is not a categorical one. It is not enough, for instance, to show that the relevant information is set out in a Cabinet document. Rather a judgment, involving an element of damage, is required: the person wishing to withhold must show that the withholding is necessary to maintain the particular interest. That

---

[71] 'Freedom of Information in Ireland' in *Open Government: Freedom of Information and Privacy* ed Andrew McDonald and Greg Terrill 1998

[72] Report 40 October 1997

> phrase has been interpreted by the Ombudsmen as requiring that release would go "to the heart" of the relevant interest. Factors such as the age of the information, or the timing of the request, may be relevant.
>
> - The third point about the provisions is linked: a judgment is required on the facts of the particular case, measured against the statutory standards. Although general trends and practices may emerge, they cannot produce automatic answers, especially in marginal cases.
>
> - Fourth, the trends and practices might vary over time. The Danks Committee in its *General Report* recognised that dangers possibly resulting from openness are not such as to deter us from supporting greater openness. But they should be taken carefully into account in mapping out the critical path for change. A new and sharper definition of areas of responsibility at senior levels, and the development of new and perhaps more explicit codes governing the relationship between Ministers and officials might be required. The importance of careful adjustments in this area does point yet again to an evolutionary approach to openness. (para 49)

It concluded that the Act should not contain categoric (or class) exclusions or exclude factual material as a matter of course from the exemption while acknowledging the drafting was less than perfect in terms of clarity (paras 246-7).

S 36 of Australia's FOI Act exempts documents relating to the deliberative processes of an agency where disclosure would be contrary to the public interest. The exemption does not apply to the reports of scientific or technical experts or to purely factual material. The Australian review found that the exact scope of the exemption was unclear and recommended that the power to issue a conclusive certificate should be removed, to make decisions to claim the exemption completely reviewable (paras 6.11 -6.12).

S 21 of Canada's *Access to Information Act 1982* allows advice and policy formulation to be exempted, but consultants or advisers reports are not covered unless they are in the employment of a government institution. The Commissioner has recommended that it be redrafted to include an 'injury' test and that the term advice should be defined.[73]

Ireland's *Freedom of Information Act 1997* has an exemption for meetings of the government and for the deliberations of public bodies (ss 19-20). The latter exemption has a public interest test and certain factual information and expert technical reports are not included within the exemption. The Campaign have argued that this is a more restrictive definition of policy advice than in the draft bill.[74]

---

[73] *The Access to Information Act - A Critical Review* Chapter 2, Section 21

[74] comments at Freedom of Information Awards 7 June 1999

C. Public Interest Tests

The New Zealand Official Information Act 1982 contains a general provision in s 4(c) 'to protect official information to the extent consistent with the public interest and the preservation of personal privacy. S 5 sets out the principle of the availability of information 'unless there is good reason for withholding it'. S9 allows the public interest to be weighed against the 'good reasons' for withholding information. The Office of the Ombudsman has issued practice guidelines on the current approach of the Ombudsman to s 9. They note the power of the Ombudsman to review the information requested and to take into account the public interest, and cite legal cases emphasising the duty of the decision-maker to justify non disclosure before the Ombudsman made his independent judgement. It also noted that the Act did not protect classes of information.

There is a public interest test in most of the exemptions in the Australian Freedom of Information Act, but the Law Reform Commission review found it an amorphous concept and recommended non-statutory guidelines on how agencies should apply the public interest test (paras 8.12-8.14). The Administrative Appeals Tribunal is able to review decisions on exemptions, but there are some limitations on access to documents for which exemption is claimed and the AAT has been criticised for making too cautious judgements in this area.

Ireland's legislation also contains a number of public interest exemptions; the decisions are taken by the relevant head, and are reviewable by the Information Commissioner. The Commissioner may annul or vary a decision (s 34(2)) and so takes the final decision over public interest.

In Canada, the Commissioner has recommended the introduction of a public interest override for several exemptions, but no legislative action has yet been taken.

The Home Office consultation paper[75] contains a series of tables which offer an international comparison of exemptions and harm tests which are reproduced below:

[75] Cm 4355 May 1999

COMPARISON OF EXEMPTIONS AND HARM TESTS IN FOI

TABLE 2

EXEMPTIONS IN UK BILL	AUSTRALIA	NEW ZEALAND	IRELAND	THE NETHERLANDS	USA	CANADA
1. **Information accessible to the public by other means.** Class exemption	Yes Documents open to public access	Not specified	Yes Class exemption	Not specified	Not specified	Yes If published or available for purchase
2. **Information intended for future publication.** Class exemption	Yes Defer until publication due	Not specified	Yes Class exemption If publication due within 3 months	Not specified	Not specified	Yes If publication is due within 3 months
3. **Information supplied by, or relating to work of, bodies dealing with security matters.** Class exemption	Not specified	Not specified	Yes 'Adversely affect'	Not specified	Not specified	Not specified
4. **National security**. If necessary to safeguard national security	Yes Class exemption	Yes 'Would be likely to prejudice'	Yes 'Adverse effect'	Yes Class exemption	Yes, by executive order	Yes 'reasonably be expected to be injurious'
5. **Defence.** 'would, or would be likely to prejudice'	Yes 'Reasonably expected to cause damage'	Yes 'Would be likely to prejudice'	Yes 'Adversely affect'	Yes 'Damage security of state'	Yes, by executive order	Yes 'reasonably be expected to be injurious'
6. **International relations**. 'would, or would be likely to prejudice'	Yes 'Reasonably expected to cause damage'	Yes 'Would be likely to Prejudice'	Yes 'Adversely affect'	Yes 'importance of disclosure does not outweigh [the interest]'	Yes, by executive order	Yes 'reasonably be expected to be injurious'

COMPARISON OF EXEMPTIONS AND HARM TESTS IN FOI **TABLE 2**

EXEMPTIONS IN UK BILL	AUSTRALIA	NEW ZEALAND	IRELAND	THE NETHERLANDS	USA	CANADA
7. **The economy**. 'would, or would be likely to prejudice'	Yes 'Substantial adverse effect'	Yes 'Would be likely to damage seriously'	Yes 'Avoid prejudice to substantial economic interest'	Yes 'importance of disclosure does not outweigh [the interest]'	Not specified	Yes 'Reasonably be expected to prejudice competitive position/ reasonably expected to be materially injurious'
8. **Investigation and proceedings conducted by public authorities**. Class exemption	Yes 'Prejudice conduct of investigation or fair trial'	Yes 'Would be likely to prejudice'	Yes 'significant adverse effect'	Yes 'importance of disclosure does not outweigh [the interest]'	Yes Class exemption	Yes 'Reasonably expected to be injurious'
9. **Law enforcement**. 'Would or would be likely to prejudice'	Yes 'Prejudice fair trial'	Yes 'Would be likely to prejudice'	Yes 'Reasonably be expected to prejudice'	Yes 'importance of disclosure does not outweigh [the interest]'	Yes Class exemption	Yes Class exemption
10. **Judicial functions**. Class exemption	Yes Class exemption	Courts not covered	Yes Class exemption	Yes Class exemption	Yes Class exemption	Yes Hearings 'in camera'
11. **Decision making and policy formulation**. Class exemption	Yes Class exemption 'Factual Information available'	Yes 'Maintains constitutional conventions'	Yes Class exemption	Yes, Class exemption, but factual information disclosable.	Yes, by executive order	Yes Class exemption
13. **Personal information.** Class exemption	Yes Class exemption	Yes 'Would be likely to prejudice interests'	Yes Class exemption	Yes 'importance of disclosure does not outweigh [the interest]'	Yes Class exemption	Yes Class exemption

COMPARISON OF EXEMPTIONS AND HARM TESTS IN FOI **TABLE 2**

EXEMPTIONS IN UK BILL	AUSTRALIA	NEW ZEALAND	IRELAND	THE NETHERLANDS	USA	CANADA
14. **Information provided in confidence.** Class exemption	Yes Class exemption	Yes 'Would be likely to prejudice'	Yes Class exemption	Yes Class exemption	Yes Class exemption	Yes Class exemption
15. **Legal professional privilege.** Class exemption	Yes Class exemption	Yes Class exemption	Yes Class exemption	Yes 'importance of disclosure does not outweigh [the interest]'	Yes Class exemption	Yes Class exemption
16. **Commercial interests.** 'Would or would be likely to prejudice'	Yes 'Reasonably be expected to affect ... adversely'	Yes 'Would be likely unreasonably to prejudice'	Yes 'cause undue disturbance'	Yes 'importance of disclosure does not outweigh [the interest]'	Yes where document obtained in confidence	Yes Class exemption
17. **Communications with Her Majesty, etc. and Honours.** Class exemption	Not specified	Yes 'maintains constitutional conventions with respect to'	Yes Excludes all records relating to the President.	In part – 'does not endanger the unity of the Crown'	Not applicable	Not specified
18. **Statutory Bars.** Yes	Yes	Not specified	Yes	Not specified	Yes	Yes

Appendix: Exemptions under the Code, White Paper and draft Bill

Code of Practice	White Paper	Bill
	EXEMPTIONS	
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.	Information is exempt if disclosure would 'substantially harm' six 'key specified' interests. These are: • National security, defence, and international relations (including communications received in confidence from foreign governments, foreign courts or international organisations;	• **National Security:** Information is exempt if: • It was directly or indirectly supplied to the authority by, or relates to the work of the Security Service, the Secret Intelligence Service, GCHQ, or special forces; • If exemption is required for the purposes of safeguarding national security; • **International relations:** Information is exempt if its disclosure would prejudice: a) Relations between the United Kingdom and any other State, b) Relations between the United Kingdom and any international organisation, c) The interests of the United Kingdom abroad, or d) the promotion or protection by the United Kingdom of its interests abroad or is confidential information obtained from another state or international organisation. • **Defence:** Information is exempt if its disclosure would prejudice: a) The defence of the United Kingdom, b) The capability of any relevant forces to carry out their tasks, or c) The security of any relevant forces.
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.	• **Law enforcement** (including information which would encourage avoidance or evasion of tax etc);	• **Criminal etc. investigations:** Information is exempt if it was obtained or recorded by the authority for the purposes of criminal investigation, or criminal proceedings conducted by the authority, or other investigation under powers granted in law. • **Law enforcement:** Information is exempt if its disclosure would prejudice: a) The prevention or detection of crime, b) The apprehension or prosecution of offenders, c) The administration of justice, d) The assessment or collection of any tax or duty or of any imposition of a similar nature, e) The operation of the immigration controls, or f) The maintenance of good order in prisons or in other institutions where persons are lawfully detained.

Code of Practice	White Paper	Bill
EXEMPTIONS (continued)		
(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 pruposes (g) Information whose disclosure would increase the likelihood of damage to the environment, or rare or endangered species and their habitats.		Or (If it isn't exempt by virtue of the above provisions) would prejudice: (a) the conduct of any investigation) which is conducted under powers conferred by or under an enactment- (i) with a view to it being ascertained whether a person has failed to comply with the law, is responsible for any other improper conduct, [or is unfit or incompetent in relation to any profession or activity which he is authorised to carry on], or (ii) with a view to ascertaining the cause of an accident, or (b) any civil proceedings [brought] [conducted] by the authority, under powers conferred by or under any enactment, for the pruposes of enforing the law.
Effective management of the economy and collection of tax (a) Infortmation 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 to tax, duties or National Insurance contributions, or assist tax avoidance or evasion. **Effective management and operation of the public service** (a) Information whose disclosure could lead to impropaer gain or advantage or would prejudice: • the competive position of a department or other public body or authority; • negotiations or the effective conduct or personnel management, or commercial or contractural 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.		• **Economy:** Information is exempt information if its disclosure under this Act would, or would be likely to, [prejudice] the economy of the United Kingdom or of any part of the United Kingdom.

Code of Practice	White Paper	Bill
	EXEMPTIONS	
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.	• The safety of the individual, the public and the environment. • **Personal privacy.**	• **Personal Information:** Information is exempt if it is personal information about the applicant, or if it is held in a computer of filing system, is about someone else and disclosure would contravene the principles set out in the Data Protection Act, or would cause 'unwarranted' substantial damage or substantial distress to him or another, or if it is manual data, if it would contravene the principles. (The principles say that the Data can't be processed unless one of a number of conditions is met, including conditions relating to sensitive personal data); or if it is exempt from the data subjects right of access to personal data under the Data Protection Act. • **Deceased persons:** Information is exempt if it relates to a deceased person and disclosure would cause grave distress to any living individual who had a close personal connection with the deceased. • **Personal safety:** Information is exempt if its disclosure would, or would be likely to: a) Endanger the physical or mental health of any individual, b) Endanger the safety of any individual.
Third party's commercial confidences Information including commercial confidences, trade services or intellectual property whose unwarranted disclosure would harm the competitive position of a third party. **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 had 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.	**Commercial confidentiality** (though openness 'should be the guiding principle where statutory or other public functions are being performed, and in the contractual arrangements of public authorities); • **Information supplied in confidence.**	• **Commercial confidentiality:** Information is exempt if: It constitutes a trade secret. Its disclosure would prejudice the commercial interests of any person(including the public authority holding it).

Code of Practice	White Paper	Bill
EXEMPTIONS (continued)		
Internal discussion and advice Information whose disclosure would harm the frankness and candour of internal discussion, incouding: • 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	• Information is exempt if ti would 'harm' the integrity of the decision making and policy advice processes in government. (Factors to be taken into account in determining this include: - the maintenance of collective responsibility in government; - the political impartiality of public officials; - the importance of internal discussion and advice being able to take place on a free and frank basis; - the extent to which the relevant records or information relate to decisions still under consideration, or publicly announced. But public authorities will be encouraged to make available raw data and factual background material.	• Decision--making and advi ce: Information is exempt if in the reasonable opinion of a Minister of the Crown, disclosure - would undermine the conventions on the collective responsibility of Ministers, the confidentiality of communications with Her Majesty or other members of the Royal Household - the provision of advice by the law officers - would inhibit the free and frank provision of advice, - would inhibit the free and frank exchange of views for the purposes of deliberation, or - would otherwise prejudice, or would be likelyotherwise to prejudice, the ffective conduct of public affairs. • **Honours:** Information is exempt 'if it relates to the conferring by the Crown of any honour'
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. **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. **Voluminous or vexatious requests** Requests for information which are vaxatious 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 inforemation from files not in current use) would require unreasonable diversion of resources. **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).		**Communications with Royal Household** Information relating to communications with Her Majesty, other Members of the Royal Family or Household. **Relations within the United Kingdom** Information which would prejudice relations between the UK Government and devolved administrations. • Information is exempt if it is reasonably accessible anyway (even if on payment), or if it is intended to be published and it's reasonable to withhold it until it is.

Code of Practice	White Paper	Bill
Research, statistics and analysis (a) Information relating to incomplete analysis, research or statistics, where disclosure could be misleading or derpive 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.		• Information is also exempt if disclosure is prohibition under other legislation or by the order of a court. The Secretary of State may add other exemptions. Under some of the exemptions, the authority is not obliged to confirm or deny whether it holds the information requested.