

## Introducing Freedom of Information

The opposition parties have longstanding commitments to introduce a Freedom of Information Act. The Government has promised a statutory right of access to personal files and health and safety information, and has introduced the 1994 Code of Practice on Open Government. Reviewing the experience here and overseas, the Constitution Unit's initial conclusions are:

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Legislation could be prepared and introduced relatively swiftly. To comply with the 1995 EC Data Protection Directive, the Home Office is preparing for limited legislation on access to personal files by October 1998. A new Government would need to decide early on whether to build on this, or whether to introduce a comprehensive Freedom of Information Act.

The broad policy choice is whether to have separate access regimes for personal files and for official information; or whether to have a single access regime covering all information held by government.

In terms of effective legislation which could readily be applied here, Australia, Canada and New Zealand offer the most useful models for the UK.

Freedom of information leads to greater accuracy and objectivity, and improved decision making. It need not disrupt the business of government; and civil servants can continue to offer candid and frank advice.

The bulk of requests will be for access to personal files. The total number of requests will depend on the level of fees charged and the publicity given to the legislation. If access is free or for modest charges there might be between 50,000 and 70,000 requests in the first year.

Appeals should go to a Freedom of Information Commissioner, with power to order disclosure. This office could be free-standing, or combined with that of the Ombudsman.

Freedom of Information needs a senior Cabinet Minister to introduce and defend it, and a strong central agency to keep other departments up to the mark.

## Introduction

Of all the possible constitutional reforms proposed by the political parties, Freedom of Information (FOI) is the one in the most advanced state of readiness. Good draft bills exist, including Mark Fisher MP's *Right to Know Bill* 1993; Government departments have the experience of the Code of Practice on Open Government, introduced in April 1994; and civil servants have conducted detailed studies of the operation of FOI overseas. As a result Whitehall is well prepared to introduce early legislation.

## Current Position in the UK

Unlike most western democracies, the UK has no Freedom of Information Act. Instead we have a patchwork of measures introduced as a result of pressures from Europe and from Private Members' Bills. On access to personal files, the Data Protection Act 1984 gives individuals a right of access to computer records about themselves, but not to paper records. Access must be extended to paper records within the scope of EC competence by October 1998, when the UK must have legislated to give effect to the 1995 EC Directive on Data Protection (95/46/EC). Private Members' Bills (the Access to Personal Files Act 1987, the Access to Medical Records Act 1988 and the Access to Health Records Act 1990) have granted limited access to certain personal files: to medical records, and to individual files held by schools and by local authority social services and housing departments.

The right of access to general information held by government is similarly patchy. The Local Government (Access to Information) Act 1985 gives a right of access to the meetings and meeting papers of local authorities. Following an EC Directive, the Environmental Information Regulations (December 1992) give a right of access to environmental information. The 1993 *White Paper on Open Government* heralded a new departure with the Code of Practice on Access to Government Information. Under the Code Whitehall departments will respond positively to requests for information, with a right of review by the Parliamentary Commissioner for Administration (the Ombudsman). But the Code has been given minimum publicity; it offers access to information, not documents; and the Ombudsman can only recommend, and not order disclosure.

The 1993 *White Paper* also promised to introduce a statutory right of access to personal files, and to health and safety information, but the Government has not found the legislative time to do so. Reviewing the operation of the Code in March 1996, the Select Committee on the Ombudsman was critical of the patchwork

access regime in the UK, and concluded that there should be a single Freedom of Information Act encompassing all access rights.

## Overseas Models

These have been extensively studied by civil servants on travelling fellowships and by the Cabinet Office. Between them they have visited Australia, Canada and New Zealand, which all legislated in 1982; and France (1978), Sweden (1776) and the USA (1966). Australia and New Zealand have been visited by the Ombudsman Select Committee, whose members were favourably impressed by the effectiveness of the legislation there. These Commonwealth countries offer the closest models for the UK, and show that FOI can readily fit into a Westminster system. Collective responsibility is protected by the exemption for Cabinet and Cabinet Committee papers; civil service neutrality is protected by the exemption for opinion and advice; and Ministerial accountability to Parliament is strengthened through the greater flow of information.

## Drafting Legislation for the UK

### Link with Data Protection

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

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

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

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

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

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

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

### **Agencies Covered**

The Select Committee has criticised the Code for its restricted coverage. A major strategic decision is involved in deciding how wide the new legislation should extend. The new Act should aim to cover all government departments at central and regional level, bodies under their control, Executive Agencies, health authorities and NHS Trusts, public corporations and Non Departmental Public Bodies. It may need to be extended in stages. The Act should also embrace local authorities, following consultation with the new Local Government Association; and should extend to devolved governments (when established) in Scotland, Wales and Northern Ireland. The wider the scope of the legislation, the harder it will be to channel complaints to a single enforcement agency; complaints about local government, for example, might go to the Local Government Ombudsmen.

### **Applicants and Records**

Applicants should include individuals and companies with no restrictions of nationality or residence. Those jurisdictions which have sought to impose restrictions have found they can be circumvented by the use of agents. Access should be to documents, not to prepared summaries of the information sought. The

definition of 'documents' should extend to any government information whether in written, visual, aural or computer-readable form; and should include access to records created before introduction of the legislation. Retrospective access has not caused any difficulty overseas. The access regime for archival records will also need to be brought into line: either by separate legislation, or by making the Public Records Office subject to the FOI Act.

### **Exemptions**

For government to function effectively it needs to be able to think and argue in private; and to be able to assure third parties that information supplied in confidence will not be disclosed. All FOI legislation contains exemptions to protect the deliberations of government, and third party information. The standard exemption provisions cover national security and defence; international relations; law enforcement; Cabinet papers; civil service advice; legal advice; damage to the economy; trade secrets; personal information about third parties; and information protected by other statutes.

These exemptions have successfully protected those matters which governments need to keep secret. But the exemptions should be narrowly drawn, and generally based on a harm test, rather than exempting whole classes of documents (except for Cabinet papers). The exemptions should be discretionary, not mandatory, so that departments are free to release exempt information if they so choose. And they should be subject to an over-riding public interest test (as are most of the exemptions in the Code). There also needs to be an exemption for voluminous or vexatious requests; but before refusal applicants must be given the opportunity to narrow their request.

### **Time Limits**

The Data Protection Act allows 40 days; overseas legislation generally sets time limits of 20 to 30 days. The legislation could adopt the target in the Code of responding to a request within 20 working days, with provision for extension in complicated cases. Unreasonable delay would be subject to external review.

### **Departmental Manuals and Guides**

The Code commits departments to publish their internal guidance and similar manuals (but permits them to exclude exempt material, such as confidential instructions about the detection of fraud). FOI legislation should contain a similar requirement: publication of departments' handbooks and staff instructions is an important part of greater openness, and a useful discipline.

There is no need for departments to publish guides to their information holdings. Such directories overseas have been too detailed to

be useful: it has proved impossible to publish a concise guide to the enormous banks of information held by government. The Civil Service Year Book is an adequate guide to departmental responsibilities: it should be available in public libraries and on the Internet. Each departmental entry should give details of the department's FOI liaison officer, and the legislation should impose a duty on liaison officers to help requesters.

### Reasons for Decisions

A little noticed provision in the Code is the commitment to give reasons for administrative decisions to those affected, subject to "a few areas where well-established convention or legal authority limits the commitment to give reasons, for example decisions on citizenship applications ...". This could also be included in FOI legislation; but the exceptions should be reviewed - they have not been found necessary in Australia and New Zealand, which have a similar statutory obligation to give reasons.

### Right of Correction

A feature of FOI and privacy legislation is the right to require correction of personal information which is inaccurate, incomplete or misleading. Although little used, this right of correction is a useful safeguard, and should be included in a British FOI Act: it is in the Data Protection Act, and will be a requirement of the EC Directive.

### Official Secrets Act

FOI can be introduced without reform or repeal of the Official Secrets Act 1989. Criminal sanctions against espionage and serious unauthorised disclosures will still be required; but the Official Secrets Act could be reformed to introduce a public interest defence, corresponding to the public interest override governing the FOI exemptions.

Disclosure of information under FOI is authorised disclosure made with the authority of the FOI Act. Unauthorised leaks will generally be dealt with not be prosecution but under the civil service disciplinary code, by suspension or dismissal.

### Appeals Machinery

The choice of review machinery is central to FOI legislation: it is the right of appeal which makes the right of access effective. There are basically four models:

- the courts.
- the Ombudsman.
- an FOI Commissioner.
- a specialist tribunal.

Overseas experience suggests that review should not be by the courts, because of their expense, delays and lack of expertise.

Tribunals can also become adversarial and legalistic, and hence costly. The review machinery needs to be:

- speedy, informal and cheap.
- effective, with a power to order disclosure.
- expert, producing good case law.

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

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

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

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

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

### Introducing the Legislation

FOI legislation is an administrative law reform, not linked to any wider constitutional change. It could be introduced early in a new Parliament. It would not count as a "first class constitutional measure" whose committee stage had to be taken on the floor of the House of Commons: the Right to Know Bill 1993 went to Standing Committee. The lead Minister could be the Home Secretary (currently responsible

## Requests, costs and staffing in Australia &amp; Canada

AUSTRALIA	1983-84	1984-85	1985-86	1994-95
Total FOI requests	19,227	32,956	36,512	37,367
Total cost	\$15.0m	\$16.5m	\$15.7m	\$10.4m
Cost per request	\$779	\$496	\$430	\$278
Total staff-years	340	374	328	150
Staff hours per request	n.a.	35	19	12
CANADA	1983-84 (9 months)	1984-85	1985-86	1995-96
Access requests	1,508	2,228	3,607	12,691
Privacy Act requests	17,109	27,556	38,606	41,564
Total FOI requests	18,617	29,784	42,213	54,255
Total cost	\$10.9m	\$12.9m	\$13.2m	\$20.5m
Cost per request:				
Access	\$1,718	\$1,622	\$1,105	\$921
Privacy	\$222	\$174	\$123	\$212
FOI staff	236	259	268	275
Staff hours per request:				
Access	119	74	53	50
Privacy	12	10	7	7

for access to personal files and data protection) or the Chancellor of the Duchy of Lancaster (currently responsible for open government).

FOI needs a senior Minister to defend the legislation in Cabinet when it begins to bite, and a strong central agency to keep other departments up to the mark. There will be an important continuing demand from departments for advice, on everything from legal interpretation to basic administration and the keeping of statistics. In other countries a central FOI unit has been critical in getting the legislation off to a strong start, and providing training at all levels and a support network for FOI liaison officers in departments. The Machinery of Government division in the Cabinet Office currently plays a co-ordinating role, but would need to give a stronger lead; it can only do this with strong Ministerial backing.

### FOI in Practice

#### Likely Number of Requests

The Code has attracted a small number of requests because few people are aware of it. In 1994 (a 9 month period) the Cabinet Office estimated there were 2,600 requests; but of these 831 were to the Employment Service, and 1059 to the Welsh Office (the Scottish Office reported 45). Following efforts to achieve more consistent reporting, the Cabinet Office reported 1,353 requests under the Code in 1995.

An FOI Act would attract a much higher volume because the legislation creates its own

publicity. But it is important not to over-estimate the initial number of requests: in Australia and Canada the number of requests built up steadily over the first three years (see Table). The early years in Australia and Canada may be a better guide to the likely volume of FOI requests than the UK's experience of the Code: or than more recent overseas figures, because the UK will have to go through the same learning curve. To allow for the UK's larger population the Australian figures need to be multiplied by 3.5 and the Canadian figures by 2.2. Extrapolating in this way suggests that with proper publicity and a liberal charging regime the UK might receive 50-70,000 requests in the first year, rising to 60-120,000 in the second. 80-90% of these requests are likely to be for personal files, concentrated on a few big casework departments: DSS and the Benefits Agency, the Immigration Department, Inland Revenue, MoD (for pensions and employment records). Of more general requests, a high proportion may come from business: in Canada business users represent 40% of requesters for general government information, and for some US agencies the proportion is as high as 80%.

#### Staffing and Resources

The table shows how over time processing FOI requests becomes considerably more efficient. Australia estimated an average of 35 staff hours per request in the first year, falling to an average of 18 hours in the third. But the number of requests doubled, so that total costs remained the same. In Canada no staff

increases were authorised when the legislation was first introduced; but the legislation had an opportunity cost, because the civil servants working on FOI had to be taken from other functions. After three years the total number of FOI staff in Canada was about 250. The marginal cost in the UK would therefore depend on the extent to which the Government was prepared to increase staffing allocations in departments, either upon introduction of the legislation or subsequently. No additional staff were authorised upon introduction of the Code. The Canadian and Australian figures suggest that Whitehall Departments might need to allocate between 500 and 1000 civil servants to cope with the equivalent of federal FOI requests; with further staff needed to handle the equivalent of provincial and state requests.

### Fees and Charges

The volume of requests will be significantly affected by the Government's charging policy. In Australia and Canada most personal files were available free of charge; and the maximum fee under the Data Protection Act is £10. When after three years Australia increased the charges for general information, the number of requests fell significantly. The Government will need to decide whether charges are to be used to keep requests within manageable bounds. If so, charges should be levied for all stages in processing requests: search time, consultation with third parties, reviewing the file for exemptions, and for copying.

But no charge should be levied for advising on the availability of information. To provide an incentive to applicants to narrow their requests, there could be a threshold of 2-5 hours' free time, as some departments currently offer under the Code. The charging rate could differ between requests for personal files and general information: the majority of requests for general information will come not from individuals but from businesses, the media and organisations.

### Conclusion: the Impact of FOI

The Select Committee summarised the benefits of FOI as

- greater accuracy and objectivity of personal files.
- improved decision making by Ministers and civil servants.
- informed public debate on the issues of the day.

There is a further benefit which is worth recording. Governments collect vast quantities of information for their own purposes; FOI helps make governments more aware of the value of their information holdings to others. In every country government is the largest single research organisation. What FOI helps to stimulate is a market in government information: a market in which people can request what they want to know, rather than what government thinks they ought to know.

### About the report

The Constitution Unit is a research project set up in April 1995 to conduct an independent inquiry into the implementation of constitutional reform. The Unit aims to: analyse current proposals for constitutional reform; explore the connections between them; and identify the practical steps involved in putting constitutional reforms in place.

A series of reports is being published by the Unit during 1996. Each report will be accompanied by a briefing. The reports deal with the practicalities of planning and legislating for constitutional reform; reform of the House of Lords; the introduction of devolved assemblies in Scotland, Wales and the English regions; human rights legislation; the relationship between constitutional reform in the UK and changes in Europe; and the conduct of referendums.

In the preparation of this Briefing, the Unit has been assisted by a wide network of experts. The principal author is Robert Hazell. As a civil servant in the 1980s he had a one-year travelling fellowship to study the implementation of freedom of information in Australia, Canada and New Zealand. This Briefing draws heavily on the report he wrote for the Cabinet Office, on subsequent research by civil servants, and on government publications. A reading list is available upon request. Neither our advisers nor the Faculty of Laws, University College London (where the Unit is based) are responsible for the conclusions of this Briefing, which are those of the Unit alone.

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The Constitution Unit  
4 Tavistock Place  
London WC1H 9RA  
Tel: 0171 209 1162  
Fax: 0171 209 1163  
E-mail: [constitution@ucl.ac.uk](mailto:constitution@ucl.ac.uk)

James Cornford (Chairman), Robert Hazell (Director)  
Advisory Committee  
Sir Kenneth Bloomfield, Nigel Forman MP, Sir William Fraser, Pamela Gordon, Alan Howarth MP, Lord Lester QC, Janet Lewis-Jones, Robert MacLennan MP, Professor David Marquand, Andrew Marr, Professor Gavin McCrone, Professor Dawn Oliver, Professor Keith Patchett, Dr Anthony Wright MP  
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